DONATED
By
PANDIT SHAMBOO NATH DAR,
(1901 — 1969)
ADVOCATE,
and former President
SRINAGAR MUNICIPAL COUNCIL

G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

Borrower's No.	Issue Date	Borrower's No.	Issue Date

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL,** the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON,** the Courts of the Judicial Commissioners of **CENTRAL PROVINCES, OUDH, PESHAWAR** and **SIND**

REPORTED IN

The following 30 Legal Periodicals:

Allahabad (1) Indian Law Reports, (2) Law Journal; **Bombay** (1) Indian Law Reports, (2) Law Reporter; **Calcutta** (1) Indian Law Reports, (2) Law Journal, (3) Weekly Notes; **Lahore** (1) Indian Law Reports, (2) Law Journal, (3) Punjab Law Reporter, (4) Punjab Weekly Reporter; **Madras** (1) Indian Law Reports, (2) Law Journal, (3) Law Times, (4) Law Weekly, (5) Weekly Notes; **Nagpur** (1) Law Journal, (2) Law Reports; **Oudh** (1) Cases, (2) Law Journal, (3) Oudh and Arga Law Reporter; **Patna** (1) Cases, (2) Indian Law Reports, (3) Law Reporter, (4) Law Times; **Rangoon** (1) Indian Law Reports, (2) Burma Law Journal; **Sind** Law Reporter; Criminal Law Journal and All India Reporter,

WITH

A large number of extra Rulings not reported elsewhere.

VOLUME 79, 1924.

EDITOR:

S. D. CHAUDHRI, B.A., LL. B.,

VAKIL, HIGH COURT, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.

1179

K UNIVERSITY LIB.
K. DIVISION
Acc No 75448 .....
Date 18.12.69 .....

q.1-L

Books Checked

CONSOLIDATED

Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.

46 I. L. R., ALLAHABAD SERIES, FROM FEBRUARY TO JULY, 1924.

Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
95	Brij Narain v. Mangal Prasad ...	**77** 689	175	A. C. Mukerji v. The Municipal Board of Benares ...	**80** 241
105	Emperor v. Jafar Husain ...	**81** 442	192	Jawahir Lal v. Jarau Lal ...	**79** 861
107	Emperor v. Aladin ...	**81** 215	205	Babban Pande v. Lachhman Chaudhri ...	**79** 584
109	Emperor v. Ghariba ...	**81** 238	208	Mahabir v. Manohar Singh ...	**79** 816
110	Ram Chand v. Maula Bakhsh ...	**79** 310	210	Babu Ram v. Kokla ...	**79** 634
114	Emperor v. Bidha ...	**81** 142	211	Hira Lal v. Khairati Lal ...	**78** 1037
115	Ghasi Ram v. Bhola Nath ...	**79** 314	214	Karim Bakhsh v. Wahaj-ud-Din	**78** 1035
119	Ganga Prasad v. Ganeshi Lal ...	**79** 332	218	Emperor v. S. M. Bose ...	**77** 826
121	*In the matter of* Dwarka Prasad Mithal ...	**81** 177	220	Ram Prasad v. Mahabir ...	**79** 803
125	East Indian Railway Company v. Sri Ram Mahadeo ...	**79** 341	227	Bishambhar Nath v. Muhammad Ubaid-Ullah Khan ...	**79** 213
128	Emperor v. Kamla Pati ...	**81** 711	230	Kanhaiya Lal v. Ashraf Khan ...	**78** 402
130	Sarab Sukh Das v. Ram Prasad ...	**78** 1018	233	Ganesh Das v. Raja Suraj Pal Singh ...	**78** 371
137	Emperor v. Kunwar Jaswant Singh ...	**81** 112	235	Emperor v. Roshan Singh ...	**77** 819
138	Emperor v. Badlu Shah ...	**81** 40	236	Emperor v. Sardara ...	**81** 604
140	Karamat v. Wazir Husain ...	**78** 587	243	Emperor v. Lachhman ...	**81** 171
142	Zamani Begam v. Khan Muhammad Khan ...	**81** 586	245	*Application of* Dwarka Dhish Prasad Singh ...	**82** 1022
144	Joshi Shib Prakash v. Jhinguria ...	**78** 416	250	Khudaijat-ul-Kubra v. Amina Khatun ...	**80** 413
146	Emperor v. Gobind Ram ...	**81** 100	254	Emperor v. Banarsi ...	**77** 829
148	Sharif Ahmad Alwi v. Muhammad ...	**79** 612	260	Mulani v. Maula Bakhsh ...	**78** 222
152	Dildar v. Shukr-Ullah ...	**78** 1023	264	Rameshra v. Kalpu Rai ...	*To be printed.*
153	Sat Dhar v. Ram Chandra ...	**79** 532	265	Emperor v. Panna Lal ...	**81** 629
158	Emperor v. Chitar Singh ...	**82** 705	269	Abid Husain Khan v. Kaniz Fatima ...	**80** 1019
161	Gadodia & Co. v. The Great Indian Peninsula Railway Company, Bombay ...	**78** 893	274	Alkhu Rai v. Lachhman Upadhiya ...	**80** 550
165	Puran Singh v. Dat Ram ...	**79** 645	286	Meghraj v. Krishna Chandra Bhatta harji ...	**78** 243
167	Sat Narain v. Sarju ...	*To be printed.*	295	Anantu Kalwar v. Ram Prasad Tiwari ...	**78** 619
170	Dhan Raj Misar v. Rameshwar Misar ...	**78** 904	297	Bihari Lal v. James Maclean ...	**78** 506
173	Ram Charan Lall v. Dharam Singh ...	**79** 626	301	Bhim Singh v. Ram Singh ...	*To be printed.*
174	Emperor v. Kishan Singh ...	**81** 260	303	Kedar Nath v. Shankar Lal ...	**78** 934

46 I. L. R., ALLAHABAD SERIES, FROM FEBRUARY TO JULY, 1924—concld.

310	Aisha Bibi v. Mahfuz-un-nissa Bibi ...	**78**	180
316	Yakub Ali v. Dhan Singh ...	**78**	863
319	Pitambar Lal v. Dodi Singh ...	**78**	358
321	Umrao v. Lachhman ...	**79**	217
323	Adya Saran Singh v. Jagannath	**78**	391
327	Manni Lal v. Rani ...	**78**	382
328	Muhammad Jan v. Shiam Lal...	**78**	1014
333	Basdeo Rai v. Jhagru Rai ...	*To be printed.*	
354	Emperor v. Kanhai Lal ...	**81**	720
355	Kanhaiya Lal v. His Highness The Maharaja of Benares ...	**78**	559
359	Samar Bahadur Singh v. Jit Lal ...	**79**	495
361	Beni Prasad v. Sheodin ...	**78**	586
364	Mahabir Prasad Misr v. Amla Prasad Rai ...	**79**	517
369	Auseri Lal v. Mullhan ...	**78**	345
370	Nageshar Prasad v. Ram Harakh Pande ...	**79**	417
372	Kanhaiya v. Kanhaiya Lal ...	**79**	363
377	Mubarak-un-nissa v. Muhommad Raza Khan ...	**79**	174
384	Gauri Shankar Singh v. Sheonandan Misra ...	**78**	911
398	Gobind Ram v. Kunj Behari Lal ..	*To be printed.*	
414	Abdul Shakur v. Muhammad Matin ...	**78**	429
417	Kedar Nath Durga Prasad v. Bishwanath Lakshmi Chand...	**80**	787
419	Kanhaiya Ojha v. Jagrani Kunwar ...	**79**	358
424	Muhammad Nazir v. Muhammad Sulaiman ...	**78**	659
427	Raghubar Dayal v. The Secretary of State for India in Council ...	**78**	642
439	Lakshmi Narain Misir v. Sumarti Kunwar ...	**79**	389
446	Emperor v. Ram Narain ...	**81**	342
447	Emperor v. Atma Ram ...	**81**	438*
453	Nazir Ahmad v. Muhammad Sharif ...	**79**	345
455	The Secretary of State for India in Council v. Radhe Lal ...	**79**	334
458	Sita Ram v. Govindi ...	**80**	592
465	Tika Ram v. Daulat Ram ...	**80**	661
470	Muhammad Raza Khan v. Muhammad Askari Khan ...	*To be printed.*	
478	Randhir Singh v. Rajpal Misir...	**81**	25

22 ALLAHABAD LAW JOURNAL, FOR FEBRUARY, 1924.

73	Karim Bakhsh v. Wahajuddin	**78**	1035
76	Hira Lal v. Khairati Lal ..	**78**	1037
79	Umed Singh v. Emperor ...	**77**	824
81	Dalganjan v. Emperor ...	**77**	881
83	S. M. Bose v. Emperor ...	**77**	826
85	Sardara v. Emperor ...	**81**	604
91	Ram Prasad v. Mahabir ...	**79**	803
98	Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga...	**80**	1038
105	Raghunath Prasad Sahu v. Sarju Prasad Sahu ...	**82**	817
110	Mohammad Jan v. Shiam Lal	**78**	1014
113	Rani v. Edal Singh ..	**78**	1041
116	Lachhman v. Emperor ..	**81**	171
118	Dwarka Dhish Prasad Singh..	**82**	1022
122	Khudaijatul Kubra v. Amina Khatun ..	**80**	413
126	Amla Nand v. Nandu ..	**78**	145
129	Roshan Singh v. Emperor ...	**77**	819
130	Nainapillai Marakayar v. Ramanathan Chettiar ...	**82**	226
137	Alkhu Rai v. Lachhman Upadhiya ...	**80**	550
144	Emperor v. Banarsi ..	**77**	829
149	Mulani v. Maula Bux ...	**78**	222
153	Sat Narain Prasad v. Ram Autar ...	**78**	221
155	Sri Thakur Kishori Ramanji Maharaj v. Duley Ram ...	**78**	226
159	Rameshra v. Kalpoo Rai ...	*To be printed.*	
162	Emperor v. Panna Lal ...	**81**	629
165	Behari Lal v. James Maclean	**78**	506
169	Pujari Lakshmana Goundan v. Subramania Ayyar ...	**81**	518
173	The India General Navigation and Railway Co., Ltd. v. The Dekhari Tea Co. Ltd. ...	**80**	777
177	Srimati Nagendrabala Dasi v. Dinanath Mahish ...	**80**	752
180	Bhim Singh v. Ram Singh ...	*To be printed.*	
182	Anantoo Kalwar v. Ram Prasad Tewari ...	**78**	619
185	Kedar Nath v. Shanker Lal ...	**78**	934
191	Pitambar Lal v. Dodee Singh	**78**	358

48 I. L. R., BOMBAY SERIES, FOR FEBRUARY-MARCH, 1924.

87	Bhagchand Dagadusa v. The Secretary of State for India	*To be printed.*	
166	Sangawa v. Huchangowda ...	**82**	533
172	Suklya v. Suklal Motichand ..	**81**	684
176	Saremal Punamchand v. Kapurchand Punamchand ...	**77**	548
185	Khanderao Vithoba v. The Municipal Corporation of Bombay ...	**79**	948
190	Government of Bombay v. Merwan Mondigar Aga ...	**82**	796
200	Bapuji Sorabji v Lakhmidas Rowji ..	**81**	844
203	Anandilal Bhagchand v. Chandrabai ...	**80**	536
210	Achyut Vishnu v. Tapibai ...	**79**	753
214	Ganpat Chandrabhan v. Tulsi	**81**	284

25 BOMBAY LAW REPORTER, FROM OCTOBER TO 15TH NOVEMBER, 1923.

1089	Emperor v. Dattatraya ...	**77**	995
1093	Saremal v. Kapurchand ..	**77**	548
1099	Putlibai v. Sorabji Naoroji Gamadia ...	**76**	996
1137	Jamshedji v. Sorabji ...	*To be printed.*	
1144	Karsandas v. Gopaldas ...	*To be printed.*	
1160	Patdaya v. The Secretary of State for India ...	**82**	577
1170	William Jacks & Co. v. Joosab Mahomed ...	**82**	791
1172	Yeshvadabai v. Janardhan ...	**81**	776
1178	Madhavji Virji v Lakshmidas Mulji & Co. ..	**81**	843
1180	Bapuji v. Lakhmidas ...	**81**	844
1182	The Government of Bombay v. Merwan Moondigar Aga ...	**82**	796
1192	Rahimtulla v. Hasanali Alimahomed ...	*To be printed.*	
1207	Sangawa v. Huchangowda ..	**82**	533
1209	Shivbasapa v. Balapa ...	**81**	673
1211	Lakshman v. Narhari ..	**81**	679
1214	Suklya v. Suklal ..	**81**	684
1218	Dayabhai v. Ahmedabad Municipality ...	**81**	638
1222	Motilal v. Nandram ...	**82**	124
1225	*In re* Ambalal Sarabhai ..	**77**	699
1232	Nagava v. The Collector of Belgaum ..	**77**	702
1237	Ghanshamdas v. Motichand	**77**	747
1240	Keshavlal v. Collector of Ahmedabad ...	**77**	749
1248	Kanhaya Lal v. National Bank of India Ltd. ..	**76**	7
1256	Jatti v. Banwari Lal ..	**74**	462
1259	Indrajit Pratap Sahi v. Amar Singh ...	**74**	747
1269	Annanda Mohan Roy v. Gour Mohan Mullick ...	**74**	499
1275	Subbaya Pandaram v. Muhammad Mustappa Maracayar ..	**74**	492
1279	Imperial Bank of India v. U Rai Gyaw Thu & Co. ...	**76**	910
1287	Midnapore Zemindari Company v. Uma Charan Mandal ...	**74**	482
1290	Bommadevara Naganna Naidu v. Ravi Venkatappayya ...	**76**	594

26 BOMBAY LAW REPORTER, FROM JANUARY TO MARCH, 1924.

1	Bhagchand v. Secretary of State for India ..	*To be printed.*	
63	Anandilal v. Chandrabai ..	**80**	536
68	*In re* P. D. Shamdasani ...	**82**	58
71	Sukhanand v. Oudh and Rohilkhand Railway ...	**80**	531
76	Phirozshah v. Bai Goolbai ..	**76**	929
84	Chaturbhuj v. Deokaran ...	**79**	769
103	Achyut v. Tapibai ..	**79**	753
105	Shamsuddin v. Dahyabhai ..	*To be printed.*	
109	Emperor v. Narayan ..	**81**	951
113	Emperor v. Moti Khoda ..	**81**	306
118	Ganpat v. Tulsi ..	**81**	281
138	Emperor v. Gopalia ..	**81**	317
141	Kalianmal v. Dharamasey ..	**80**	253
145	Mahmadbhai v. Bai Havabai ..	**80**	269
149	Shripatti v. Balvantrao .	**80**	274
153	Rudrappa v. Chanbasappa ...	**80**	162
155	Bank of Morvi v. Baerlein Bros.	**79**	1012
163	Mahomedalley v. Abdul Hussein	**79**	780
171	Mahomed v. Valli ..	**79**	723
173	Ramkishna v. Anusuyabai ..	*To be printed.*	
178	Emperor v. Sale Mahomed ..	**81**	616
182	Nagji Dula, *In re* ..	**81**	611
183	Ningoppa, *In re* ..	**81**	608
186	Mukta v. Dattu ..	**81**	613
187	Bai Jayagavri v. Ramanlal ..	**79**	749
189	Jamnabai v. Fazalbhoy ...	**77**	355
193	Khanderao v. Bombay Municipality ..	**79**	948
196	Ram Singh v. Ram Chand ..	**79**	944
198	Kondama Naicker v. Kondasamy Goundar ..	**79**	961
204	Mailireddi v. Adusumilli ..	**79**	592
209	Rustomji v. Cowasji ..	**79**	704
211	Emperor v. Bholasing ..	**81**	926
216	Emperor v. Tyaballi ..	**82**	52
218	Keshav v. Hari ...	**80**	526
222	Balabhai v. Mahadu ...	**80**	529
224	Haji Abdulla v. Stamp ...	**80**	523
227	Government of Bombay v. Ismail Ahmad ...	*To be printed.*	
231	Mehgji v. Dayalji ...	**80**	507
235	Bhiku v. Keshav ...	**80**	512
237	Kaikhushru Nusserwanji Chandabhoy v. Tata Industrial Bank ...	**80**	515
249	Bai Kamala v. Revashankar ...	**80**	520
252	Maharaja of Kolhapur v. Bala Maharaj ...	**77**	100
265	Jagannath v. Dhondu ...	**80**	266
267	Emperor v. Saifin Rasul ..	*To be printed.*	
269	Bai Paratapgavri v. Mulshankar	**80**	173
277	Dhanji v. Dhuma ...	**80**	234
280	Sakalchand v. Ambaram ...	**80**	260
282	Jivabai v. Teja ...	**80**	263
284	Lekshman v. Maruti ...	**80**	267
285	Laxminarayan v. G. I. P. Railway ...	**80**	276
288	Ramchandra v. Lodha ...	**80**	292
289	Somabhai v. Aditbhai ...	**81**	947
292	Macmillan v. Cooper ...	**83**	161
308	Ramabai v. Harnabai ...	**80**	193
312	Raja Gokal Das Mills, *In re* ...	**80**	282
317	Chanbasappa v. Holibasappa ...	**80**	289

51 I. L. R., CALCUTTA SERIES, FROM FEBRUARY TO APRIL, 1924.

86	Imperial Bank of India v. U. Rai Gyaw Thu and Company, Ltd.	76	910
101	Das Ram Chowdhury v. Tirtha Nath Das ..	81	522
110	Midnapore Zemindary Co., Ltd. v. Trailokya Nath Haldar ..	81	501
124	Sabur Bibi v. Ismail Shaikh ...	80	294
135	Sailaja Nath Roy Chowdhury v. Rishee Case Law ..	81	493
150	Jyoti Prakash Nandi v. Mukti Prakash Nandi ..	81	734
160	Emperor v. Jamaldi Fakir ..	81	712
168	Bhupendra Kumar Dutt v. Emperor ..	81	788
185	Bank of Bengal v. Lucas ..	81	471
216	Tara Prasanna Chongdar v. Nrisingha Moorari Pal ..	81	763
224	Joggeswar Mahata v. Jhapal Santal ...	82	848
230	Pramada Nath Roy v. Basiruddin Quanji ..	81	993
236	Emperor v. Nabab Ali Sarkar	81	803
250	Legal Remembrancer v. Manmatha Bhusan Chatterjee ..	*To be printed.*	
265	Emperor v. Ali Mirza ..	81	800
271	Emperor v. Akbar Molla ..	81	261
279	Manindra Chandra Nandi v. Provas Chandra Mitter ..	79	1042
299	Nagendrabala Dasi v. Dinanath Mahish ..	81	752
304	India General Navigation and Railway Company, Ltd., v. Dekhari Tea Company, Ltd...	80	777
314	Bijoy Chand Mahatab v. Akhil Bhuiya ..	81	564
320	Muller Maclean & Co. v. Ataulla & Co. ...	81	561
324	Baikuntha Nath Chattoraj v. Prosannamoyi Debi ..	81	571
331	Habibar Rahaman v. Saidaunnessa Bibi ..	77	949
337	Abraham v. Sookias ..	81	584
342	Krishna Lal Burman v. Satyabala Debi ..	81	569
347	Emperor v. Dhananjoy Raha ..	81	246

39 CALCUTTA LAW JOURNAL, FROM JANUARY TO MARCH, 1924.

1	Barendra Kumar Ghose v. Emperor ..	*To be printed.*	
16	Tata Iron and Steel Company v. Chief Revenue Authority of Bombay ..	74	469
26	Surapoti Roy v. Ram Narayan Mukerji ...	73	193
31	Gulzari Lal v. Emperor ...	71	51
33	Sarbeswar Nath Nath v. Emperor	*To be printed.*	
34	Amrita v. Emperor ...	*Not reportable.*	
40	Dwejendra Narayan Roy v. Joges Chandra De ..	79	520
58	Manindra Chandra Nandi v. Provas Chandra Mitter ..	79	1042
75	Benode Behari Nath v. Emperor	81	149
77	Pannalal Sagore Mull v. Mukhram Radhakissen ..	80	87
85	Basanti Charan Sinha v. Rajani Mohan Chatterjee ..	*Not reportable.*	
88	Jamini Kumar Seal v. Thakur Dhan Baishnab ..	79	1048
90	Lakshan Chandra Mandal v. Takim Dhali ...	80	357
98	Sham Lal Rai Chowdhury v. Radha Charan Rai Chowdhury	81	774
100	Dharani Kalitani v. Sisuram Kalita ..	70	36
102	Mukbusor Rahaman v. Raj Lakhi Debya ...	81	744
107	Bhupendra Kumar Dutta v. Emperor ...	81	788
117	Inatulla v. Emperor ..	81	820
122	Charu Chandra Ghose v. Emperor ...	81	810
131	Sita Nath Basak v. Mohini Mohan Singh ...	81	754
140	Bhuban Mohini Dasi v. Kumudbala Dasi ..	82	934
151	Kali Das v. Emperor ..	*To be printed.*	
165	Bon Behari Chatterji v. Kumar Satish Kantha Roy ..	73	391
186	Imperial Bank of India v. U. Rai Gyaw Thu & Company..	76	910
194	Kondama Naicker v. Kandsamy Goundar ...	79	961
201	K. V. Kore v. The Municipal Corporation of Bombay ...	79	948
204	Malireddi Ayyareddi v. Adusumilli Gopalakrishnayya	79	592
209	Thaddeus Nahapiet v. Secretary of State ...	81	751
212	Taraprasanna Chongdar v. Nrisinha Murari Pal ...	81	763
217	Raj Rajeswari Jiu v. Gati Krishna Chakravarty ...	82	292
222	Nanda Lal Agrani v. Jogendra Chandra Dutta ...	82	297
236	Nripendra Bhusan Rai v. Gobinda Bandhu Majumdar...	82	266
247	Gopika Raman Ray v. Mahar Ali ...	81	738
251	Irrani Mundlei v. Naimuddin Sardar ...	81	527
256	Manna Lal v. Karu Singh	56	766
261	Kebal Namdas v. Rajani Kanta Rao ...	81	999
264	Emperor v. Osman Sardar ...	81	824
269	Gojadhar Agarwalla v. Shibananda Pradhani ...	81	768
273	H. K. Bhedwar v. C. S. R. Rao...	74	76
278	Bansi Mridha v. Emperor ..	81	974
279	Satyendra Nath Sen v. Narendra Nath Gupta ...	81	867
284	Jinnat Ali v. Kailas Chandra...	81	870

28 CALCUTTA WEEKLY NOTES, FOR FEBRUARY, 1924.

327	Satish Chandra v. Kumar Satish Kantha Roy ...	**73**	391	377	Barendra Kumar Ghose v. Emperor ...	*To be printed.*	
343	Gopi Lal v. Lakhpat Rai ...	*Not reportable.*		388	Bupendra Kumar Dutt v. Emperor ...	**81**	788
347	Kiamuddi Karikar v. Emperor	**81**	593	397	Champsey Bhara & Co. v. The Jivraj Balloo Spinning and Weaving Co., Ltd. ...	**73**	436
351	Satya Narain Singh v. Satya Niranjan Chakravarty ...	**79**	825	403	Nandi Lal Agrani v. Jogendra Chandra Dutta ...	**82**	297
375	Khanderao Vithoba Kore v. Municipal Corporation of Bombay ...	**79**	948	414	Charu Chandra Ghose v. Emperor ...	**81**	810

5 I. L. R., LAHORE SERIES, FOR JANUARY-FEBRUARY, 1924.

1	Crown v. Mihan Singh ..	*To be printed.*		36	Crown v. Jawali ...	**81**	948
11	Emperor v. Wasawi ...	**81**	544	38	Phulli v. Debi Parshad ...	**75**	449
16	Emperor Achhar Singh ...	**81**	517	50	Kaju Mal v. Salig Ram ...	**79**	946
20	Rehana v. Emperor ..	**81**	351	54	Lahore Bank Limited, in Liquidation v. Ghulam Jilani	**78**	460
23	Ram Singh v. Ram Chand ...	**79**	944	56	Harnam Singh v. Emperor ...	**81**	185
27	Daulat Ram v. Baharat National Bank, Ltd. ..	**79**	740	59	Tafazzal Beg v. Majid Ullah ...	**79**	120
34	Rakhi v. Baza ...	**79**	743	67	Sohrab v. Emperor ...	**81**	826

5 LAHORE LAW JOURNAL, FOR NOVEMBER-DECEMBER, 1923.

480	Ganga Puri v. Mohan Lal ...	**73**	645	530	Balak Ram v. Muhammad Said	**77**	872
482	Gulli v. Sawan ...	**74**	146	533	Dhumi v. Nawab Muhammad Sajjad Ali Khan ..	**73**	600
487	Jawahar Singh v. Seva Singh...	**79**	572	539	Hanwa v. Joto Prasad .	**73**	903
494	Maya Das v. Junda Ram ...	**73**	874	541	Kapur Chand v. Chet Ram ..	**80**	494
496	Munshi Lal v. Shiv Devi ..	**78**	266	543	Keshwa Nand v. Mohan Puri..	**80**	496
505	Nawab Bibi v. Allah Ditta ..	**73**	896	546	Kirpa v. Gulaba ...	**80**	503
507	Nidhi Ram v. Parsa Ram ..	**74**	1	548	Muhammad Umar v. Fayaz-ud-din ..	**73**	911
509	Pala Ram v. Notified Area Committee, Kot Addu, District Muzaffargarh ..	**73**	785	551	Piara Singh v. Mula Mal ..	**75**	915
511	Permeshri Das & Jugal Kishore v. Paras Ram ...	**73**	1	555	Qadar Baksh v. Mangha Mal ..	**73**	889
513	Ram Saran Das v. Mula ..	**78**	103	558	Ram Chand v. Bank of Upper India, Ltd. ...	**74**	187
517	Zai-ud-din v. Fakhrudin ..	**73**	791	569	Sri Narain v. Liquidator Union Bank of India ...	**74**	600
520	Badan Singh v. Emperor ..	*To be printed.*		571	Wali Dad Khan v. Mani Ram..	**73**	800
522	Gulzar Jan v. Emperor ..	**74**	433	572	Saudagar Singh v. Emperor ..	**77**	895
524	Insar Singh v. Emperor ..	**73**	932	574	Teja Singh v. Emperor ..	**73**	939
528	Malla v. Emperor ..	**77**	983				

6 LAHORE LAW JOURNAL, FOR FEBRUARY-MARCH, 1924.

54	Gulab v. Emperor ...	**75**	693	103	Allu v. Emperor ..	**75**	980
59	Wallu v. Emperor ..	**77**	433	110	Fattu v. Emperor ..	**75**	368
62	Waryam Singh v. Emperor ..	**75**	359	111	Labh Singh v. Emperor ..	**75**	77
67	Asad Ullah Khan v. Karam Chand & Wadaya Ram ..	**76**	605	115	Kunj Lal v. Emperor ..	**67**	577
69	Bal Kaur v. Deoki ...	**75**	109	125	Kudrat Mall v. Emperor ..	**75**	79
72	Badhu Ram v. Niamat Rai ...	**75**	375	127	Basant v. Kabul Singh ..	**80**	329
78	Dhama Mal v. Rai Sahib Lala Motisagar ..	**75**	654	130	Mangat Ram v. Dr. Siraj-ul-Hasan ..	**78**	152
82	Ishar Singh v. Surat Singh ..	**74**	294	133	Munshi v. Ghanaya ..	**80**	332
84	Jamna Rai v. Gonda Ram ..	**80**	519	137	Nand Kishore v. Narain Singh..	**78**	350
86	Karori Mal v. The E. T. & Lighting Co., Ltd., Delhi ..	**75**	156	142	Ralya Singh v. Tunia Mal ...	**80**	316
89	Kishan Das v. Lachhman Singh	**75**	91	145	Ram Mehr v. Pali Ram ..	**78**	401
93	Arjan v. Hari Ram ..	**80**	522	151	Wazir Chand v. Nathu Ram ..	**80**	321
97	Ladha Singh v. Hukam Devi ..	**75**	57	153	Wisakhi Ram v. Alawal ..	**78**	408
99	Partap Singh v. Hakim Singh..	**75**	87	155	Zulfikar Ali v. Nabi Baksh ..	**80**	321
				160	Dwarkadas v. Emperor ..	*To be printed.*	

47 I. L. R., MADRAS SERIES, FROM FEBRUARY TO MAY, 1924.

87	Sellamuthu Servai, *In re* ..	**80**	108	245	Govindan Nair v. Kuthaseri Kunhi Krishnan Nair ..	**21**	54
116	Usman Kasim Sait v. The Secretary of State for India in Council ..	**74**	25	250	Burla Appanna v. Anala Latchayya ..	**79**	372
120	Sivasubramania Pillia v. Theethiappa Pillai ..	**75**	572	262	Best & Co., Ltd. v. The Corporation of Madras .	**79**	928
136	Krishna Reddy v. Thanikachala Mudali ..	**73**	1054	288	Rajagopala Ayyar v. Ramanuja Chariar ..	**80**	92
139	Ranganatha Thathachariar v. Krishnaswami Thathachariar	**75**	189	308	Mohieswara Rao v. Ayyadevara Durgamba *alias* Mahalakshmamma ..	**78**	831
150	Sundara Ramanujam Naidu v. Sivalingam Pillai ..	**77**	542	312	Sattayya Padayachi v. Soundarathachi ..	**79**	1017
160	Arsamma v. Moidin Kunhi Beari	**77**	264	316	Sonachalam Pillai v. Kumaravelu Chettiar ..	**79**	109
164	Anglo-Persian Oil Company v. P. S. Panchpakesa Aiyar ..	**76**	1011	325	Kona Thimma Reddi v. The Secretary of State for India in Council ..	**78**	91
171	Krishnaswany Naidu v. Chengalraya Naidu ..	**76**	836	337	Nainapillai Marakayar v. Ramanathan Chettiar ..	**82**	226
176	Manyam Surayya v. Sunkavilli Venkataratnam ..	**79**	779	357	Abdul Sattar Sahib v. The Special Deputy Collector, Vizagapatam Harbour Acquisition ..	*To be printed.*	
181	Obala Kondama Naicker Ayyan v. Kandaswami Goundar ..	**79**	961	369	Kokku Parthasaradhi Naidu Garu v. Chintlachervu Koteswara Rao Garu ..	**78**	98
190	Malireddi Ayyareddi v. Gopalakrishanayya ..	**79**	592	381	Punya Syamalo, *In re* ..	**77**	240
197	Board of Revenue, Madras v. R M. A. R. R. M. Arunachalam Chettiar ..	**77**	216	384	Nataraja Pillai v. Rangaswamy Pillai ..	**77**	297
203	Nadapena Appanna v. Sripilli Venkatasami ..	**79**	510	396	S. Tirumala Reddi, *In re* ..	**77**	422
215	Aburubammal v. The Official Assignee of Madras ..	**79**	809	398	Velamakanya Krishnaiya v. Ponnuswamy Aiyar ..	*To be printed.*	
222	Hajee Shakoo Gani v. T. S. Sabapathi Pillai ..	**77**	70	403	Ponnuswamy Aiyar v. Damodar Hunsraj ..	**79**	800
229	Pallikudathan *alias* Samudi Goundan v. Budda Goundan..	**76**	647				
232	Bachula Peda Somadu v. Emperor ..	**81**	203				

46 MADRAS LAW JOURNAL, FOR FEBRUARY, 1924.

196	Ramaswami Naidu v. Ayyalu Naidu ...	**78**	625	255	K. V. Periya Miyana Marakayar v. P. K. Subramania Aiyar ...	**78**	505
198	Ramaswami Reddi v. Marudai Reddi ...	*To be printed.*		258	Venkatrama Aiyar v. A. V. Rangiyan Chetty ..	**77**	504
201	Koku Parthasaradhi Naidu Garu v. Chintalachervu Koteswara Rao Garu ...	**78**	98	261	Kadirvelusami Nayakar v. Eastern Development Corporation Ltd. ..	**80**	163
209	Abdul Sattar Sahib v. The Deputy Collector Vizagapatam Harbour Acquisition ...	*To be printed.*		274	Nataraja Pillai v. Rangasami Pillai ..	**77**	297
217	Best & Co. v. Corporatian of Madras ..	**79**	928	282	James Ralph Freer v. H. A. Johnson	**78**	120
239	Anantalal Damani v. Surjimul Murlidhar ..	**78**	165	285	Rukmani Ammal v. Narasimhachariar ...	**78**	173
240	Arunachala Goundan v. Swaminatha Aiyar ...	**77**	547	288	P. Venkatachalam Chetty v P. S. Govindaswami Nicker ...	**78**	156
242	V. N. P. Kumaraswami Nadar v. Venkatasami Koundan ...	**78**	857	291	Yezzu Mallaya v. Talluri Punnamma ...	**77**	628
245	Pir Pacha Saheb v. Mohammad Ruhimuddin Sahib ...	**77**	777	295	Velamakanya Krishnayya v. S. Ponnuswami Iyer ...	*To be printed.*	
250	K. C. Manavikraman v. N. C. Ananthanarayana Ayyan ...	**79**	806	298	K. Ramaswami Naicker v. Alamelu Ammal ...	**78**	921
254	Chidambaran Chetty v. Muthuratnam Aiyar ...	**76**	767	302	South Indian Railway Co. v. S. P. R. S. Narayana Ayyar..	**77**	511
				309	Chinniah, *In re* ..	**77**	303

46 MADRAS LAW JOURNAL, FOR FEBRUARY, 1924—concld.

311	P. Kottoora Thevan, *In re* ..	**77**	444
314	Sankaranarayana Pillai v. Rajamani ..	**83**	196
324	Bharata Iyer, *In re* ..	**77**	418
325	P. C. Perumal, *In re* ..	**77**	290
329	C. Adimoola Mudaliar v. N. C. Manicka Mudaliar ..	**78**	142
334	Ma Than Than v. Ma Pwa Thit ..	**77**	63

19 LAW WEEKLY, FOR FEBRUARY, 1924.

164	Syed Agajan Sahib v. Abdul Majid Khan ..	**77**	764
165	Ayyadevara Suryachandra Mouleswara Rao v. Ayyadevara Durgamba ..	**78**	831
168	Ponnuswamy Aiyar v. Damodar Hunsraj ...	**79**	800
173	Natesa Pillay v. Kannammal Anni ..	**78**	64
174	Pir Pacha Sahib v. Mohammad Ruhimuddin Sahib ..	**77**	777
179	Rajagopala Aiyar v. Ramanujachariar ..	**80**	92
193	V. N. P. Kumaraswamy Nadar v. Venkataswamy Kounden ..	**78**	857
197	Gangabattula Kanthamma v. Manchiraju Reddipantulu ..	**78**	296
201	V. Sesha Ayyar v. Venkatasubba Chetty	**77**	730
205	Bobba Bhavamma v. Bobba Ramamma ..	**78**	176
207	Assistant Commissioner of Labour, *In re* ..	**78**	435
210	Thirumurthy Chetty v. Ponnan Chetty ..	**76**	843
211	P. Kottoora Thevan *In re* ..	**77**	444
215	Malireddi Ayyareddi v. Adusumilli Gopalakrishnayya ..	**79**	592
219	Chinniah, *In re* ..	**77**	303
221	Narayanan Chetti v. Elayaperumal ..	**73**	381
233	Arumuga Goundan v. Periavanjiappa Goundan	**78**	76
235	Lanka Rama Naidu v. Lanka Ramakrishna Naidu .	**78**	829
238	C. Adimoola Mudaliar v. N. C. Manicka Mudaliar ...	**78**	142
245	Subbayya Chakkiliyan v. Maniam Muthiah Goundan ..	**78**	414
247	Ramaswamy Naidu v. Ayyalu Naidu ..	**78**	625
249	Velora Karuppan Veetil Chiyancheri Chathu Kutty Nair v. Kallur Venkayil Chathu Kutty Nair ...	**78**	118
251	Savanna Vena Ana Runa Vellayappa Chettiar v. M. L. M. Ramanathan Chettiar	**78**	1017
253	Pujari Lakshmana Goundan v. Subramania Ayyar ...	**81**	518
259	A. S. N. Nainapillai Marakayar v. T. A. R. A. Rm. Ramanathan Chettiar	**82**	226
272	P. C. Perumal, *In re* ..	**77**	290
275	Bharata Ayyar, *In re* ..	**77**	418
277	India General Navigation and Railway Co., Ltd. v. Dekhari Tea Co. Ltd. ..	**80**	777
283	Raja Mohammad Mumtaz Ali Khan v. Mohan Singh ...	**74**	476
290	Itikayala Pedda Aswatappa v. Ankulu Gadu	**78**	70
292	S. Thirumalai Reddi, *In re* ..	**77**	422
294	V. A. Subba Rao v. Ponnammai Nadathi ..	**80**	363
298	Thimmarazu Venkata Kutumba Rao v. Thimmarazu Venkatappayya ..	**77**	765
299	Macmillan and Co., Ltd. v. K. and J. Cooper ..	**83**	101
316	The Official Assignee of Madras v. The Official Assignee of Rangoon ..	**83**	174
331	The Official Assignee of Madras v. N. Subramania Aiyar ..	**77**	740

20 NAGPUR LAW REPORTS, FROM FEBRUARY TO MAY, 1924.

17	Tukaram Chintaram ..	*To be printed.*	
23	Ramchandra v. Hardeo ..	**80**	599
24	Behari Singh v. Nawal Singh ..	**78**	136
28	Sonba v. Babya ..	**78**	376
33	Ramlal v. Kisanchandra ..	*To be printed.*	
43	Bhaddoo v. Saddoo ..	**81**	766
46	Seth Gopikisan v. Mankuarbai	**78**	239
49	Seth Rambhau v. Prayagdas ..	**78**	198
52	Jailal Sao v. Lal Fateh Singh	**75**	826
55	Mohammad Razzak v. Amrutrao ..	**76**	451
57	Sheokabai v. Ganpat ..	**79**	142
60	Vithaldas v. Goma ..	**79**	173
63	Krishnabai v. Dhondo ..	**78**	542
70	Rambax v. Moti ..	**78**	872
72	Banerji v. Potnis ..	**81**	538
76	Kanhayalal v. Sitaram ..	**81**	847

381	Kunj Behari v. Bhuta ..	**72**	199
384	Rup Kishore v. Kanhaiya Lal ..	**74**	563
404	Ram Das v. Inayat Ullah ..	**71**	1027
410	Hari Das Faqir v. Praduman Nath ..	**79**	550
412	Bhagwan v. Ganga Baksh ..	**79**	545
414	Bhudhar Singh v. Sheikh Sahamat ..	**79**	547
415	Ashfaq Husain v. Bunyad Husain ..	**77**	874
419	Surja v. Girindrao Nath Chatterjee ..	**79**	552
421	Rohilkhand and Kamayun Railway Company v. Bij Raj ..	**72**	428
424	Shamsher Singh v. Ram Kali ..	**7-**	784
429	Munni Babu v. Koer Kamta Singh ..	**72**	86
433	Badlu Singh v. Panthu Singh ..	**71**	474
437	Mathura Singh v. Sheo Mohan Prasad ..	**74**	792
440	Husaini v. Muhammad Zamir Abedi ..	**74**	802
443	Bindeshri Pande v. Sheo Ratan Pande ..	**74**	811
445	Dwarka v. Idu ..	**74**	813
448	Muhammad Yunis Khan v. Gulab ..	**74**	715
450	Chhotey Lal v. Collector of Muradabad ..	**69**	44
458	Balda Pasi v. Nasir Ali Khan ...	**74**	718
460	Nanhun v. Ram Dayal ..	**74**	818
463	Darshan Singh v. Ratan Lal ..	**74**	821
465	Mathura Singh v. Kandhai Pathak ..	**74**	816
477	Shah Muhammad Eahsanulla v. Peoples' Industrial Bank, Ltd., Allahabad ..	**72**	106
479	Ram Nath v. Mata Sahai ..	**72**	108
482	Emperor v. Sarju ..	*To be printed.*	
481	Abid Husain Khan v. Ahmad Husain Khan ..	**75**	502
485	Jagrani v. Iqbal Narain ..	**80**	441
488	Kishen Narain v. Pal Mal ..	**72**	187
494	Dwarka Ram v. Jhulai Pande ..	**72**	134
495	Her Keshi v. Mewa Ram ..	**72**	247
498	Shabbir Hussain v. Ghulam Husain ..	**72**	276
501	Baikuntha Nath Chattoraj v. Prasannamoyi Debya ..	**72**	286
511	Ahmad Husain v. Rahiman ..	*To be printed.*	
514	Muhammad Ayub v. Sarfraz Ahmad ..	*To be printed.*	
517	Raghu Datt v. Emperor ..	**74**	535
521	Ashiq Ali v. Ghulam Sarwar ..	**74**	553
526	Emperor v. Rameshwar Tewari	**74**	539
531	East Indian Railway Company v. Firm Kishin Lal Tirkhamal	**73**	986
538	Narayan Das v. Maheshi Lal ..	**73**	309
541	Pirthipal Singh v. Ganesh Din Singh ..	**71**	641
545	Nand Kishore v. Kishori Lal ..	**74**	299
547	Dalsher v. Emperor ..	**74**	544
549	Mukand Singh v. Ghafur-unnissa ..	**74**	108
554	Ghasi Ram v. Uma Datt ..	**79**	576
556	Gurdin v. Emperor ..	*To be printed.*	
558	Din Dayal v. Emperor ..	**81**	949
560	Brij Mohan Lal v. Emperor ..	*To be printed.*	
561	Bhajua v. Emperor ...	*To be printed.*	
563	Bishwa Nath Singh v. Jugul Kishore ..	**78**	244
567	Narayan Das v. Moheshi Lal ..	**79**	578
577	Surja Baksh Singh v. Munnu Lal ..	**76**	763
581	Balgobind v. Badri Prasad ..	**74**	449
587	Baldeo Singh v. Deputy Commissioner, Kheri, Manager of Jhandi Estate ..	**74**	503
611	Jamna Prasad v. Emperor ..	**74**	518
614	Ram Naresh Singh v. Dalpat Singh ..	**77**	120
617	Durga v. Jamna Prasad ..	**77**	109
625	Ram Narain Singh v. Ram Sukh	**77**	79
631	Bhola Nath v. Rasool Baksh ..	**77**	78
635	Mariam Begum v. Syed Muhammad Mehdi ..	**74**	40
638	Abdul Shakur v. Emperor ..	**76**	1033
642	Debi Prasad v. Lekhraj ..	**76**	1050
643	Jokhu v. Saraswati ..	**76**	1017
645	Nasir Khan v. Itwari ..	**74**	905
648	Ram Kumar v Har Prasad ..	**76**	1021
651	Jai Gobind v. Abhairaj Singh ..	**77**	125
667	Sant Baksh v. Dildar Husain ..	**76**	1053
672	Raran *alias* Ratan v. Sheo Lal...	**76**	1055
674	Lallu Mal v. Reoti Ram ..	**74**	353
677	Lutar Ram v. Lal Ranjit Singh	**73**	113
694	Maharaj Prasad v. Emperor ..	**74**	443
696	Kashi Nath v. Emperor ..	**79**	693
703	Kamta Prasad v. Uman Prasad ..	**76**	33
707	Balbhadra Prasad v. Dhanpat Dayal ..	**80**	213
733	Abdul Hakim v. Sajjad Husain ..	**74**	304
742	Janka v. Shiam Kishore Lal ..	**80**	483
746	Lal Ram Singh v. Deputy Commissioner of Partabgarh ..	**76**	922
761	Baldeo v. Sher Bahadur Singh ..	**74**	42
766	Sitla Prasad v. Chameli Balu ..	**75**	316
770	Ram Charan v. Chanpat Singh ..	**80**	819
773	Brij Raj Kuar v. Ram Nath ..	**80**	821
776	Chhotai Singh v. Emperor ..	**73**	334
779	Munwa v. Emperor ..	*To be printed.*	
783	Tota Iron and Steel Company, Ltd., v. Chief Revenue Authority of Bombay ..	**74**	469
796	Syed Ijaz Husain v. Lachman Das	**75**	790
799	Foolcooverbai v. Keshri Singh Rajmal ..	**73**	242
805	Rajanikanta Pal v. Jaga Mohan Pal ..	**73**	252

*Decisions of the Board of Revenue, U. P., not printed in Indian Cases.—[*Ed.*]

*9 OUDH & AGRA LAW REPORTER, FROM 12TH APRIL TO DECEMBER, 1923—concld.

812	Kalu Singh v. Hansraj Upadhya ..	**78**	47
815	Ali Abbas v. Raja Kunwar Sher Bahadur Singh ..	**75**	267
820	Ratan Singh v. Hafiz-ullah Haji ..	**72**	1011
822	Mahabir Pande v. Mathura Prasad ..	**72**	470
826	Beni Madho v. M. Yusuf Husain Khan ..	**72**	1031
832	Santi Lal v. Raj Narain ..	**79**	87
836	Sheo Ambar v. Emperor ..	**77**	439
846	Badri Prasad v. Murli Dhar ..	**77**	553
847	Binda Prasad v. Banarsi Das ..	**77**	115
848	Kali Baksh Singh v. Bhagwan Das ..	**72**	1023
850	Bhagwati Prasad v. Emperor ..	**74**	69
857	Ram Nath v. Ram Harakh ..	**80**	471
865	Sher Bahadur Singh v. Fazal Ali	**75**	736
867	Emperor v. Sarju Prasad ..	**77**	192
869	Haider Khan v. Emperor ..	**75**	978
871	Parmeshur Lal v. Rukmin ..	**75**	875
873	Faqir Chand v. Baij Nath ..	**75**	888
875	Murlidhar v. Mool Chand ..	**73**	39
879	Jagesar Pande v. Deo Dat Pande ..	**74**	931
885	Bhagwan Dut v. Brij Bhukhan..	**75**	868
889	Nawab Haider Mirza v. Kailash Narain Dar ..	**80**	454
893	Bhim Shankar Datt v. Mani Ram ..	**80**	457
898	Jogi Ram v. Muhammad Rafi	**80**	467
900	Mahadeo Rai v. Emperor ..	**81**	140
901	Muhammad Mumtaz Ali Khan v. Mohan Singh ..	**74**	476
910	Ganga Prasad v. Bachchu Lal .	**80**	469
913	Chandra Kuar a. Chotey Lal ..	**80**	330
918	Gur Dayal v. Emperor ..	*To be printed.*	
922	Angnoo v. Emperor ..	**81**	143
925	Samuel Burge v. Improvement Trust Lucknow ..	**73**	127
928	Emperor v. Ganesh Prasad ..	*To be printed.*	
931	Jagannath Pershad v. Bechu ..	**80**	327
937	Imperial Bank of India v. U. Rai Gyaw Thu and Company Ltd. ..	**76**	910
947	Manna Lal v. Emperor ..	**75**	753
968	Sarda Saran v. Emperor ..	*To be printed.*	
973	Tula Ram v. Emperor ..	*To be printed.*	
978	Puttoo Khan v. Ahmad Zaman Khan ..	**74**	56
982	Ram Dayal v. Emperor ..	*To be printed.*	
983	Kuber Singh v. Bachu Ram ..	**80**	444
989	Surajman Chaube v. Anjore Shukul ..	**79**	605
994	Wali Muhammad v. Emperor ..	*To be printed.*	
1001	Jagmohan Das v. Emperor ..	**75**	292
1007	Mian Jan v. Emperor ..	*To be printed.*	
1013	Sartaji v. Ramjas ..	**79**	25
1017	Mahtab Kuer v. Birhmo ..	**75**	254
1019	Gayan Singh v. Babu Lal ..	**79**	438
1024	Kedar v. Emperor ..	*To be printed.*	
1030	Narotam Das v. Sheikh Muhammad Raza ..	**80**	781
1041	Shams-ud-din Khan v. Agha Syed Fateh Shah ..	**75**	936
1045	Dayal v. Bhimma ..	**80**	860
1047	Puttoo Lal v. Emperor ..	**77**	818
1049	Suraj Prasad v. Emperor ..	**81**	595
1053	Babu Lal v. The Municipal Board, Farrukhabad ..	**75**	777
1056	Chedi v. Ram Lal ..	**81**	615
1061	Gauri Misra v. Mohan ..	**80**	847
1066	Ram Nath v. Damodar Prasad..	**80**	855
1074	Bombay, Baroda and Central India Railway Company v. Firm Budh Sen Pusp Chand	**79**	562
1083	Brij Behari Lal v. Emperor ..	**81**	717
1085	Ram Adhin v. Emperor ..	**81**	613
1089	Sahdeo v. Raghubar ..	**81**	573
1092	Muhammad Ibrahim v. Asmatullah ..	**81**	562
1096	Lachmi Kuer v. Umrao Singh..	**81**	333
1102	Idu v. Emperor ..	**81**	529

*10 OUDH & AGRA LAW REPORTER, FOR FEBRUARY, 1924.

97	Ghasi Ram v. Bhola Nath ..	**79**	314
103	Shyam Lal v. Radhe Shyam ..	**74**	510
105	Emperor v. Aladin ..	**81**	215
108	N. K. Dutt v. Pandit Sheo Balak ..	*To be printed.*	
111	Lal Khan v. Kimman Khan ..	**80**	560
115	National Bank of Upper India Ltd. v. Sheo Mangal Bajpai	**79**	968
117	The President Zardozi Union, Lucknow v. Bashir Khan ..	**80**	556
119	Harihar Prasad v. Babu Shankar Dayal ..	**77**	337
121	Khanderao Vithoba Kore v. The Municipal Carporation of Bombay ..	**79**	948
129	Gokul Prasad v. Sukru ..	**81**	581
136	Manni Lal v. Sheo Raran ..	**78**	157
140	Gauri Shankar v. Bansi Dube	**78**	540
144	Chhedi Lal v. Emperor ..	**88**	951
146	Mohammad Ahsan Ali v. Masud Ali ..	**77**	358
156	Ram Singh v. Ram Chand ..	**79**	944
161	Jukhu Pande v. Mata Prasad Tewari ..	*To be printed.*	

* Decisions of the Board of Revenue, U. P., not printed in Indian Cases—[*Ed.*]

*10 OUDH & AGRA LAW REPORTER, FOR FEBRUARY, 1924.

169	Gur Din v. Sirajunnissa ..	**80**	513	185	Raghunandan v. Ajodhia Prasad	**81**	648
172	Siya Ram v. Salik ..	**77**	352	186	Chandi v. Sat Narain ..	**81**	650
176	Obala Kondama Naicker Ayyan v. Kandasamy Goundar ..	**79**	961	187	Umrao Khan v. Emperor ..	**81**	597
183	Bishambar Nath v. Rukkha ..	**81**	647	189	Jang Bahadur Singh v. Ranjit Singh ..	**77**	353

27 OUDH CASES, FROM FEBRUARY TO APRIL, 1924.

35	Mansa Din v. Munnu Lal ..	*To be printed.*		99	Bishambhar Nath v. Rukkha ..	**81**	647
40	Manna Lal v. Emperor ..	**75**	753	100	Lal Khan v. Kimman Khan ..	**80**	560
56	Akbar Husain v. Shahanshah Begam ..	*To be printed.*		103	Manni Lal v. Sheobaran ..	**78**	157
				107	Jang Bahadur Singh v. Ranjit Singh ..	**77**	353
60	Avantika Prasad Shukul v. Gur Bakhsh ..	**78**	804	111	Bhagwati Sahai v. Pragdin Maharaj ..	**81**	15
64	Ragho Prasad v Secretary of State for India in Council ..	**74**	369	114	Rachhpali v. Chandresar Dei ..	**78**	256
72	Abid Husain v. Kaniz Fatima	**80**	1019	124	Gauri Shankar v. Jang Bahadur Singh ..	**79**	1008
77	Indarpal Singh v. Thakur Din Singh ..	**78**	895	130	Gur Sahai Kandu v. Chhedi ..	**79**	964
89	Jagannath Prasad v. Bechu ..	**80**	327	133	Gajadhar Baksh Singh v. Baij Nath ..	**79**	104
94	Mahabir Prasad v. Surajpal Singh ..	**80**	475	137	Sarabjit Singh v. Jai Karan Singh ..	**79**	950

3 I. L. R., PATNA SERIES, FOR FEBRUARY-MARCH, 1924.

81	Hit Lal Mahton v. Joboo Mahton ..	**75**	378	152	Ram Pergash Singh v. Dahan Bibi ..	**78**	749
		75	378				
85	Shashi Bhusan Banerji v. Ramjas Agarwala ..	**83**	205	183	Satya Narain Singh v. Satya Niranjan Chakravarti ..	**79**	825
114	Birinchi Singh v. Sarado Prasad Mukherji ..	**75**	942	221	Nripendranath Chattarji v. Jhumak Mandar ..	**80**	588
120	Kamaluddin Ahmad v. Kumar Ramanand Singh ..	**78**	605	224	Lalloo Prasad Singh v. Lachman Singh ..	**82**	510
126	Ram Lal Mandar v. Kuldip Narayan Tewari ..	**75**	841	230	East Indian Ry. Co. v. Ram Lakhan Ram ..	**78**	312
134	Garabini Kumarin v. Suraja Narain Singh ..	**75**	177	236	Nageshwar Bux Rai v. Biseswar Dayal Singh ..	**78**	889
146	Kuldip Sahay v. Harihar Prasad ..	**75**	871				

(1924) PATNA CASES, FOR FEBRUARY.

33	Balmakund Marwari v. Basanta Kumari Dasi ..	**78**	200	63	Shyam Prosono Katari v. Keshab Chandra Rana ..	**81**	702
54	Sridhar Chowdhury v. Mugniram Bangar ..	**78**	620	65	Badri Narain Singh v. Dwarka Prosad ..	**78**	630
60	Kamakshya Narain Singh v. Suraj Nath Misra ..	**78**	474	67	Mundo Singh v. Mahanth Krishna Dayal Gir ..	**75**	98

†2 PATNA LAW REPORTER, FOR FEBRUARY, 1924.

Criminal.

25	Maharajadhiraj of Darbhanga v. Commissioner of Income-Tax	**78**	783	58	Nageshwar Bux Rai v. Biseswar Dayal Singh ..	**78**	889
45	Maniruddin v. Emperor ..	**74**	861	65	Mahanth Ramrup Ghoshain v. Mahabir Shah ..	**74**	825
52	Thibu Bhogta v. Emperor ..	**73**	569	69	Kumar Kamakhya Narayan Singh v. Surajnath Misra ..	**78**	474
69	Binode Behary Banerjee v. Emperor ..	**81**	78	74	Indian General Navigation and Ry. Co. Ltd. v. Firm Daulat Ram Chaturbhuj ..	**80**	745
	Civil.			76	Raghunath Sukul v. Ramrup Raut ..	**76**	2
54	Kishun Bahadur v. Sassaram Lime Ltd. ..	**80**	572				

* Decisions of the Board of Revenue, U. P., not printed in Indian Cases—[*Ed.*]
† Decisions of the Board of Revenue, Bihar & Orissa, not printed in Indian Cases—[*Ed.*]

5 PATNA LAW TIMES, FROM 29TH JANUARY TO 12TH FEBRUARY, 1924.

49	Chandrika Prasad v. Hira Lal ...	**75**	433	72	Raghunath Prasad Sahu v. Sarju Prasad Sahu ...	**82**	817
52	Garabini Kumarin v. Surja Narain Singh ..	**75**	177	77	Babu Ramji Ram v. Ram Kumar Singh ...	**75**	411
61	Kishundeo Narayan Mahta v. Ramrejhan Singh ..	*To be printed.*		85	Kumar Kamakhya Narayan Singh v. Surajnath Misra ...	**78**	474
63	Binode Behary Banerjee v. Emperor .	**81**	78	88	Maharaj Kumar Jagat Nohan Nath Sahi Deo v. Jaipal Singh	*To be printed.*	
66	Mahanth Ramrup Ghoshain v. Mahabir Shah ...	**74**	825	90	Akal Mahton v. Mahabir Mahto	**75**	531
69	Bhulan Raut v. Kumar Rai ...	**75**	535	93	Maniruddin v. Emperor ...	**74**	861

2 I. L. R., RANGOON SERIES, FOR FEBRUARY, 1924.

62	Ma Thein Yin v. Maung Tha Dun	**79**	501	99	Baijnath Singh v. Jamal Brothers and Company Limited ...	**79**	940
66	K. E. A. K. A. Sahib & Co. v. K. M. Adamsa ...	**81**	465	106	Maung San Myaing v. U. Pon Gyaw ...	**80**	753
80	Ram Pershad v. Emperor ...	**81**	443	108	Raj Chandra Dhar v. Messrs K. D. O. C. Ray ...	**79**	506
91	D. R. Saklat v. Bella ..	**80**	744	113	Maung Pe Gyi v. Hakim Ally	**80**	759
94	Ma Sein v. Ma Pan Nyun ..	**80**	749	117	Haji Pu v. Tin Tin ...	**80**	746

3 BURMA LAW JOURNAL, FOR FEBRUARY-MARCH, 1924.

25	Ma Ma Gun v. Maung Ba Than	**82**	352	44	Maung Pe Gyi v. Hakim Ally ..	**80**	759
26	Sya Kyaw v. Emperor ...	**82**	288	47	Samson v. Silvaram ...	**82**	418
27	On Pe v. Emperor ...	**82**	471	49	Nga Son Min v. Emperor ...	**82**	473
30	D. L. Saklat v. Bella ...	**80**	744	54	Maung Thwe v. Ma Shwe Pon ...	**82**	423
32	Emperor v. Nga Po Thaung ..	**82**	478	58	Maung Pe v. Ma Hnit ...	**82**	427
34	Wazir Chand v. B. M. Bharadwaza ...	*To be printed.*		63	Mg. Hoe Kyin v. Pe Hla Gyi ...	*To be printed.*	
36	Azee Meah v. Jeewa ...	**82**	381	67	Lim Chwe Htaw v. Lu Tyaw Tat	*To be printed.*	
40	Kwa Hai v. The Northern Assurance Co. Ltd ...	*To be printed.*		68	U Shwe Min v. Maung Maung Gyi ...	**82**	973
				71	T. C. Bose v. O. R. Chowdhury	**82**	865

25 CRIMINAL LAW JOURNAL, FROM FEBRUARY TO APRIL, 1924.

81	Metcalfe v. Watson ...	**76**	17	114	Dhunmun Choudhury v. Emperor	**76**	178
82	Santa Singh v. Emperor ...	**76**	18	116	Neki v. Emperor ...	**76**	180
83	Sheikh Munir v. Emperor ...	**76**	19	119	Abdul Qadir v. Muhammad Ibrahim Khan ...	**76**	183
84	Abdul v. Ghulam Muhammad ...	**76**	20	120	Emperor v. Nazir Singh ..	**76**	184
85	Emperor v. Nga Sein Po ...	**76**	21	121	Dil Bahadur v. Emperor ...	**76**	185
87	Nabi Bakhsh v. Emperor ...	**76**	23	122	Abdul Ghani v. Emperor ...	**76**	186
88	Durganand Ojha v. Hiranand Ojha ...	**76**	24	123	Etakandan Kunhokker, *In re* ...	**76**	187
89	Shamas-ud-din v. Ram Dyal Singh ...	**76**	25	125	Chiragh Din v. Emperor ...	**76**	189
89	Sondi Singh v. Govind Singh ...	**76**	25	127	Hargayan v. Emperor ...	**76**	191
91	Kanwal Nabh v. Emperor ...	**76**	27	129	Nga Ba Thein v. Emperor ...	**76**	225
92	Sri Ram v. Emperor ...	**76**	28	131	Mana v. Emperor ...	**76**	227
93	Emperor v. Khanun ...	**76**	29	132	Bajirao v. Emperor ...	**76**	228
94	Kembu Ammal v. Ranganatham	**76**	30	134	Hiranand v. Emperor ...	**76**	230
95	Bhika v. Emperor ...	**76**	31	138	Tiruvenkatachariar v. Chockalinga Chetty ...	**76**	234
97	Abdul Wahab v. Emperor ...	**76**	97	139	Marimuthu Naidu, *In re* ...	**76**	235
104	Lal Badshah v. Emperor ...	**76**	104	140	Jogesh Chandra Sen v. Nikunja Behari Choudhuri ...	**76**	236
105	Bodhraj v. Emperor ...	**76**	105	141	Laxman v. Emperor ..	**76**	237
111	Maung v. Mang Tom ...	**76**	111	145	Nanni Kudumban, *In re* ..	**76**	289
113	Solhu v. Kishna Ram ...	**76**	177				

25 CRIMINAL LAW JOURNAL, FROM FEBRUARY TO APRIL, 1924—concld.

147	Sukhwaria Chamarin v. Emperor	76	291
149	Fazar Pramanik v. Emperor ...	76	293
150	Pitre v. Emperor ...	76	294
155	Atma Ram v. Emperor ...	76	299
156	Nogendra Nath Bose v. Emperor	76	300
159	Bhure Khan v. Fakira ..	76	303
161	Abdul Rashid, *In re* ..	76	385
165	Emperor v. Sukhu Bewa ...	76	389
167	Debendra Nath v. Bhagirathi Mahto ..	76	391
168	Fakir Chandra De v. Emperor...	76	392
169	Baga Mahar v. Emperor ..	76	393
170	Raghunath Ram v. Kurseong Municipality ..	76	394
171	Sessions Judge, Bhandara v Pandia ..	76	395
172	Ah Shein v. Emperor ...	76	396
173	Jagtu v. Emperor ..	76	397
174	Emperor v. Waryam Singh ...	76	398
177	Oates v. Emperor ..	76	417
184	Amulya Charan Dutt, *In re* ..	76	424
185	S. C. Gupta v. Emperor ..	76	425
189	Nafar Chandra Pal Chowdhury v. Emperor ..	76	429
190	Nagendra Chandra Dhar v. Emperor ..	76	430
191	Abdul Rashid v. Momtaz ..	76	431
191	Maung Saing v. Emperor ...	76	431
192	Jagatbandu Saha v. Jagabandhu Saha Sardar ..	76	432
193	Nga Aung Hman v. Emperor ..	76	561
194	Muhammad Naqi Khan v. Rahamat-unnisa ..	76	562
196	Mahomed Surty v. Emperor ...	76	564
198	Brij Bhukhan v. Ram Kirat ..	76	566
200	Ganga Prasad v. Emperor ..	76	568
203	Nga Tha Hla v. Emperor ..	76	571
204	Shiam Sunder v. Emperor ..	76	572
205	Nga Mu v. Emperor ..	76	573
207	Kra Chan U v. Emperor ..	76	575
209	Ellan v. Emperor ..	76	641
209	Ram Chand v. Jesa Ram ..	76	641
210	Basireddi Naiappa, *In re* ..	76	642
212	Thaikkottathil Kunhaeen, *In re*	76	644
214	Maung Tha Gyaw v. Emperor ..	76	646
215	Pallikuduthan v. Buddu Goundan ..	76	647
217	Maung Po Hmyin v. Emperor	76	649
218	Ovid v. Chandra Bhan ...	76	650
219	Babujan v. Emperor ..	76	651
220	Ganga Prasad v. Emperor ..	76	652
221	Public Prosecutor v. Mari Mudali ..	76	653
222	Kartikeswar Roy v. Bansidhar Byas ...	76	654
223	Nand Lal v. Emperor ...	76	655
225	Bahadur Singh v. Emperor ..	76	689
227	Chotey Lal v. Emperor ...	76	691
228	Mahomed Hassan v. Emperor..	76	692
229	J. R. Das v. Emperor ..	76	693
231	Jeremiah v. Johnson ..	76	695
233	Nga E v. Emperor ..	76	697
234	Khushal Singh v. Emperor ..	76	698
236	Maung Po Lu v. Emperor ..	76	700
238	Maulu v. Emperor ..	76	702
240	Nga San Ba v. Emperor ...	76	704
241	Maung Gyi v. Emperor ...	76	705
244	Chinnappa Naidu ...	76	708
245	Nga Pan Yin v. Emperor ...	76	709
246	Rahm Ali v. Emperor ...	76	710
247	On Shwe v. Emperor ...	76	711
252	Suleman v. Emperor ...	76	716
255	U Tiloka v. Emperor ...	76	719
257	Nga Nyo v. Emperor ...	76	817
259	Wadhawa Singh v. Emperor ..	76	819
261	Mahomed Moidin v. Emperor ..	76	821
264	Nawab v. Emperor ..	76	824
265	*In the matter of* Professional Misconduct of Maung Kin So	76	825
266	Jassi v. Emperor ..	76	826
267	*In the matter of* Maung Ba Kyin ...	76	827
269	Mulimayandi Thevan v. Emperor	76	829
270	Emperor v. Nga Aung Gyaw ..	76	830
273	Gopi Chand v. Emperor ..	76	865
274	Sohan Singh v. Emperor ..	76	866
275	Mg Toe Bwa v. Emperor ..	76	867
276	Sat Narayan Singh v. Emperor	76	868
277	*In re* Court-fees Act ...	76	869
277	Krishna Row v. Seshasubramania Iyer ..	76	869
278	Muhammad Zahur v. Emperor	76	870
279	Kishen Singh v. Emperor ..	76	871
280	Nambia Pillai v. Sudalaimuthu Nadan ..	76	872
281	*In the matter of* An Advocate of the High Court ...	76	873
289	Haro Nath Malo v. Ala Bux ..	76	961
290	*In re* Kandaswami Goundan ..	76	962
291	Muhammad Khandu Sarkar v. Sadak Ali Sheikh ..	76	963
291	Arjan Das v. Emperor ..	76	963
293	Ponthiram Joab v. Emperor ..	76	965
294	*In re*, Thirumal Reddy ..	76	966
294	Emperor v. Charu Chunder Mukerjee ...	76	966
297	Durga Prasad v. Emperor ..	76	969
298	Partapa v. Emperor ...	76	970
299	Hori Lal v. Emperor ...	76	971
302	Kamta v. Mangal Dei ...	76	974
303	Bande Ali v. Rejaullah ...	76	975
303	Lalta Prasad v. Emperor ...	76	975
305	Mahadeo Prasad v. Emperor ...	76	1025
308	Pir Muhammad v. Emperor ..	76	1028
310	Gopobondhu v. Venkatesam Pantulu ...	76	1030
310	Abdul Jabbar v. Emperor ...	76	1030
311	Emperor v. Nga Tha Shwin ...	76	1031
311	Easatulla Mian v. Emperor ...	76	1031
312	Mahammed Yakub Ali v. Emperor ...	76	1032
313	Abdul Shakur v. Emperor ...	76	1033
314	Abdullah v. Emperor ...	76	1034
315	Emperor v. Shankar Balkrishna	76	1035
317	Hossain Khan v. Emperor ..	76	1037
319	Karim Bakhsh v. Emperor ...	76	1039
319	Emperor v. Nga Sein ...	76	1039
320	Asghar Ali v. Emperor ...	76	1040

ALL INDIA REPORTER, FROM FEBRUARY TO APRIL, 1924.

	Privy Council.		
28	Motibai v. Jamsetjee ...	**80**	1038
34	Nagendrabala Dasi v. Dinanath	**81**	752
36	Malireddi Ayyareddi v. Adusumilli Gopalakrishnayya ...	**79**	592
40	India Gen. N. & R. Co. v. Dekhari Tea Co. ...	**80**	777
44	Lakshmana Goundan v. Subramania Ayyar ...	**81**	518
48	Baijnath Singh v. Jamal Bros. & Co. ...	**79**	940
50	Raja Brij Narain Rai v. Mangla Prasad ...	**77**	689
56	Obala Kondama Naicker v. Kandasamy Gounder ...	**79**	961
60	Raghunath Prasad v. Sarju Prasad ...	**82**	817
65	Nainapillai Marakayar v. T. A. R. A. Rm. Ramanathan ...	**82**	226
75	Macmillan & Co. v. K. & J. Cooper ...	**83**	101
88	Ma Thaung v. Ma Than ...	**80**	1031
93	Haji Hedayetulla v. Mahomed Kamil ...	**81**	525
95	Ramlal v. Kishanchandra ...	*To be prinied.*	
102	Mirza Abid Husain v. Kaniz Fatima ..	**80**	1019
106	Waman Ganesh v. Srubai ..	**80**	641
109	Muhammad Raza v. Syed Yadgar Husain ..	**80**	645
	Allahabad High Court.		
49	Ballo v. Ram Kishen ...	**81**	490
50	Panna Lal v. Bohra Panna Lal	**74**	481
51	Jagesor Pande v. Deo Dat Pande	**74**	931
52	Balwant Singh v. Mare Singh ...	**74**	322
53	Kesho Dass v. Hanuman Pandey	**74**	924
54	Ruhul Amin v. Shankar Lal ...	**77**	30
57	Hawal Rai v. Har Prasad Rai ..	**75**	835
59	Muiz-ud-Din v. Mohammad Ikhlaq ...	**74**	756
60	Bhairo Tewari v. Ramnath Rai	**75**	404
62	Har Prasad v. Raghubar Dayal	**74**	817
63	Mathura Prasad v. Anandi Kunwar ...	**74**	911
64	Chhutan v. Jwala Prasad ...	**73**	602
65	Aftab Begum v. Muhammad Ayub ..	**74**	345
66	Bu Ali Khan v. Sujan Kuer ...	**75**	100
68	Devi Prasad v. Secretary of State ...	**74**	746
69	Kashi Nath v. Emperor ...	**74**	11
70	Lallu Mal v. Reoti Ram ...	**74**	353
71	Radhika Natha Saha v. Jotish Chandra ...	**73**	523
72	Tara v. Emperor ...	**74**	529
76	Bansi v. Lakshmi Das ...	**75**	984
77	Girdhar Das v. Emperor ...	**75**	353
78	Ghulam Husain v. Emperor ...	**73**	769
	Allahabad High Court—contd.		
79	Bhagelu v. Dharma ...	**75**	898
80	Jarbhandan v. Badri Narain ...	*Not reportable.*	
81	Shankar Lal v. Kirari Mal ..	**77**	144
82	Baldeo Misir v. Ramlagan Shukul ..	**77**	694
83	Maharaj Prasad v. Emperor ..	**74**	443
84	Chunni Lal v. Baldeo ..	**75**	730
86	Gayan Singh v. Babu Lal ..	**79**	438
88	Uman Shanker v. Aisha Khatun	**74**	869
91	Sheo Nandan v. Balgobind Misra	**74**	647
94	Hargobind Singh v. Hukum Chand ..	**75**	351
95	Gajraj Tewari v. Bhagirathi Pande ..	**74**	14
97	Sri Ram v. Mani Ram ..	**74**	922
98	Mohammed Siddiq Ali Khan v. Anwarul Hasan ..	**74**	389
99	Mahabir Prasad v. Kanhaiya Lal ..	**74**	372
100	Gupta Nand v. Behari Lal ..	**74**	827
101	Jwala Prasad v. Emperor ..	**82**	139
102	Khairuddin v. Sahu Gulab Das	**74**	220
103	Kamlapat Dubey v. Ram Raj ..	**79**	450
104	Mahomed Iftikhar Ullah v. Banke Lal ..	**73**	950
105	Mahalakshmi Bai v. Chaudhari Badan Singh ..	**74**	927
107	Prashadi Lal v. Thakur Laiq Singh ..	**74**	943
109	Jhari Koeri v. Bijai Singh ..	**74**	865
111	Sitla Prasad v. Chameli Bahu ..	**75**	316
112	Sahu Govind Prasad v. Kundan	**74**	760
113	Muhammad Zain Khan v. Nurul Hassan Khan ..	**74**	142
114	Adhar Singh v. Babu Ram Manohar Singh ..	**73**	990
116	Altafan v. Ibrahim ..	**75**	502
119	Santi Lal v. Raj Narain ..	**79**	87
121	Nannhu v. Roshan Singh ..	**74**	112
122	Gopal Das v. Gauri Shanker ..	**74**	186
123	Muhammad Ali v. Sultan Ahmad ..	*To be printed.*	
125	Rabi Pratap Narain Singh v. Ram Prasad Bharathi ..	**74**	502
126	Mithu Lal v. Sri Lal ..	**74**	918
127	Bishun Narain v. Bibi Ramji ..	**74**	842
128	Jamna Prasad v. Emperor ..	**73**	518
129	Firm Dwarka Das Ajodhya Prasad v. Firm Lachmi Narain Girdhari Lal ..	**74**	692
130	Muhammad Yakub Ali v. Emperor ..	**76**	1032
131	Mahadeo Prasad v. Crown ..	**75**	159
132	Suraj Narain v. Jang Bahadur ..	**74**	2
134	Sultan Baksh v. Abdul Hamid ..	**74**	24
135	Muhammad Baksh v. Muhammad Abdul Baqi Khan ..	**74**	490
137	Lalla Mal Hardeo Das Cotton Spinning Mill Co. of Hathras, *In the matter of* ..	**75**	339

ALL INDIA REPORTER, FROM FEBRUARY TO APRIL, 1924—contd.

Allahabad High Court—concld.

141	Dukhi v. Emperor ..	**74**	448
142	Jhandoo Singh v. Emperor ..	**75**	733
143	Abdul Rashid Khan v. Haji Nisar Muhammad Khan ..	**77**	448
144	Nasir Khan v. Itwari ..	**74**	905
145	Ummed v. Emperor ..	**74**	858
146	Ramdas Rai v. Abdul Ghafur ..	**74**	297
147	Ganesh Din v. Lachman Singh ..	**74**	755
148	Aisha Bibi v. Chhajju Mal ..	**74**	776
149	Lalta Prasad v. Darshan Singh ..	**74**	839
150	Kundan Lal v. Makundi Kunwar ..	**77**	609
153	Ghasi Ram v. Bhola Nath ..	**79**	314
156	Mahomed Said v. Bishambhar Nath ...	*To be printed.*	
157	Babu Lall v. The Municipal Board, Furukabad ..	**75**	777
159	Karan Singh v. Dal Chand ..	**74**	703
160	Niarat Ullah v. Shafut-un-nissa Bibi ...	**74**	768

Bombay High Court.

33	Vamanacharya v. Govind ...	**76**	1014
36	Venkapaiya v. Nazerally ..	*To be printed.*	
39	Somshikharswami v. Shivappa	**76**	557
41	Harbut J. Amies v. Jal P. Virji...	**77**	150
44	Ahmad Saheb v. Ubhaiya Harsi	*To be printed.*	
47	Emperor Parshotam ...	**77**	186
49	Ramchandra Narayan Datar v. T. V. Nipunge ...	**73**	379
51	Rambharthi, *In re* ..	**77**	189
54	Gajanan v. The Assistant Collector of Salsette ...	*To be printed.*	
57	Hasham Ismayal v. Nariman Rustomji ...	**81**	463
58	Talak Chand Bheraji v. Atmaram ..	**77**	312
62	Shrichand Anopchand v. P. E. Boyce & Sons ...	**80**	720
64	Mahomed Shidick v. Mahommad Hassan ...	*Not reportable.*	
65	Secretary of State v. Patel Narsibhai Dadhabai ..	**77**	241
70	Emperor v. Ramchandra ..	**81**	972
71	Bindu Govind v. Hanmanth Gobind ..	**79**	407
72	Dolatsingji Jaswantsingji v. Oghad Vira ..	**82**	867
88	Natha Gulab and Co. v. W. C. Shaller and G. I. P. Railway Co. ..	*To be printed.*	
89	Bapuji Sorabji Patel v. Lakshmidas Ravji Tersi ..	**81**	844

Bombay High Court—concld.

90	Jethabhai Versey & Co. v. Amarchand Madhavji & Co. ..	**82**	852
98	Dattatraya Vithal Garware v. Wasudev Anant Gargate ..	**76**	1023
99	Madhavji Virji v. Lakshmidas Mulji and Co. ..	**81**	843
100	Gokal Das Pitambar v. Odhavji Gigabhai ..	**77**	206
102	Parshuram Dattaram Shamdasani v. Tata Industrial Bank, Ltd. ..	**80**	75
105	Emperor v. Nemchand Natha	**77**	226
109	Rampratap Brijmohandas v. Gavrishankar Kashiram ..	*To be printed.*	
112	Babagowda Malgowda Patil v. Tanibai	**76**	1041
113	Gundappa v. Shantappa ..	*Not reportable*	
114	Mallawa v. Shivudraya ..	**81**	1052
115	William Jacks & Co. v. Joosab Muhammad ...	**82**	791
116	Dayabai v. Ahmedabad Municipality ..	**81**	638
118	Sidagavada v. Ramchandra ..	*Not reportable.*	
119	Karsandas v. Chhotalal ..	**77**	275
130	Bapuji v. Janardan ..	**80**	648
131	Alice M. Campbell v. William Chard & Co. ..	*To be printed.*	
132	Wilhelmina Codd v. Bertie Elijah Codd -	*To be printed.*	
135	Husseinali Casam Mahomed v. Dinbai ..	*To be printed.*	
139	Motilal Ratanchand Marwadi v. Nandram Dalpatram Marwadi ..	**82**	124
140	Haribhai Gulab v. Mathur Lallu	**77**	224
141	Yeshvadabhai v. Janardhan Raghunath Warik ..	**81**	776
144	The Tata Industrial Bank Ltd. v. Abdul Husein Hakimji ..	*To be printed.*	
149	Tyebbhai Essubhai Thanawala v. Abdul Husein Tyebally ..	*To be printed.*	
150	Laxman Manaku Kasar v. Ravji Dhansing Patil ..	**77**	305
152	Ramchandra Madhavrao Gadre v. Trimbak Sridhar Jahagirdar	**77**	562
154	Babaji Ramaling Gurav v. Appa Vithavja Sutar ..	**77**	131
155	Motilal Jasraj v. Chandmal Hindumal ..	**77**	1055
157	Nagava Gurlingaya Nandi v. The Collector of Belgaum ..	**77**	702
159	Ganpati Shankarappa Hegde v. Krishnappa Shivram Hegde ..	**73**	204

ALL INDIA REPORTER, FROM FEBRUARY TO APRIL, 1924—contd.

	Calcutta High Court.		
49	Satish Kanta Roy v. Jyotirupa Devi ...	**81**	459
52	Kenaram Pal v. Kinu Mandal	**75**	379
53	Kali Singh v. Emperor ...	**75**	533
55	Baisnab Charan Das v. Amin Ali ...	**72**	953
56	Barada Prasad v. Bhupendra Nath ...	**75**	55
57	Saleh Abraham v. Manekji Cowasji ...	**75**	521
63	Natabar Khan v. Emperor ...	**82**	278
64	Tulsi Telini v. Emperor ..	**72**	362
68	Mathura Nath v Lakhi Narain	**75**	435
72	Baidyanath v. Panchanani Dasi	**72**	128
74	Seodoyal v. Joharmull ...	**75**	81
80	Taraprasanna Sarkar v. Kalikamohan Sarkar ...	**75**	319
82	Ramani Kanta Ray v. Bhimnandan Singh ...	*To be printed.*	
83	Meghraj Purohit, *In re* ...	**80**	840
84	Prabhat Chandra v. Bijoy Chand ...	**75**	89
85	Corporation of Calcutta v. Calcutta Improvement Trust	**75**	346
90	Rajani Kanta v. Jyoti Prasad Singh ..	**75**	255
92	Lakshmi Narain v. Secretary of State ...	**80**	279
95	Bansi Mirdha v. Brojeswar Dutt ...	**81**	974
96	Nityananda Koer v. Rakhahari	**73**	940
97	Pahal Ghorai v. Fazluddin Mahammad ..	**76**	407
98	Santala Bewa v. Badaswari Dasi ..	**75**	11
101	Superintendent and Remembrancer of Legal affairs, Bengal v. Narayan Chandra Banerjee	**73**	776
104	R. H. E. Oates v. Emperor ..	**76**	417
111	H. K. Bhedwar v. Rao Shahat C. S. R. Rao ..	**76**	76
114	Nafar Chandra Pal Chowdhury v. Emperor ..	**76**	429
115	G. T. Williams *In re* ..	**75**	466
117	Gladstone Wyllie & Co. v. Joosub Peer Mahomed & Co.	**77**	868
118	Pankaj Mohan Rai v. Bipin Behari Chakladar ..	**76**	511
124	Probodh Chandra Mitter v. Harish Chandra Naskar .	**78**	7
128	Bhupendra Kumar Chakraburty v. Suraj Kanta Kai Chowdhury ..	**76**	917
131	Hayatunessa Chowdhurani v. Achia Khatun ..	**74**	1017
133	Nurul Haq v. Maharaja Birendra Kishore Manikya Bahadur	**72**	979
135	Sarat Chandra Das v. Sm. Sarajini Rudraja ..	**79**	257
138	Srimanta Seal v. Bindubasini Dasi ..	**76**	517
139	Surendra Nath v. Raja Reshee Case Law .	**73**	271
142	Abedunnissa Bibi v. Isuf Ali Khan ..	**74**	1010
143	Narendra Lal Chowdhury v. Benode Behari Sadhukhan ..	**80**	577
145	Dakshina Ranjan Ghose v. Omar Chand Oswal ..	**73**	173
148	Injad Ali v. Mohini Chandra Adhikari ..	**80**	623
152	Annada Kumar Das Gupta v. Dwarka Nath Mandal ..	**80**	1017
153	Sailendra Chandra Singh v. Crown ..	**77**	812
154	Arun Chandra Sinha v. Manmohan Sinha Roy ..	**70**	784
156	Kazemini Mutwali v. Manik Chandra Pramanik ..	**80**	580
158	Sasi Kanta Acharyya v. Abdur Rahman Sarkar ..	**75**	203
159	Malchand Baid v. Osman Ali Mandal ..	**80**	307
160	Peary Mohan Mookerjee v. Manohar Mookerjee	**74**	373
165	Abinash Chandra Roy v. Fulchand Chaudhuri ...	**74**	1032
167	Jogneswar Chatterjee v. Surendra Nath Chatterjee ..	**76**	343
168	Girish Chandra Gangopadhaya v. Sri Krishna De Nag ..	**75**	325
172	Banka Behary Das v. Gurdas Dhar ..	**80**	257
173	Vally Muhammad Haji Gunny v. Nederland S. Navigation Co.	**80**	612
176	Govind Das Pity v. Jardine Skinner & Co. ..	**80**	849
182	Haro Nath Malo v. Ala Bux ...	**76**	961
183	Idol Sri Sri Gokul Nath Jiu v. The New Birbhum Coal Co. Ltd.	**80**	589
185	Radha Benode Mondal v. Nitai Chand Sant ..	**76**	358
186	Girdharilal Honuman Bux v. Eagle Star and British Dominions Insurance Co. Ltd. ..	**80**	637
188	Lakshan Chunder Dey v. Sm. Nikunjamoni Dassi	**80**	538
190	J. C. Gulstaun v. E. D. Sassoon & Co. Ltd.	**82**	348
192	Jagat Bandhu Saha v. Jagabandhu Saha Sardar ..	**76**	432
193	Sadek Ali v. Samed Ali Serang..	**80**	309
196	Ponthiram Joab v. Emperor .	**76**	965
197	Saudamini Dassya v. The Secretary of State for India	**77**	707
208	Radha Raman Kundu v. Gopal Chander Sinha ..	**80**	513

Calcutta High Court—concld.

ALL INDIA REPORTER, FROM FEBRUARY TO APRIL, 1924—contd.

	Lahore High Court.		
33	Debi Prasad v. Bhago ...	**74**	682
35	Ujagar Singh v. Sucha Singh	**74**	489
36	Umri v. Shah Muhammad ...	**74**	497
37	Naman v. Batan Singh ...	**74**	589
39	Mahomed Hussain v. Ram Lal	**71**	783
40	Hukam Chand v. Sahab Din ...	**71**	495
41	Muhammad Hasanuddin v. Saif Ali ...	**74**	451
43	Jai Gopal Singh v. Muna Lal...	**73**	655
44	Khazana Mal v. Jagan Nath ...	**74**	484
45	Gulli v. Sawan ...	**74**	146
47	Dyal Singh v. Emperor ...	**71**	52
48	Salig Ram v. Barkat Ali ...	**73**	442
49	Kallan v. Jowahar Singh ...	**71**	837
52	Chet Ram v. Spedding & Co. ...	**74**	479
53	Sri Narain v. Liquidator, Union Bank of India ...	**74**	600
54	Gian Singh v. Emperor ...	**73**	106
55	Donald v. Emperor ...	**73**	696
58	Ali Mohammad Khan v. Ali Akbar Khan ...	**80**	765
59	Sher Khan v. Emperor ...	*To be printed.*	
61	Mala Singh v. Emperor ...	*To be printed.*	
62	Mahomed Yar v. Emperor ...	**81**	173
65	Gobind Das v. Rup Kishore ..	**77**	409
68	Sanwal Das v. Jaigo Mal ..	**79**	448
70	Firm Kahna Mal Benarsi Das v. Firm Kahna Mal Nathu Mal..	**69**	718
71	Bir Sen v. Raja Ram ..	**73**	33
72	Emperor v Mauj Din ..	**71**	77
73	Emperor v. Puran Singh ..	**73**	699
74	Narain Dass v. Jawahir Singh	**69**	827
75	Kanshi Ram v Emperor ..	**73**	937
76	Chunni Lal v. Ishar Das .	**73**	702
78	Bishan Das v. Emperor ..	**71**	700
80	Gulzar Jan v. Emperor ..	**74**	433
81	Abdulla v. Emperor ..	**71**	998
82	Nawaz Ali v. Allu ..	**75**	520
83	Nabi Bakhsh v. Muhammad Salam Ullah ..	**72**	91
84	R. A. Byrne v. Crown ..	**81**	337
89	Ghasita v. Crown .	**73**	813
90	Emperor v. Waryam Singh ..	**76**	398
91	Hakam v. Ralia Ram .	**74**	79
93	Nandoo Singh v. Baljit Singh ..	**69**	495
97	Jawahar Singh v. Sewa Singh ..	**79**	572
99	Hamiri v. Crown ..	**73**	700
101	Khan Muhammad v. Crown ..	**71**	596
102	Kala v. Mam Chand ..	**73**	988
103	Ishar Singh v. Surat Singh ..	**74**	294
104	Allu v. Emperor ...	**75**	980
107	Harji Mal v. Devi Ditta Mal ..	**77**	398
109	Wallu v. Emperor ..	**77**	433
110	Sher v. Crown ..	**77**	606
112	Walaiti Ram v. Ram Kishan ..	**72**	385
115	Asad Ullah Khan v. Karam Chand	**76**	605
116	Ram Narain v. Har Narinjan Kaur ..	**76**	535

	Lahore High Court—concld.		
123	Abdul Rashid, *In the matter of* ..	**76**	385
127	Amir Khan v. Minh Mal .	**73**	370
128	Bhedu v. Crown ..	*To be printed.*	
	Madras High Court.		
33	Subbaraya Mudali v. Thangavelu Mudali ...	**72**	815
38	Kanniappa Mudaliar v. Chinnaswami Chettiar ...	**73**	540
40	Avudayappa Mudali v. Emperor	**74**	856
41	Marimuthu, *In re* ..	**73**	961
43	Viswanatha Asari v. Sami Asari	**73**	982
44	Kachi Reddi v. Saki Reddi ...	**74**	703
45	Satyanarayana Varaprasad Rao v. Venkata Lakshmi Narasayamma ...	**73**	948
46	D. R. Kannisa v. Devichand ...	**75**	390
49	Kondal Rayal v. Ranganayaki Ammal ...	**74**	166
56	Govinda Kaviraj v. Gauranga Saw ...	**75**	739
57	Visvanathan Chetty v. Ethirajulu Chetty ...	**76**	467
63	Secretary, Board of Revenue, Madras v. Madras Export Co.	**76**	375
67	Parthasarathy v. Subbaraya ...	**72**	559
73	Sambasadasiv v. Bannar Maddulappa ...	**74**	968
74	Mahomed Ghouse v. Shaik Mohideen ...	**73**	985
75	Ammani Ammal v. Periasami Udayan ...	**74**	58
79	Dharma Raja v. K. M. Pethur Raja ...	**74**	4
80	Polimati Mungadu v. Nalla Bapadu ...	**73**	946
81	Ramaswami Aiyar v. Venkatarama Aiyar	**75**	406
84	Venkatachalam Pillai v. Srinivasa Aiyar ..	**75**	115
86	Arumugam Pillai, *In re* ..	**81**	219
87	Neelakandhan Nambudri v. Vasudevan Nambudri ..	**73**	1041
88	Chenraya Goundan v. Athappa Goundan	**75**	336
90	Krishna Reddy v. Thanikachala Mudali	**73**	1054
91	Kaliyaperumal Naidu v. Bavaji	**73**	941
92	Secretary of State v. Appurao	**76**	212
93	Venkatarangayya Apparao v. Morampudi Bajiraju	**76**	61
94	B. Chandramma v. Naganna .	**75**	170
95	Balusami Aiyar v. Venkataswami Naicken	**75**	219
96	Mahalakshmi v. Venkam Setti	*Not reportable.*	
97	Somasundaram Chettiar v. Sundaresa Rao ..	*Not reportable.*	

ALL INDIA REPORTER, FROM FEBRUARY TO APRIL, 1924—contd.

Madras High Court—contd.

98	Murari Rao v. Balavanth Dikshit ..	**76**	342	
100	R. Mamillayya v. A. Venkataratnam ...	**77**	12	
102	Ambi v. P. K. V. Sridevi ..	**75**	566	
103	Thiruvadi Ayyangar v. P. Janaki ..	**75**	1016	
107	B. Levai Sahib v. Ammeenammal	**79**	968	
108	Gangulu v. Jagannatham ..	**76**	331	
111	Aisamma v. Moidin Kunhi ..	**77**	264	
113	Rajagopala Aiyangar v. Soundararaja Aiyangar ..	**74**	1018	
114	R. C. Krishnaswami Naidu v. Chengalroya Naidu ..	**76**	836	
116	Mukambike Shettithi v. Shiddaya Shetti ..	**75**	613	
117	Tota Varahaliah v. Venkata Suryanarayana	**75**	465	
118	Balaguru Naidu v. Muthu Ratnam Aiyar ..	**76**	767	
119	Burla Appana v. Anala Latchayya ..	**79**	372	
123	Ramakrishna Annavi v. Pichandi Chettiar ..	**74**	777	
124	Pakkiri Kanni v. Haji Mohammad Manjoor ..	**75**	334	
125	Shanmugappa v. Sangaraya Chetty ..	**74**	120	
126	Venkataramana Aiyar v. Coimbatore Mercantile Bank Ltd.	**74**	966	
129	*In the matter of a* Second Grade Pleader, Ramchandrapur ..	**75**	977	
130	Doriaswami v. Chidambaram Pillai ..	**75**	46	
137	T. K. V. Paramasiva Thevar v. Pulukaruppa Thevar ..	**77**	631	
144	Vikrama Deo v. Lakshminarasimha Garu ..	**76**	269	
145	Candaswamy Chettiar v. Maruda Pillai ..	**76**	761	
147	Panja Ramchandra Rao v. Gurraju ..	**76**	977	
150	Rose Charlotte Pritchard v. Walter Edger Pritchard ..	**74**	139	
151	Rosa Maria v. Jacob Souza ..	**75**	881	
154	E. E. Mack v. The Madras and Southern Mahratta Railway Company Limited ..	**75**	250	
158	Janoo Hasan v. Batchu Kamandu ..	**76**	752	
159	Kandaswami Goundan v. Narayanaswami Goundan	**76**	306	
160	*In the matter of a* First Grade Pleader, Guntur ..	**81**	57	
161	Subrahmaniam Chetty v. Lakshmanan Chetty ..	**76**	670	
162	Srirangam Municipal Council v. Bodi ..	**72**	703	
163	Sivasubramania Pillai v. Theethiappa Pillai ..	**75**	572	

Madras High Court—concld.

168	M. V. D. Gyana Sambanda Pandara Sannathi v. A. Vaithilinga Mudaliar ..	**74**	115
174	Meenakshi Nethiar Amma v. Cheriya Parvati Nethiar ..	**74**	1012
176	Deenabandu Rajaguru v. Visvasarayi Lachanna Dora ..	**74**	862

Nagpur Judicial Commissioner's Court.

17	Kamruddin v. Indrani ...	**75**	769
18	Ganpatlal v. Firm of Bilasrai Ramjidas ...	**79**	393
19	Local Government v. Hanmantrao ...	**75**	764
22	Kasam v. Firm of Haji Jamal...	**76**	327
23	Pandia Mahar, *In re* ...	**76**	395
24	Commissioner of Income Tax C. P. v. Dharamchand ...	**76**	82
26	Onkar v. Kamalchand ...	**76**	288
27	Radhi v. Emperor ...	**75**	701
29	Sukhwaria Chamarin v. Emperor ...	**76**	291
32	Munir v. Emperor ...	**76**	19
33	Laxman v. Emperor ..	**76**	237
35	Parmanand Parwar v. Kartarnath ..	**75**	703
37	Baba v. Emperor ..	**74**	66
38	Ramji v. Balkrishna ..	**69**	719
39	Maganmal v. Raghunath Rao..	**75**	749
41	Nanhelal v. Mangilal ..	**78**	372
42	Gulsher Khan v. Ramswarup..	**77**	620
43	Daudbhai v. G. I. P. Railway ..	**73**	375
44	Achalsingh v. Seth Jiwandas ..	**75**	993
46	Chunni Lal v. Gulzari Lal ..	**75**	752
47	Krishna Rao v. Emperor ..	**73**	335
48	Yasinkhan v. Emperor ..	**75**	544

Oudh Judicial Commissioner's Court.

17	Bhagirathi v. Onkar Nath ...	**72**	142
19	J. C. Galstaun v. Abid Husain	**73**	428
28	Ram Raj Singh v. Avadh Behari Lal ..	**80**	489
30	Babu Ram v Ram Dulari Debi	**77**	701
31	Akhtar Husain v. Qudrat Ali...	*To be printed.*	
32	Emperor v. Sarju Prasad ...	**77**	192
33	Beni Madho v. Yusuf Husain Khan ..	**72**	1031
34	Mahadeo Bakhsh Singh v Suraj Bakhsh Singh ..	**80**	447
40	Jai Gobind Singh v. Abhairaj Singh ..	**77**	125
44	Gomti Misra v. Deota Din Singh	**77**	737
46	Mahabir Prasad v. Surajpal Singh ..	**80**	475
48	Sidh Gopal v. Avadh Bihari Lal ..	**77**	749
49	Ram Nath v. Ram Harakh ..	**75**	770

ALL INDIA REPORTER, FROM FEBRUARY TO APRIL, 1924—contd.

	Oudh Judicial Commissioner's Court—concld.		
52	Suraj Bakhsh Singh v. Munnu Lal ..	**76**	763
54	Murli Dhar v. Mulchand ..	**73**	39
56	Duber v. Ram Sahai ..	**79**	654
60	Lal Mohammad Khan v. Amatul Fatima ..	**76**	534
62	Gulab Rai v. Khudaiya Bibi ..	**79**	214
64	Ram Nidh v. Ram Saran ..	**81**	314
65	Mahadeo v. Emperor ..	*To be printed.*	
69	Bishunath Saran Singh v. Sitla Bakhsh Singh ..	**79**	784
80	Emperor v. Muhammad Bakhsh	**81**	316
	Patna High Court.		
33	Raghunath Sukul v. Ramrup Raut ...	**76**	2
36	Mode Narain Singh v. Bikram Singh ...	*To be printed.*	
37	Zainab v. Paras Nath ...	**75**	430
39	E. I. R. Co. v. Nadia Coal Co.	**77**	260
40	Akhaj Khalifa v. Ramlal ...	**79**	696
41	Ratna Koer v. Nanhaki ...	**73**	1053
42	Lachmi Narain v. Emperor ...	**77**	177
46	Abdul Hamid v. Emperor ...	**75**	72
47	Wayesul Huq v. Shobrati Jolaha ...	**74**	258
49	Ram Bahadur Sen v. Ganesh Bhagat ...	**73**	512
65	K. V. Limaya v. J. K. Watve	**76**	950
67	Kishundeo Narayan Mahta v. Ramrejhan Singh ..	*To be printed.*	
69	Gopal Saran-Narain Singh v. Sita Devi ..	**77**	718
71	Mahadeo Prashad v. Bissessar Prashad	**74**	695
76	Puhupdei v. Ramcharitar Barhi	**74**	87
77	Waziri Begum v. Shashi Bhushan Roy ..	**74**	820
81	Abdul Haq v. Mohammad Yehia Khan ..	**78**	483
88	A. H. Forbes v. Hanuman Bhagat ..	**77**	32
91	Ramnandan v. Deni Sahi ..	**74**	877
94	Debendra Kumar v. Fyzabad Bank Ltd. ..	**75**	53
96	Sarju Sahu v. Sukhi Lal ..	**79**	420
98	Durga Prasad v. G. I. P. Ry. and E. I. Ry. ...	**74**	993
103	Ram Oraon v. Doman Kalal ..	**75**	209
104	Hazari Lal Sahu v. Ambica Gir	**79**	5
107	Fyzabad Bank Ltd. v. Ramdayal Marwari ..	**74**	831
110	Firm Shyam Lal Gokal Chand v. Jamil Ahmed ..	**74**	487
111	Mahadeo Singh v. Dhobi Singh	**74**	838
113	Jadu Nandan Sahay v. Hanuman Sahay ..	**77**	461
	Patna High Court—concld.		
114	Banwari Rai v. Chetru Lal Rai ..	**74**	1033
118	The Tata Iron and Steel Company, Ltd. v. Baidyanath Laik ..	**76**	55
120	K. B. Dutt v. Taraprasanna Roy Choudhury ..	**74**	753
122	Jago Mahton v. Khirodhar Ram	**74**	130
125	Bodh Kishen Goala v. Emperor	**72**	614
126	Mahanth Ramperkash Dass v. Kunj Lall ..	**79**	414
128	Cheta Mahto v. Emperor ..	**74**	536
131	Narendra Nath Roy v. Crown ..	**75**	728
134	Kapileshwar Jha v. Raghunandan Prasad ..	**74**	474
135	Bibi Nasiban v. Eknam Narain Singh ..	**74**	938
136	Bisheshwar Pratap Narain Sahi v. Asarfi Singh ..	**74**	110
138	Bansidhar Marwari v. Emperor ..	**74**	1054
140	Kiran Sarkar v. Emperor ..	**74**	719
142	Debi Singh v. Emperor ..	**74**	863
143	Jasuram Marwari v. Emperor ..	**74**	73
	Rangoon High Court.		
17	S. C. Gupta v. Emperor ...	**76**	425
21	Maung Lun Bye v. Maung Po Nyun ...	**76**	679
22	Nga Pan Yin v. Emperor ...	**76**	709
23	Nga E v. Emperor ...	**76**	697
24	Moola Dawood Cotton Manufacturing Co. *In re* ...	**83**	3
25	Bibby Bros. v. Charles R. Cowie & Co. ...	**74**	916
27	Official Assignee v. Momed E. Naikwarah ...	**74**	919
30	D. F. Chalmers v. Emperor ...	**83**	20
31	Maung Po Lu v. Emperor ...	**76**	700
33	Nga Po Saw v. Emperor ..	*Not reportable.*	
34	Maung Gyi v. Maung On Gaing	**74**	970
35	J. R. Das v. Emperor ..	**76**	693
37	Maung Tha Dun v. Ma Thein Yin ..	**73**	1014
42	Maung Pya On v. Ma Hla Kyu	**76**	841
45	Maung Hman v. Ma Shin ..	**79**	441
46	P. C. Paul v. K. A. L. R. Firm	**76**	835
47	Saya Pye v. U Kundinnya ..	**76**	525
48	U Pe Gyi v. Mg. Thein Shin ...	**77**	372
54	Valab Das v. Maung Ba Than ..	*To be printed.*	
57	Maung Wala v. Mg. Shew Gun ..	**82**	610
60	Ma Mya v. Ko Po Sa ..	**79**	742
61	Mg. Shwe Kye v. Mg. Po Tha ..	**76**	538
63	Muhammad Surty v. Emperor	**76**	564
64	Muhammad Moosa v. Goolam Rasool ..	**81**	328

Alphabetical List of Cases reported in Volume 79 of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Names of cases reported.	Where reported	Page.
Abdul Ghani v. Ishar Singh ...	(1923) A I. R. (L.) 239 ...	814
Abdul Manuaf v. Muslim ...	*Calcutta High Court ...	978
Abdul Quddus v. Ahmad Husain ...	(1923) A. I. R. (A.) 415 .	411
Abdul Rahman v. Ayyub .	22 A. L. J. 817 ...	1053
Abdulla Beg v. Ramzan Khan ...	21 A. L. J. 901; (1924) A. I, R. (A.) 173 ..	381
Abdullah *alias* Masita v. Girdhari ...	8 P. W. R. 1923 .	692
Abdur Rashid v. Qudratunnissa ...	22 A. L. J. 432 ...	338
Abrubammal v. Official Assignee of Madras ...	45 M. L. J. 817; 19 L. W. 54; 33 M. L. T. 217; (1924) A. I. R. (M.) 214; 47 M. 215 ...	809
Achyit Vishnu Patankar v. Tapibai Krishnaji Joshi ...	26 Bom. L. R. 103; 48 B. 210; (1924) A. I. R. (B.) 310 ..	753
Adamji Lukmanji, *In re* ...	*Sind Judicial Commissioner's Court ...	986
Agnes Harriel David v. Murray & Co., Ltd. ...	11 O. L. J. 459 .	1026
Ahmed v. Rahimunnissa ...	*Patna High Court ...	906
Ahmed Sahib & Co. v. Pakir Mahomed Rowther	1 R. 694; 2 Bur. L. J. 169; (1924) A. I. R. (R.) 145 ...	755
Aidal Singh v. Gyan Singh ...	*Allahabad High Court ...	318
Akbari Begam v. Zamin Ali ...	(1923) A. I. R. (A.) 364 ...	402
Akhaj Khalifa v. Ramlal Marwari ...	(1923) Pat. 271; (1924) A. I. R. (Pat.) 40 ...	696
Ali Husain v. Syed Mazahir Husain ...	(1924) A. I. R. (A.) 477 ...	134
Ali Nawaz v. Faiz Ali ...	*Lahore High Court ...	165
Allahdino v. Shikarpur Municipality ...	*Sind Judicial Commissioner's Court ...	409
Amar Chand v. Satya Pal ...	*Lahore High Court ...	43
Amjad Hosain v. Ummatul Askari ...	10 O. L. J. 409; (1924) A. I. R (O.) 232 ...	644
Ananthanaryana Iyer v. Ramasubba Aiyar ...	18 L. W. 857; 33 M. L. T. 196; (1924) A. I. R. (M.) 345 ...	395
Angavalthammal v. Janaki Ammal ...	19 L. W. 119; (1924) M W. N. 207; (1924) A. I. R. (M.) 466 ...	894
Anokh Singh v. Sapuran Singh ...	(1923) A. I. R. (L.) 660 ...	980
Anwar Khan v. Yakubkhan ...	*Nagpur Judicial Commissioner's Court ...	911
Appamma v. Chinnavadu ...	(1923) M. W. N. 825; 45 M. L. J. 667; 33 M. L. T. 146; 47 M. 203; 19 L. W. 37; (1924) A. I. R. (M.) 292 ...	510
Appanna v. Latchayya ...	45 M. L. J. 735; 33 M. L. T. 92; 18 L. W. 849; (1924) A. I. R. (M.) 119; 47 M. 250 ...	372
Areti Subbayya v. Venkataramiah ...	34 M. L. T. 233; 19 L. W. 626; (1924) M W. N. 630; 47 M. L. J. 469 ...	718
Asghari Begum v. Irshad-ud-Din ...	*Lahore High Court ...	57
Asharfi Lal v. Deputy Commissioner of Gonda ...	10 O. & A. L. R. 553; 11 O. L. J 448	660
Ashrof Ali v. Morden ...	1 R. 656; (1924) A. I. R. (R.) 177 .	482
Asmati Bibi v. Saimuddi Pathan ...	*Calcutta High Court ...	991
Aung Kaing Saing v. Maung San ...	(1923) A. I. R. (R.) 41 ...	249
Ayodhyaprasad v. Secretary of State ...	*Nagpur Judicial Commissioner's Court ...	123
Awadh Ram Singh v. Mahbub Khan ...	10 O. L. J. 525; (1924) A. I. R. (O.) 255 ..	725
Babban Panday v. Lachhman Chaudhri ...	22 A. L. J. 62; 46 A. 205; (1924) A. I. R. (A.) 371	581
Babu Ram v. Kokla ...	22 A. L. J. 68; 10 O. & A. L. R. 204; 46 A. 210; (1924) A. I. R. (A.) 391	631
Bachal Shah v. Juma Shah ...	(1923) A. I. R. (S.) 35; 16 S. L. R. 221 ...	539
Badri Das v. East Indian Railway Co. ..	4 P. L. T. 185; (1923) A. I. R. (Pat.) 325	571
Badri Sah v. Balbhaddar Singh ...	10 O. L. J. 468; (1924) A. I. R. (O.) 115 ...	697
Badri Singh v. Gobardhan ...	(1923) A. I. R. (A.) 187 ...	220
Badri Singh v. Lalta Singh ...	10 O. & A. L. R. 437 ...	1024

Badri Singh v. Tulsi Ram ...	45 A. 203; 21 A. L. J. 53; (1923) A. I. R. (A.) 186 ...	82
Bageshar Rai v. Mahadei ...	22 A. L. J. 419; (1924) A. I. R. (A.) 461 ...	514
Bahadur Chand v. Muhammad Ismail ...	4 L 408;(1924) A. I. R. (L) 181 ...	201
Bai Jayagavri v. Ramanlal Chhotalal ...	26 Bom. L. R. 187; 48 B. 355; (1924) A. I. R. (B.) 302 ...	749
Bai Parwati v. Nadiad Municipality ...	25 Bom. L. R. 63; 47 B. 315; (1923) A. I. R. (B.) 459 ...	197
Baijnath Singh v. Jamal Brothers & Co. Ltd.	22 A. L J. 42; (1924) A. I. R. (P C.) 48; 19 L. W. 345; (1924) M. W. N. 196; 10 O. & A. L. R. 288; 51 C. 354; 2 R. 99; 28 C. W. N. 1029 P. C. ...	940
Balaji Vinayak Buti v. Vithoba ..	*Nagpur Judicial Commissioner's Court ...	614
Balbir Singh v. Gobind ...	(1923) A. I. R. (L.) 532 ...	543
Balmokand v. Wazir Chand ...	5 L. L. J. 47 ...	279
Balmokand v. Wazir Chand ...	5 L. L. J. 89 ...	504
Bank of Mervi Ltd. v. Berlein Brothers ...	26 Bom L. R. 155; 48 B. 374; (1924) A. I. R. B.) 325 ...	1012
Bariam Singh v. Phaggu Mal ...	5 L. L. J. 90 ...	506
Basheshar Nath v. Mehr Chand ...	(1923) A. I. R. (L.) 21 ...	440
Bashiruddin Khan v. Mahadeo Singh ...	27 O. C. 26; (1924) A. I. R. (O.) 306 ...	663
Basu v. Nanhi ...	*Allahabad High Court ...	951
Basuki Behary Pandey v. Chatter Pandey ...	(1924) Pat. 210 ...	913
Bava Levvai Sahib v. Ammeenammal ...	45 M. L. J. 805; (1924) A. I. R. (M.) 107 ...	968
Bed Prasad v. Nanchhed Prasad ...	*Nagpur Judicial Commissioner's Court ...	884
Behari Lal v. Amin Chand ...	*Allahabad High Court ...	1029
Best & Co., Ltd. v. Corporation of Madras ..	19 L. W. 142; 46 M. L. J. 217; (1924) M. W. N. 249; 47 M. 262; (1924) A. I. R. (M.) 420 ...	928
Bhagat Ram v. Raghbar Dial ...	*Lahore High Court ...	132
Bhagwan v. Ganga Baksh ...	9 O. & A. L. R. 412; (1924) A. I. R. (O.) 304 ...	545
Bhairabendra Narain Deb v. Udai Narain Deb ...	50 C. 853; (1924) A. I. R. (C.) 251 ...	298
Bhaironprasad v. Laxmi Narayan Das ...	*Nagpur Judicial Commissioner's Court ...	609
Bharat Singh v. Shah Muhammad ...	*Lahore High Court ...	484
Bhawani Prasad Misir v. Ram Sunder ...	22 A. L. J. 301 ...	393
Bhudhar Singh v. Sheikh Sahamat ...	9 O. & A. L. R. 414 ...	547
Bhullan Singh v. Khushi Ram ...	21 A. L. J. 932; 10 O. & A. L. R. 342; (1924) A. I. R. (A.) 229 ...	320
Bidiya Misir v. Daryai ...	*Allahabad High Court ...	566
Bindeshwari Prasad Tiwari v. Hanuman Prasad Tiwari ...	22 A. L. J. 65; (1924) A. I. R. (A.) 445 ...	640
Bindu Govind Naik Kurbet v. Hanmant Govind Bhat ...	(1924) A. I. R. (B.) 71 ...	407
Bindubashini Roy Chowdhury v. Secretary of State ...	51 C. 70; 40 C. L. J. 163 ...	745
Bishambher Nath v. Muhammad Abaidullah ...	46 A. 227; (1924) A. I. R. (A.) 559 ...	213
Bishan Singh v. Mahindar Singh ...	*Lahore High Court ...	125
Bishnu Priya Chowdurani, *In re* ...	50 C. 967 (1924) A. I. R. (C.) 337 ...	305
Bishunath Saran Singh v. Sitla Bakhsh Singh ...	10 O. L. J. 315; (1924) A. I. R. (O.) 69 ..	784
Bodu Anna Naidu v. Varada Jaggu Naidu ...	*Madras High Court ...	646
Bombay, Baroda and Central India Ry., Co. v. Budh Sen Pusp Chand ...	21 A. L. J. 830; 9 O. & A. L. R. 1074; 46 A. 35; (1924) A. I. R. (A.) 180 ...	562
Bon Kwi v. Mayek Youn ...	2 Bur. L. J. 102; (1923) A. I. R. (R.) 236 ..	244
Boondu v. Moti Chand ..	(1923) A. I. R. (L.) 652 ...	284
Bulu Mal v. Hardwari Mali ...	6 L. L. J. 219; (1924) A. I. R. (L.) 570 ...	451
Bura v. Paul ...	(1923) A. I. R. (R.) 98 ..	284
Central Bank of India, Ltd. v. Nadirshaha Metha ...	(1924) A. I. R. (S.) 13 ...	445
Champa Konwar v. Tulsi Ram ...	*Allahabad High Court ..	954
Chandammull Begaraj v. National Bank of India Ltd. ...	51 C. 43; (1924) A. I. R. (C.) 552 ...	757
Chandar Mohan Maiti v. Kishan Maiti ...	*Calcutta High Court ...	412
Chandar Sahai v. Durga Prasad ...	22 A. L. J. 427 ...	323
Chandradip Tewari v. Jadumandan Singh ..	*Allahabad High Court ..	1041
Chandrika Ram Tiwari v. Narain Prasad Rai ...	22 A. L. J. 468 ..	1036

Chathoth Parkum v. Parambath Chathenkandi ...	34 M. L. T. 238; 20 L. W. 41; (1924) M. W. N. 480 ...	886
Chatturbhuj v. Deokaran ...	26 Bom. L. R. 84; (1924) A. I. R. (B.) 370 ...	760
Chaube Benaik Rao v. Puttain Singh ...	*Allahabad High Court ...	69
Chellamma v. Pantayya ...	(1924) M. W. N. 449; 20 L. W. 478 ...	845
Chelmayya v. Lakshmi Devamma ...	*Madras High Court ...	857
Chetan Singh v. Sartaj Singh ...	22 A. L. J. 702 ...	1001
Chhiddu Singh v. Jhanjhan ...	(1923) A. I. R. (A.) 261; 45 A. 154 ...	303
Chidambaragurukkal v. Sivagnana Sundaram Pillai ...	(1924) M. W. N. 487; 47 M. L. J. 598 ...	619
Chiranji Lal v. Dost Mahomed ...	(1923) A. I. R. (L.) 634 ...	935
Chiranji Lal v. Syed Ilias Ali ...	22 A. L. J. 493; 10 O. & A. L. R. 678 ...	556
Chitnavis v. Nathu Sao ...	20 N. L. R. 103; 7 N. L. J. 170 ...	1002
Chokalingam Pillai v. Sami Battar ...	*Madras High Court ...	623
Chuni Lal v. Chuni Lal ...	(1923) A. I. R. (L.) 659 ...	957
Churanji Lal v. Kartar Singh ...	*Lahore High Court ...	171
Daji Mahar v. Mahadeo Kumbi ...	*Nagpur Judicial Commissioner's Court ...	66
Damini Dasi v. Fatumani Dasi ...	2 P. L. R. 34; 5 P. L. T. 564; (1924) A. I. R. (Pat.) 520 ...	639
Daulan v. Abdul Haq ...	5 L. L. J. 95 ...	286
Daulat Ram v. Bharat National Bank, Ltd., Delhi ...	5 L. 27; (1924) A. I. R. (L.) 435 ...	740
Daya Ram v. Sita Ram ...	*Allahabad High Court ...	394
Dhanraj Rai v. Ram Naresh Rai ...	*Allahabad High Court ...	1019
Dipchand Doulatram v. Parmanand Chimandas ...	16 S. L. R. 273 ...	582
Donald Graham & Co. v. Kewalram ...	16 S. L. R. 245 ...	477
Duber v. Ram Sahai ...	10 O. L. J. 305; (1924) A. I. R. (O.) 56 ...	654
Durga Chowdhuri v. Jagroop ...	(1923) A. I. R. (A.) 191 ...	232
Durga Dat Jagan Nath v. Ram Partab Sukh Dayal ...	(1923) A. I. R. (L.) 138 ...	221
Dwijendra Narain Roy v. Jogesh Chandra Dey ...	39 C. L. J. 49; (1924) A. I. R. (C.) 60 ...	520
East India Railway Company v. Jagpat Singh ...	51 C. 615; 28 C. W. N. 1001; (1924) A. I. R. (C.) 725 ...	126
East Indian Railway Company v. Sri Ram Mahadeo ...	21 A. L. J. 806; 46 A. 125; (1924) A. I. R. (A.) 177 ...	341
Ejaz Rasul Khan v. Mubarac Hussain ...	10 O. & A. L. R. 685 ...	1033
Elahinewaj Khan v. Biseswar Baisya ...	*Calcutta High Court ...	924
Election Officer, Gujrat v. Abdul Ghani ...	(1923) A. I. R. (L.) 47 ...	233
Ellammal v. Venkataramana Rao ...	*Madras High Court ...	958
Fakirullah Khan v. Baldeo Sahai ...	(1923) A. I. R. (A.) 185 ...	225
Faqir Mumammad v. Bhagu Khan ...	*Allahabad High Court ...	371
Feroz-ud-Din Ahmed v. Sirdar Shah ...	6 L. L. J. 221; (1924) A. I. R. (L.) 562 ...	81
Foucar and Co. v. M. C. T. Mudaliar ...	2 R. 45; (1924) A. I. R. (R.) 232 ...	750
G. E. G. R. v. E. M. R. ...	16 S. L. R. 267 ...	535
Gajadhar Bakhsh Singh v. Baijnath ...	10 O. & A. L. R. 264; 11 O. L. J. 264; 27 O. C. 133 ...	104
Ganga Prasad v. Ganeshi Lal ...	21 A. L. J. 809; 10 O. & A. L. R. 61; (1924) A. I. R. (A.) 161; 46 A. 119 ...	332
Gani v. Sitaram ...	*Nagpur Judicial Commissioner's Court ...	625
Ganpatlal v. Firm of Bilasraj ...	(1924) A. I. R. (N.) 18 ...	393
Gauri Shankar v. Jang Bahadur Singh ...	10 O. & A. L. R. 49; 11 O. L. J. 246; 27 O. C. 124 ...	1003
Gayan Singh v. Babu Lal ...	21 A. L. J. 822; 9 O. & A. L. R. 1019; (1924) A. I. R. (A.) 83 ...	138
Ghania v. Phuman Singh ...	*Lahore High Court ...	170
Ghannu Ram v. Hotu Ram ...	(1923) A. I. R. (L.) 51 ...	984
Ghasi Ram v. Pandit Bhola Nath ...	21 A. L. J. 886; 10 O. & A. L. R. 97; (1924) A. I. R. (A.) 153; 46 A. 115 ...	314
Ghasi Ram v. Uma Datt ...	9 O. & A. L. R. 551; 10 O. L. J. 318; 26 O. C. 327; (1924) A. I. R. (O.) 189 ...	576
Girdhari v. Mam Chand ...	6 L. L. J. 224 ...	442
Gnanamuthu Nadan v. Veilukanda Nadathi ...	19 L. W. 454; (1924) M. W. N. 451; (1924) A. I. R. (M.) 542 ...	2
Gobind Ram v. Ali Muhammad ...	*Lahore High Court ...	81

Gobindram Vorhomal v. Assistant Collector of Shikarpur	*Sind Judicial Commissioner's Court	376
Gokaran Singh v. Jokhu Singh	11 O. L. J. 405	21
Gopalakrishna Pillai v. Kunjithapatham Pillai	(1923) M. W. N. 811; 18 L. W. 844; 45 M. L. J. 849; (1924) A. I. R. (M.) 324; 33 M. L. T. 106; 47 M. 543	651
Gulab v. Bhagwan Das	21 A. L. J. 907; (1924) A. I. R. (A.) 229	577
Gulab Rai v. Khudaija Bibi	9 O. & A. L. R. 141; 10 O. L. J. 295; (1924) A. I. R. (O.) 62	214
Gulab Rai-Sagar Mal v. Nirbha Ram Nagar Mal	4 L. 423; (1924) A. I. R. (L.) 239	194
Gunnis & Co., Ltd. v. Amanmal Tulsidas	17 S. L. R. 133; (1924) A. I. R. (S.) 75	920
Gur Prasad Mukerji v. Bishun Dut	*Allahabad High Court	349
Gur Sahai Kandu v. Chhedi	10 O. & A. L. R. 67; 11 O. L. J. 251; 27 O. C. 130	964
Gurunadha Rama Seshayya v. Turupurasundari Cotton Press, Bejwada	46 M. L. J. 563; 19 L. W. 623	947
Hamid Ali v. Ram Charan Goldar	*Calcutta High Court	569
Har Dayal Singh v. Gar Dayal Singh	(1923) A. I. R. (A.) 181	542
Har Phul v. Bhagmal	*Lahore High Court	488
Har Sarup v. Brijnandan Lal	(1924) A. I. R. (A.) 479	587
Harditta v. Nigahia Mal	4 L. L. J. 259; (1922) A. I. R. (L.) 396	546
Hari Charan Das v. Taraprasanna Sen	*Calcutta High Court	354
Harihar Prasad v. Mahabir Pandey	10 O. & A. L. R. 893	1055
Harpal v. Mohan	*Allahabad High Court	1047
Hazari Lal Sahu v. Ambica Gir	(1923) Pat. 273; (1924) A. I. R. (Pat) 104; 3 Pat. 67; 2 P. L. R. 169; 5 P. L. T. 591	5
Hira Lal v. Chuni Sah	5 P. L. T. 556; 2 P. L. R. 263	1
Hira Lal v. Hoti Lal	22 A. L. J. 459	500
Hiraji v Vishnu	(1923) A. I. R. (B.) 429	186
Hussainbhai Bhora v. Bansilal	*Nagpur Judicial Commissioner's Court	48
Ibrahim Mallick v. Lalit Mohan Roy	50 C. 974; 28 C. W. N. 322; (1924) A. I. R. (C.) 288	489
Ishdat Tewari v. Tameshar	*Allahabad High Court	296
Ismail v. Hasan Ali	(1923) A. I. R. (A.) 220	473
Ismail v. Karam Ali	10 O. & A. L. R. 579	922
Jagannath Prasad v. Chhatur Kunwar	45 A. 149; (1923) A. I. R. (A.) 171	308
Jageshwar Rao v. Gujab Rao	*Nagpur Judicial Commissioner's Court	22
Jaha Baksha v. Abdul Latif	*Calcutta High Court	319
Jai Indar Bahadur Singh v. Bachun Singh	*Oudh Judicial Commissioner's Court	1051
Jai Indra Bahadur Singh v. Bijai Raj Kunwar	21 A. L. J. 125; 27 C. W. N. 221 **P. C.**	250
Jaikrishna v. Savitri	7 N. L. J. 187	627
Jalaluddin, *In re*	16 S. L. R. 11	564
Jamini Kumar Seal v. Thakur Dhan Baishnab	39 C. L. J. 88	1048
Jamwanti Kunwar v. Mohan Dei	10 O. & A. L. R. 72; 11 O. L. J. 379	799
Janardhan v. Wasudeo	*Nagpur Judicial Commissioner's Court	19
Janki Kuer v. Brij Bhikhan Ojha	3 Pat. 349; (1924) Pat. 185; 5 P. L. T. 541	26
Jawahar Singh v. Sewa Singh	5 L. L. J. 487; (1924) A. I. R. (L.) 97	572
Jawahara v. Data Ram	*Lahore High Court	497
Jawahir Lal v. Jarau Lal	22 A. L. J. 48; 46 A. 192; (1924) A. I. R. (A.) 350	861
Jhobali Rai v. Sakhi Rai	(1923) Pat. 266; (1923) A. I. R. (Pat.) 585	335
Jhuman v. Dulia	4 L. 439; (1923) A. L. R. (L.) 646	248
Jnanendra Nath Mcokerjee v. Brahmapada Pramanick	(1923) A. I. R. (C.) 704	191
Jnanendra Nath Roy Chaudhury v. Ram Ranjan Ranerji	*Calcutta High Court	
Jones v. Jones	1 R. 705; (1924) A. I. R. (P.) 193	588
Jwala Prasad v. Hoti Lal	22 A. L. J. 558	719
Kabir Udin Mondol v. Fatuj Mondal	*Calcutta High Court	1049
Kabul v. Kabeel Singh	(1923) A. I. R. (A.) 413	586
Kahan Chand v. Jawand	(1923) A. I. R. (L.) 174	408
Kaju Mal v. Salig Ram	(1924) A. I. R. (P. C.) 1; 22 A. L. J. 40; (1924) M. W. N. 172; 10 O. & A. L. R. 261; 46 M. L. J. 536; 5 L. 50 **P. C.**	500
Kali Prasanna Baladuri v. Hemanta Kumari Debi	*Calcutta High Court	946
Kalicharan Lal v. Shivshankar Sahai	*Nagpur Judicial Commissioner's Court	1038
		113

Kalidin v. Chandika Prasad ...	(1923) A. I. R. (A.) 182 ...	503
Kalyandappa v. Chanbasappa ...	22 A. L. J. 508; 46 M. L. J. 598; 23 C. W. N. 666; 26 Bom. L. R. 509; (1924) A. I. R. (P. C.) 137; (1924) M. W. N. 414; 34 M. L. T. 111; 20 L. W. 109; 11 O. L. J. 181; 48 B. 411 **P. C.** ...	971
Kamlapat Dubey v. Ram Raj ...	(1924) A. I. R. (A.) 103 ...	450
Kandhaiya Ojha v. Jagrani Kuer ...	22 A. L. J. 349; 10 O. & A. L. R. 485; 46 A. 419 ...	358
Kanhai Lal Khemka v. Thakur Prasad Singh ...	(1923) A. I. R. (Pat.) 268; 5 P. L. T. 594 ...	9
Kanhaiya v. Kanhaiya Lal ...	22 A. L. J. 345; 46 A. 372; (1924) A. I. R. (A.) 376 ...	363
Kanniappa Mudaliar v. Raju Chettiar ...	47 M. L. J. 16; 20 L. W. 45; (1924) M. W. N. 520; 47 M. 605 ...	850
Kanniappa Chettiar v. Ramachandraiyar ...	46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 386 ...	92
Karakkattidathil Ryrappan v. Kalliyatt Thazhathveetil ...	46 M. L. J. 377; 19 L. W. 668; (1924) A. I. R. (M.) 621 ...	343
Karshan Bhaban Chatalia v. Indra Narain Chandpa ...	1 P. L. R. 393 ...	188
Karuthan Chettiar v. Raman Chettiar ...	(1923) M. W. N. 838; 18 L. W. 837; 45 M. L. J. 804; 33 M. L. T. 188; (1924) A. I. R. (M.) 185 ...	340
Kashi Nath v. Emperor ...	9 O. & A. L. R. 696 ...	693
Kasturi v. Baliram ...	*Nagpur Judicial Commissioner's Court ...	117
Kasturibai Bhratar Onkardas Marwadi v. G. I.P. Railway Company ...	(1923) A. I. R. (B.) 172 ...	245
Kesho Prasad Singh v. Ramjas Pande ...	(1923) A. I. R. (Pat.) 324; 2 Pat. 92 ...	199
Keval Das Tribhovandas v. Sakerlal Bulakhidas...	(1923) A. I. R. (P. C.) 178; 45 M. L. J. 763; 33 M. L. T. 424; 28 C. W. N. 930 **P. C.** ...	452
Kewal Ram v. Allah Diya ...	*Lahore High Court ...	55
Khanderao Vithoba Kore v. Municipal Corporation of Bombay ...	(1924) A. I. R. (P. C.) 3; 19 L. W. 1; 22 A. L. J. 11; (1924) M. W. N. 77; 46 M. L. J. 169; 33 M. L. T. 462; 28 C. W. N. 375; 26 Bom. L. R. 193; 10 O. & A. L. R. 121; 2 P. L. R. 108; 39 C. L. J. 201; 48 B. 185 **P. C.** ...	948
Khedu Singh v. Bhagwan Singh ...	*Nagpur Judicial Commissioner's Court ...	400
Khunai Tewari v. Dil Kunwar ...	(1923) A. I. R. (O.) 38	237
Khurshaid Alam v. Chaudhri Phango ...	5 L. 382 ...	91
Kishen Lal v. Kanhya ...	5 L. L. J. 106 ...	970
Kishen Singh v. Chhajju Singh ...	45 A. 90; (1923) A. L. P. (A.) 206 ...	258
Kooverbhan Sukhanand v. Louis Dreyfus & Co....	*Sind Judicial Commissioner's Court ...	30
Kothandaramasami Naidu v. Pappammal ...	*Madras High Court ...	891
Krishnarao v. Chandrabhagabai ...	*Nagpur Judicial Commissioner's Court ...	668
Kuar Behari Lal v. Beni Madho ...	10 O. & A. L. R. 371 ...	942
Kundan Lal v. Parshadi ...	22 A. L. J. 466 ...	960
Kunhan Menon v. Kannan Menon ...	46 M. L. J. 133; (1924) M. W. N. 202; (1924) A. I. R. (M.) 482 ...	561
Kushi Bai v. Manrakhan ...	(1923) A. I. R. (N.) 265 ...	422
Labhua Sao v. Chatan ...	20 N. L. R. 145 ...	161
Lachhman Das v. Jai Singh ...	4 L. L. J. 262; (1922) A. I. R. (L.) 399 ...	549
Lachhman Lal v. Padarath Singh ...	4 P. L. T. 735; (1924) A. I. R. (Pat.) 346 ...	591
Lachman Pande v. Tribani Sahu ...	22 A. L. J. 518 ...	538
Lagan Rai v. Raja Rai ...	(1924) A. I. R. (A.) 507 ...	1025
Lajja Ram v. Shambhu Nath Ram Sarup ...	5 L. L. J. 14; (1923) A. I. R. (L.) 252 ...	162
Lakshmi Ammal v. Alamelu Ammal ...	(1923) M. W. N. 839; 18 L. W. 874; 45 M. L. J. 811; (1924) A. I. R. (M.) 309 ...	325
Lakshmi Narain Misir v. Sumrut Kuar ...	46 A. 439 ...	389
Lala Das v. Mina Mal ...	4 L. L. J. 266; (1922) A. I. R. (L.) 259 ...	553
Lee Lim Ma Hock v. Saw Mah Hone ...	2 R. 4; (1924) A. I. R. (R.) 221 ...	729
Lekha v. Bhani ...	(1923) A. I. R. (L.) 647 ...	182
M. P. L. M. P. Chetty v. Ma Ngwe Sin ...	1 R. 665; (1924) A. I. R. (R.) 200 ...	185
Ma Hla Gyi v. Maung Seik Po ...	1 R. 700; (1924) A. I. R. (R.) 192 ...	718
Ma Hmon v. Maung Tin Kauk ...	1 R. 722; (1924) A. I. R. (R.) 182 ...	705

Ma Lon v. Ma Nyo	...	1 R. 714; (1924) A. I. R. (R.) 204	... 766
Ma Ma Gyi v. May Nyo Po	...	(1923) A. I. R. (R.) 44	... 278
Ma Mya v. Ko Po Sa	...	2 Bur. L. J. 163; (1924) A. I. R. (R.) 60	... 742
Ma Shin v. Maung Hman	...	1 R. 651; (1924) A. I. R. (R.) 102	... 579
Ma Thein Yin v. Maung Tha Dun	...	2 Bur. L. J. 292. (1924) A. I. R. (R.) 105; 2 R. 62	... 501
Madhavrao Visvanath v. Shrikrishan	...	(1923) A. I. R. (B.) 393	... 517
Madho Parshad v. Asham Ilahi Abdul Hafiz	...	5 L. L. J. 108	... 977
Madho Singh v. Mangal Singh	...	(1924) A. I. R. (A.) 533	... 1023
Madras and Southern Maharatta Ry. Co., Ltd. v. Krishnaswami Chetty	...	*Madras High Court	... 137
Mahabir v. Manohar	...	22 A. L. J. 67; 46 A. 208; (1924) A. I. R. (A.) 510	... 816
Mahabir Prasad v. Amla Prasad Rai	...	22 A. L. J. 295; 46 A. 364; (1924) A. I. R. (A.) 379	... 517
Mahabir Singh v. Matabadal Singh	...	22 A. L. J. 441	... 327
Mahimjan Bibi v. Mir Rahim Ali	...	*Calcutta High Court	... 360
Mahmood Hasan v. National Bank of Upper India in Liquidation	...	*Oudh Judicial Commissioner's Court	... 691
Mahomed Farug v. Sidik	...	*Sind Judicial Commissioner's Court	... 59
Mahomedally Adamji v. Abdul Hussain Adamji		23 Bom. L. R. 163; 48 B. 331; (1924) A. I. R. (B.) 313	... 780
Malireddi Ayyareddi v. Adusumilli Gopala Krishnayya	...	22 A. L. J. 45; 46 M. L. J. 164; (1924) A. I. R. (P. C.) 36; 19 L. W. 215; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 P. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 47 M. 190; 28 C. W. N. 1025 P. C.	... 592
Man Singh v. Madho Singh	...	22 A. L. J. 70; (1924) A. I. R. (A.) 430	... 599
Manavikaraman v. Ananthanarayana Ayyan	...	19 L. W. 16; (1924) M. W. N. 38; 46 M. L. J. 250; (1924) A. I. R. (M.) 457	... 806
Manindra Chandra Nandi v. Kaulat Shaik	...	50 C. 957; 28 C. W. N. 264; (1924) A. I. R. (C.) 374	... 852
Manindra Chandra Nandi v. Provas Chandra Mitter	...	39 C. L. J. 58; 51 C. 279	... 1042
Masita Bibi v. Khuda Baksh	...	(1923) A. I. R. (A.) 65	... 246
Maung Chit Hlaing v. N. A. R. M. Chetty	...	2 Bur. L. J. 166; (1924) A. I. R. (R.) 81	... 747
Maung Hman v. Ma Shin	...	2 Bur. L. J. 164; (1924) A. I. R. (R.) 45	... 441
Maung Pein v. Maung Po Maung	...	2 Bur. L. J. 15; (1923) A. I. R. (R.) 138	... 817
Maung Po Kin v. Maung Kyaw Ye	...	2 Bur. L. J. 47; (1924) A. I. R. (R.) 143	... 815
Maung San Ya v. Maung Ngwe Hla	...	2 Bur. L. J. 29; (1923) A. I. R. (R.) 250	... 818
Maung Saw Myaing v. Ma Sein	...	2 Bur. L. J. 294; (1924) A. I. R. (R.) 208	... 504
Mautina Ramachandra Raju v. Mautipragada Bujanga Bahadur Zemindar Garu	...	46 M. L. J. 46; 19 L. W. 69; (1924) M. W. N. 115; (1924) A. I. R. (M.) 473	... 635
Meyyappa Chettiar v. Chidambaram Chittiar	...	46 M. L. J. 415; 34 M. L. T. 118; (1924) M. W. N. 392; (1924) A. I. R. (M.) 494; 47 M. 483	... 144
Mg Pe Thein v. S Boon Kyan	...	2 Bur. L. J. 280; 1 R. 772; (1924) A. I. R. (R.) 163	... 505
Mohammed Taqi v. Abdul Rahman	...	(1923) A. I. R. (L.) 151	... 281
Mohammadin and Co. v. Eastern Japan Trading Co.	...	50 C. 215; (1923) A. I. R. (C.) 639	... 242
Mohan Lal v. N. W. Ry. Co-operative Stores Association Ltd., Lahore	...	5 L. L. J. 19	... 275
Mohanya v. Panna Lal	...	10 O. & A. L. R. 534; 11 O. L. J. 513	... 848
Moosa v. Fatehullah	...	*Sind Judicial Commissioner's Court	... 406
Moti Lal v. Agent, O. R. Railway	...	*Allahabad High Court	... 893
Motiomal v. Molap Lai	...	*Sind Judicial Commissioner's Court	... 923
Moteomal v. Teomal	...	*Sind Judicial Commissioner's Court	... 89
Motumal Perumal v. Lekhumal	...	16 S. L. R. 106; (1922) A. I. R. (S.) 18	... 847
Mubarak-un-Nissa v. Muhammad Raza Khan	...	22 A. L. J. 307; 46 A. 377; (1924) A. I. R. (A.) 384	... 174
Mughla v. Abdul Lam	...	(1923) A. I. R. (L.) 172; 4 P. W. R. 1923	... 494
Muhammad Abbas v. Shahamat Husain	...	26 O. C. 64; 9 O. & A. L. R. 1; (1923) A. I. R. (O.) 246	... 274

Muhammad Ibrahim v. Muhammad Ismail ...	5 L. L. J. 111 ...	294
Muhammad Shafi v. Kalsum Bi ...	4 L. 467; (1924) A. I. R. (L) 200 ...	260
Mukat Singh v. Misra Paras Ram ...	*Allahabad High Court ...	103
Mulchand v. G. I. P. Ry. Co., Bombay ...	*Nagpur Judicial Commissioner's Court ...	602
Municipal Board of Bareilly v. Hafiz Ala Baksh ...	22 A. L. J. 457 ...	567
Municipal Committee of Jhang v. Devi Dial ...	*Lahore High Court ...	8
Municipal Corporation of the City of Rangoon v. Surati Bara Bazaar Co. Ltd. ...	1 R. 668; (1924) A. I. R. (R.) 194 ...	432
Munna Lal v. Hamid Ali ...	*Lahore High Court ...	39
Munnu Lal v. Bishambhar Nath ...	11 O. L. J. 415 ...	35
Naba Kumar Choudhury v. Higheazany ...	*Calcutta High Court ...	403
Nebadwip Chandra Nandi v. Secretary of State for India ...	50 C. 208; (1923) A. I. R. (C) 609 ...	218
Nagathal v. Arumugam Pilai ...	17 L. W. 154; 44 M. L. J. 362; 32 M. L. T. 371; (1923) A. I. R. (M) 751 ...	40
Nageshar Prasad v. Ram Harak Pande ...	22 A. L. J. 342; 46 A. 370; (1924) A. I. R. (A.) 541 ...	417
Nagina Singh v. Jiwan Singh ...	*Lahore High Court ...	197
Naikwara v. Ma Aye Byu ...	1 R. 770; (1924) A. I. R. (R.) 181 ...	724
Nalini Bhusan Gupta v. Ali Mia ...	51 C. 643 ...	346
Nanchi v. Shititi Kulsambi ...	(1923) A. I. R. (B.) 42 ...	491
Nandan Singh v. Guptar Singh ...	22 A. L. J. 7; (1924) A. I. R. (A.) 424 ...	639
Narain Singh v. Chiranji Lal ...	22 A. L. J. 461 ...	945
Narain Singh v. Niranjan Chakravarti ...	(1924) A. I. R. (P. C.) 5; 78 C. W. N. 351; 5 P. L. T. 171; 3 Pat. 183 P. C. ...	825
Narayan Das v. Maheshi Lal ...	9 O. & A. L. R. 567 ...	378
Narendra Nath Chatterji v. Rakhal Das ...	*Calcutta High Court ...	551
Nathal v. Dhan Kaur ...	*Lahore High Court ...	115
Nathalal Ramdas Vaghji v. Nadiad Municipality ...	25 Bom. L. R. 58; 47 B. 306; (1923) A. I. R. (B) 456 ...	192
National Bank of Upper India Ltd. v. Sheo Mangal Bajpai ...	19 O. & A. L. R. 115; 11 O. L. J. 349 ...	968
Nazir Ahmad v. Muhammad Sharif ...	46 A. 453 ...	345
Nazko v. Gopal ...	(1923) A. I. R. (L.) 208 ...	812
Nayajaddin v. Akamat Ali ...	*Calcutta High Court ...	365
Nidadavolu Achutam v. Veerina Suryya ...	(1924) M. W. N. 485 ...	932
Nilawa Iraya Mathapati v. Revanshidaya Shidlingaya ...	(1923) A. I. R. (B) 419 ...	208
Nohar Ahir v. Partab Ahir ...	21 A. L. J. 809; (1924) A. I. R. (A.) 231 ...	367
Obula Koadama v. Kandasamy ...	22 A. L. J. 16; 19 L. W. 107; (1924) M. W. N. 86; 46 M. L. J. 172; (1924) A. I. R. (P. C.) 53; 26 Bom. L. R. 198; 19 O. & A. L. R. 136; 30 C. L. J. 194; 47 M. 18; 28 C. W. N. 1050 P. C. ...	561
Official Assignee of Madras v. Official Assignee of Rangoon ...	19 L. W. 316; 34 M. L. T. 99; 46 M. L. J. 530; (1924) M. W. N. 458; (1924) A. I. R. (M.) 662 ...	610
Official Receiver of South Arcot v. Perumal Pillai ...	18 L. W. 881; 33 M. L. T. 230; (1924) A. I. R. (M) 387 ...	329
Oudh Behari Lal v. Dal Singh ...	10 O. L. J. 404; (1924) A. I. R. (O.) 203 ...	666
Pahalan Garain v. Chotu Kunja ...	2 P. L. R. 24; (1924) A. I. R. (Pat.) 522; 5 P. L. T. 614 ...	601
Parag Din v. Sheo Mangal ...	9 O. & A. L. R. 309 ...	285
Pars Ram v. Hargolal and Sons ...	*Lahore High Court ...	444
Partab Singh v. Bohra Nathu Ram ...	45 A. 49; (1923) A. I. R. (A) 197 ...	234
Partap Narain Singh v. Nathan Singh ...	(1924) Pat. 173 ...	858
Perayya v. Vaisayamma ...	31 M. L. T. 291; 19 L. W. 627; 47 M. L. J. 14 ...	899
Pir Makhdum v. Malik Boola Khan ...	16 S. L. R. 87 ...	819
Pitam v. Baboo Singh ...	*Nagpur Judicial Commissioner's Court ...	611
Pitta Ramaswamiah v. Subramania Aiyar ...	*Madras High Court ...	443
Ponnuswamy Iyer v. Damodar Hunsraj ...	46 M. L. J. 82; 19 L. W. 168; (1924) M. W. N. 178; 34 M. L. T. 7; 47 M. 403; (1924) A. I. R. (M.) 464 ...	890

Potti Nayakar v. Supoammal ...	20 L. W. 31 ...	874
Prag Narain v. Mathura Prasad ...	22 A. L. J. 472 ...	575
Pran Krishna Gharai v. Nitya Gopal Maiti ...	50 C. 892; (1924) A. I. R. (C.) 239 ...	333
Prasanna Kumar Pai Sanatan Kunda v. Panaulla Miji ...	(1923) A. I. R. (C.) 659 ...	77
Prem Das v. Sarbaland ...	(1923) A. I. R. (L.) 41 ...	211
Prithuram Kalita v. Mayaram Sarma ...	*Calcutta High Court ...	330
Priya Lal v. Bohra Champa Ram ...	(1923) A. I. R. (A.) 271; 45 A. 268 ...	498
Punjab Cotton Press Co. v. Secretary of State ...	4 L. 432; (1924) A. I. R. (L.) 192 ...	185
Punjab Cotton Press Co. v. Secretary of State ...	4 L. 428; (1924) A. I. R. (L.) 169 ...	208
Punjab National Bank Ltd. v. Balkishan Das ...	6 L. L. J. 230 ...	461
Puran Singh v. Dat Ram ...	22 A. L. J. 5; 46 A. 165; (1924) A. I. R. (A.) 447 ...	645
Ragho v. Dwarka Das ...	10 P. W. R. 1923 ...	687
Raghunandan Prasad v. Ghulam Alaudin Beg	22 A. L. J. 464 ...	916
Raghunandan Singh v. Mulak Raj Singh ...	21 A. L. J. 84; (1923) A. I. R. (A.) 255 ...	470
Raj Chandra Dhar v. Messrs. K. D. O. C. Ray ...	2 Bur. L. J. 282; 2 R. 108; (1924) A. I. R. (R.) 137 ...	506
Raj Narain Mal v. Santi Lal ...	21 A. L. J. 37; (1923) A. I. R. (A) 203 ...	85
Rajabala Dasi v. Radhika Charan Roy ...	40 C. L. J. 150 ...	982
Rajaram v. Bapu ...	20 N. L. R. 154 ...	596
Rajindra Puri v. Beni Madho ...	10 O. & A. L. R. 823; 11 O. L. J. 351 ...	1031
Rakhi v. Baza ...	5 L. 34; (1924) A. I. R. (L.) 452 ...	743
Ralla v. Harnam Singh ...	(1923) A. I. R. (L.) 208 ...	808
Rallabandy Venkataratnam v. Yanamandra Satyavati ...	46 M. L. J. 383; 34 M. L. T. 141; (1924) A I. R. (M.) 578 ...	44
Ralliaram Shewaram v. Budhuram Parmanand	*Sind Judicial Commissioner's Court ...	914
Ram Chand v. Maula Baksh ...	21 A. L. J. 882; 10 O. & A. L. R. 39; 46 A. 110; (1924) A. I. R. (A.) 178 ...	310
Ram Chander v. Bhagwati ...	22 A. L. J. 576 ...	590
Ram Charan Lal v. Dharam Singh ...	22 A. L. J. 10; 46 A. 173; (1924) A. I. R. (A.) 444 ...	626
Ram Dayal v. Ghamandi Lal ...	(1923) A. I. R. (L.) 56 ...	990
Ram Jas v. Chani ...	4 L. L. J. 272; (1923) A. I. R. (L.) 89 ...	178
Ram Mandar v. Nawlakhvati ...	(1924) Pat. 206; 3 Pat. 815 ...	908
Ram Narain v. Akbar ...	(1923) A. I. R. (A.) 180 ...	508
Ram Prasad v. Mahabir ...	22 A. L. J. 91; 46 A. 220; (1924) A. I. R. (A.) 310 ...	803
Ram Sarup v Hardeo ...	10 O. & A. L. R. 431; (1924) A. I. R. (A.) 396	429
Ram Singh v. Ramchand ...	(1924) A. I. R. (P. C.) 2; 19 L. W. 4; 22 A. L. J. 14; (1924) M. W. N. 76; 46 M. L. J. 158; 26 Bom. L. R. 196; 10 O. & A. L. R. 156; 2 P. L. R. 94; 28 C. W. N. 566; 5 L. 23; 40 C. L. J. 276 **P. C.** ...	944
Ram Sundar Ram v. Ram Charit Bhakat ..	51 C. 663 ...	326
Rama v. Waman Rao ...	*Nagpur Judicial Commissioner's Court ...	870
Ramachari v. Sadho Saran Tewari ...	*Allahabad High Court ...	405
Ramappa Chettiar v. Ekambara Padayachi ...	19 L. W. 685; 47 M. L. J. 13; (1924) M. W. N. 479; 47 M, 651 ...	818
Ramaswami Thevan v. Alaga Pillai ...	*Madras High Court ...	881
Ramcharun Singh v. Jang Bahadur Singh ...	*Patna High Court ...	900
Ramdayal Ram Narain v. Bhairo Bux Gouridatta	1 P. L. R. 398; (1924) A. I. R. (Pat.) 240; 5 P. L. T. 558 ...	183
Ramesh Chandra Sinha v. Mohammed Elahi Bukhsh ...	50 C. 898; (1924) A. I. R. (C.) 383 ...	369
Ramji Lal v. Munshi Lal ...	*Lahore High Court ...	24
Ramperkash Das v. Kunj Lal ...	4 P. L. T. 567; (1924) A. I. R. (Pat.) 126 ...	414
Rangiah Chettiar v. Annaswamy Alwar Ayyanger	(1923) M. W. N. 840; 18 L. W. 836; (1924) A. I. R. (M.) 308 ...	408
Reshee Case Law v. Ambika Dassi ...	*Calcutta High Court ...	567
Reshma Bibi v. Bhawani Saran ...	(1923) A. I. R. (A.) 281 ...	77
Reshma Kuari v. Rameshwar Ojha ...	*Patna High Court ...	897
Rudra Partap Singh v. Hausla Prasad ...	10 O. L. J. 524; (1924) A. I. R. (O.) 295 ...	722
Rudur Partab Singh v. Sheo Prasad ...	10 O. & A. L. R. 413 ...	880
Rustomjee Heerjibhai v. Cowasjee Dadabhai ...	26 Bom. L. R. 209; 48 B 348; (1924) A. I. R. (B.) 317 ...	704

Sachhidananda Thakar v. Mahes Chandra Das ...	50 C. 903; 28 C. W. N. 116; (1924) A. I. R. (C.) 345 ...	312
Sadanand Pandey v. Tufail Ahmad ...	(1923) A. I. R. (A.) 115 ...	486
Saddik Ahmed v. M. K. M. Firm ...	2 Bur. L. J. 52; (1923) A. I. R. (R.) 149 ...	813
Sakharam Balwant Peshwe v. Laxman Trimbak Purandare ...	(1923) A. I. R. (B.) 428 ...	200
Sakharam Maruti v. Rajmal Girdharilal ...	25 Bom. L. R. 52; (1923) A. I. R. (B.) 173; 47 B. 298 ...	179
Samar Bahadur Singh v. Jit Lal ...	22 A. L. J. 292; 46 A. 359; (1924) A. I. R. (A.) 390 ...	495
Sangatmal Lilaram v. Jan Mahomed Gulam Khan	16 S. L. R. 260 ...	553
Sanket Narain Pande v. Ram Bharos ...	*Allahabad High Court ...	1010
Santi Lal v. Raj Narain ...	21 A. L. J. 686; 9 O. & A. L. R. 832; 45 A. 741; (1924) A. I. R. (A.) 119 ...	87
Sanwal Das v. Jaigo Mal ...	(1924) A. I. R. (L.) 68 ...	448
Sarabjit Singh v. Jaikaran Singh ...	10 O. & A. L. R. 240; 11 O. L. J. 423; 27 O. C. 137 ...	950
Sarat Chandra Das v. Sarajini Rudraja ...	27 C. W. N. 897; (1924) A. I. R. (C.) 135 ...	257
Sardari Lal v. Mohar Singh ...	*Lahore High Court ...	143
Sarju Sahu v. Sukhi Lal ...	4 P. L. T. 577; (1924) A. I. R. (Pat.) 96 ...	420
Sartaji v. Ramjas ...	21 A. L. J. 796; 9 O. & A. L. R. 1013; (1924) A. I. R. (A.) 166; 46 A. 59 ...	25
Satchidananda Dutt v. Nritya Nath Mitter ...	50 C. 878; 27 C. W. N. 1007; (1924) A. I. R. (C.) 517 ...	287
Satdhar v. Ramchandra ...	21 A. L. J. 917; 46 A. 153; (1924) A. I. R. (A.) 261 ...	532
Sattaya Padayachi v. Soundrathatchi ...	46 M. L. J. 78; (1924) M. W. N. 162; 19 L. W. 468; 47 M. 312; (1924) A. I. R. (M.) 448 ...	1017
Secretary of State v. Charanjit Lal ...	6 L. L. J. 237 ...	428
——— v. Radhey Lal ...	46 A. 455 ...	334
——— v. Sarla Devi Chaudhrani ...	5 L. 227; (1924) A. I. R. (L.) 548 ...	74
Secretary to the Board of Revenue (Income-Tax), Madras v. Ramanathan Chettiar ...	19 L. W. 34; 46 M. L. J. 42; (1924) M. W. N. 142; (1924) A. I. R. (M.) 455 ...	608
Shaxoor & Co. v. Finlay Fleming & Co. ...	2 Bur. L. J. 130; 1 R. 333; (1923) A. I. R. (R.) 265 ...	291
Shankar Dayal v. Binayak Prasad ...	27 O. C. 1; (1924) A. I. R. (O.) 305 ...	695
Shankar Sakharam Jagdale v. Ratanji Premji Shet	25 Bom. L. R. 328; 47 B. 607; (1923) A. I. R. (B.) 441 ...	226
Sharif Ahmad Alvee v. Muhammad ...	46 A. 148; (1924) A. I. R. (A.) 375 ...	612
Sharif Khan v. Moazzum Ali Khan ...	(1923) A. I. R. (A.) 214 ...	464
Sharf-uz-Zaman v. Deputy Commissioner, Barabanki ...	10 O. & A. L. R. 514 ...	888
Shau ng Nyan v. Ko Maung ...	(1923) A. I. R. (R.) 98 ...	280
Shebaits of Idol Sridhar Jin v. Nalinaksha Rai ...	*Calcutta High Court ...	557
Sheokabai v. Ganpat ...	20 N. L. R. 57 ...	142
Sheonandan Singh v. Jai Ram Singh ...	10 O. & A. L. R. 445 ...	1022
Sheopratap Shrinivas v. Sukhdeo Kanhaiyalal ...	*Nagpur Judicial Commissioner's Court ...	168
Sheoratan Singh v. Kali Charan Charan ...	10 O. & A. L. R. 543; 11 O. L. J. 498 ...	955
Sher Khan v. Kamal-un-Nissa ...	10 O. & A. L. R. 597 ...	716
Sher Muhammad Khan v. Parbhu Lal ...	21 A. L. J. 801; 46 A. 47; (1924) A. I. R. (A.) 274 ...	11
Shriniwas Laxmipatirao v. Hanmant Shriniwas Deshpande ...	(1923) A. I. R. (B.) 39 ...	210
Shulachana v. Kali Bibi ...	*Calcutta High Court ...	317
Siva Subramania Pillai v. Rakkumuthu Mooppan	19 L. W. 502; (1924) M. W. N. 454; (1924) A. I. R. (M.) 645 ...	418
Somar Singh v. Premdei ...	5 P. L. T. 21; (1924) Pat. 105; 3 Pat. 327 ...	724
Somachalam Pillai v. Kumaravelu Chettiar ...	46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 427; 47 M. 316; (1924) A. I. R. (M.) 597 ...	109
Sonba v. Narayan ...	*Nagpur Judicial Commissioner's Court ...	171
Sri Kantoo Singh v. Imdad Ali ...	*Allahabad High Court ...	965
Sri Mahant Baba Hari Das Faqir v. Praduman Nath ...	9 O. & A. L. R. 110 ...	530
Srinivasachariar v. Raghavachariar ...	46 M. L. J. 560; 19 L. W. 621; (1924) M. W. N. 628; (1924) A. I. R. (M.) 676 ...	1014

Srish Chandra Pal Chowdhury v. Debendra Nath Sinha Roy	..	*Calcutta High Court	369
Standard Oil Co. v. Haridas Velji	...	16 S. L. R. 235	456
Strathie v. Chidambaram Chettiar	...	(1924) M. W. N. 35; 19 L. W. 129; (1924) A. I. R. (M.) 485	798
Subbramiah v. Bansilal Abcerchand	...	19 L. W. 46; (1924) M. W. N. 161; (1924) A. I. R. (M.) 595	966
Subramania Mudaliar v. Parsuramaier	...	(1924) M. W. N. 51; (1924) A. I. R. (M.) 644	953
Sukur Mahomed v. Asmot Mandal	...	50 C. 978; (1924) A. I. R. (C.) 384	491
Sulaiman Khan v. Uma Charan Sil	...	*Calcutta High Court	648
Sundar Mal v. Kamal Din	...	*Lahore High Court	138
Sunderbai v. Shrikishan Ramdhan	...	20 N. L. R. 170	636
Suraja v. Girindro Nath Chatterjee	...	9 O. & A. L. R. 419	552
Surajman Chaube v. Anjore Shukul	...	21 A. L. J. 861; 9 O. & A. L. R. 989; 46 A. 73; (1924) A. I. R. (A.) 263	605
Surayya v. Venkataratnam	...	45 M. L. J. 822; 19 L. W. 20; (1924) A. I. R. (M.) 210; 47 M. 176	779
Surendra Nath v. Raja Reshee Case-Law	...	27 C. W. N. 893; (1924) A. I. R. (C.) 139	271
Tafazzal Beg v. Majid Ullah	...	5 L. 59; (1924) A. I. R. (L.) 432	120
Tasadduq Hussain v. Ram Kishen	...	*Lahore High Court	86
Tagha v. Ram Singh	...	*Lahore High Court	67
Taha v. Shadi	...	(1923) A. I. R. (L.) 601	579
Tehl Kaur v. Amar Nath	...	17 P. W. R. 1923	670
Thakur Das v. Bishan Das	...	(1923) A. I. R. (L.) 636	998
Thakur Kallu Singh v. Bhuraji	...	*Nagpur Judicial Commissioner's Court	633
Thakur Prasad Lal v. Sukhlal Singh	...	5 P. L. T. 567	598
Thavasamuthu Nadar v. Balaguruswamy Nadar	...	*Madras High Court	658
Thawerdas Jethanand v. Vishendas Nihalchand	...	*Sind Judicial Commissioner's Court	384
Thayuman Pillai v. Ramaswami Chettiar	...	19 L. W. 681	632
Todar Mal v. Kishen Lal	...	*Allahabad High Court	1007
Tota Ram v. Panna Lal	..	22 A. L. J. 583	997
Tularam v. Sumrati	...	*Nagpur Judicial Commissioner's Court	61
Umar Bahadur v. Khaja Mohamed Karim Nawab		(1923) Pat. 287; 2 P. L. R. 276; 5 P. L. T. 606	76
Umar Sharif v. Jwala Prasad	...	*Nagpur Judicial Commissioner's Court	662
Umrao v. Lachhman	...	22 A. L. J. 234; 46 A. 321; (1924) A. I. R. (A.) 448	217
Vadilal v. Manaklal	...	(1923) A. I. R. (B.) 41	489
Valli Asmal v. Valli Asmal	...	26 Bom. L. R. 171; (1924) A. I. R. (B.) 324	723
Vardhman v. Radhakishan and Jaikishan	...	7 N. L. J. 74; (1924) A. I. R. (N.) 79	139
Vazir v. Dwarka mal	...	16 S. L. R. 133; (1922) A. I. R. (S.) 41	841
Veeresalingam v. Kondayya	...	*Madras High Court	869
Vellayan Asari v. Sivagnanam Asari	...	31 M. L. T. 193	917
Venkata Seshamma v. Gunneswara Rao	...	(1921) M. W. N. 58; 19 L. W. 113; 46 M. L. J. 129; (1924) A. I. R. (M.) 622	860
Vir Singh v. Nihal Chand	...	*Lahore High Court	140
Vithal Singh v. Agarchand	...	*Nagpur Judicial Commissioner's Court	903
Vithaldas Marwari v. Gonu	...	20 N. L. R. 60	173
Wisekla v. Parana	...	(1923) A. I. R. (R.) 40	273
Yasin Ali Khan v. Ali Bahadur	...	10 O. L. J. 443; (1924) A. I. R. (O.) 230	685
Zaitun v. Konmal	...	22 A. L. J. 423	907

Table showing seriatim the pages of Volume 79 of Indian Cases and the corresponding Pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Page.	Names of cases reported.	Where reported.
1	Hira Lal v. Chuni Shah ...	5 P. L. T. 556; 2 P. L. R. 263.
2	Gnanamuthu Nadan v. Veilukanda Nadathi ...	19 L. W. 494; (1924) M. W. N. 451; (1924) A. I. R. (M.) 542.
5	Hazari Lal Sahu v. Ambica Gir ...	(1923) Pat. 273; (1924) A. I. R. (Pat.) 104; 3 Pat. 67; 2 P. L. R. 169; 5 P. L. T. 591.
8	Municipal Committee of Jhang v. Devi Dial ...	*Lahore High Court.
9	Kanhai Lal Khemka v. Thakur Prasad Singh ...	(1923) A. I. R. (Pat.) 268; 5 P. L. T. 594.
19	Janardhan v. Wasudeo ...	*Nagpur Judicial Commissioner's Court.
21	Gobaran Singh v. Jokhu Singh ...	11 O. L. J. 405.
22	Jageshwar Rao v. Gujab Rao ...	*Nagpur Judicial Commissioner's Court.
24	Ramji Lal v. Munshi Lal ...	*Lahore High Court.
25	Sartaji v. Ramjas ...	21 A. L. J. 796; 9 O. & A. L. R. 1013; (1924) A. I. R. (A.) 166; 46 A. 59.
26	Janki Kuer v. Birj Bhikhan Ojha ...	3 Pat. 349; (1924) Pat. 185; 5 P. L. T. 541.
30	Kooverbhan Sukhanand v. Louis Dreyfus & Co.	*Sind Judicial Commissioner's Court.
35	Munnu Lal v. Bishambhar Nath ...	11 O. L. J. 415.
39	Munna Lal v. Hamid Ali ...	*Lahore High Court.
40	Nagathal v. Arumugam Pillai ...	17 L. W. 154; 44 M. L. J. 362; 32 M. L. T. 371; (1923) A. I. R. (M.) 351.
41	Sher Muhammad Khan v. Parbhu Lal ...	21 A. L. J. 891; 46 A. 47; (1924) A. I. R. (A.) 274.
43	Amar Chand v. Satya Pal ...	*Lahore High Court.
44	Rallabandy Venkataratnam v. Yanamandra Satyavati ...	46 M. L. J. 383; 34 M. L. T. 141; (1924) A. I. R. (M.) 518.
48	Hussainbhai Bhora v. Bansilal ...	*Nagpur Judicial Commissioner's Court.
55	Kewal Ram v. Alla Diya ...	*Lahore High Court.
56	Umar Bahadur v. Khaja Mohamad Karim Nawab	(1923) Pat. 287; 2 P. L. R. 276; 5 P. L. T. 603.
57	Asghari Begum v. Irshad-ud-Din ...	*Lahore High Court.
59	Muhomed Faruq v. Sidik ...	*Sind Judicial Commissioner's Court.
66	Daji Mahar v. Mahadeo Kunbi ...	*Nagpur Judicial Commissioner's Court.
67	Tagha v. Ram Singh ...	*Lahore High Court.
69	Chaube Benaik Rao v. Puttain Singh ...	*Allahabad High Court.
74	Secretary of State v. Sarla Devi Chaudharni ...	5 L. 227; (1924) A. I. R. (L.) 518.
77	Reshma Bibi v. Bhawani Saran ...	(1923) A. I. R. (A.) 281.
77	Prasanna Kumar Pal Sanatan Kunda v. Panaulla Miji ...	(1923) A. I. R. (C.) 659.
81	Feroz-ud-Din Ahmed v. Sirdar Shah ...	6 L. L. J. 221; (1924) A. I. R. (L.) 562.
82	Badri Singh v. Tulsi Ram ...	45 A. 203; 21 A. L. J. 53; (1923) A. I. R. (A.) 186.
84	Gobind Ram v. Ali Mohammad ...	*Lahore High Court.
85	Raj Narain Mal v. Santi Lal ...	21 A. L. J. 37 (1923) A. I. R. (A.) 203.
86	Tasaduq Hussain v. Ram Kishen ...	*Lahore High Court.
87	Santi Lal v. Raj Narain ...	21 A. L. J. 686; 9 O. & A. L. R. 832; 45 A. 741; (1924) A. I. R. (A.) 119.
89	Motoomal v. Teomal ...	*Sind Judicial Commissioner's Court.
91	Khurshaid Alam v. Chaudhuri Phango ...	5 L. 382.
92	Kanniappa Chettiar v. Ramachandraiyar ...	46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 536
104	Gajadhar Bakhsh Singh v. Baijnath ...	10 O. & A. L. R. 161; 11 O. L. J. 161; 27 O. C. 183.
106	Mukat Singh v. Misra Paras Ram ...	*Allahabad High Court.
107	Nagina Singh v. Jiwan Singh ...	*Lahore High Court.

109	Sonachalam Pillai v. Kumaravelu Chettiar ...	46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 427; 47 M. 316; (1924) A. I. R. (M.) 597.
113	Kalicharan Lal v. Shivshankar Sahai ...	*Nagpur Judicial Commissioner's Court.
115	Nathal v. Dhan Kaur ...	*Lahore High Court.
117	Kasturi v. Baliram ...	*Nagpur Judicial Commissioner's Court
120	Tafazzal Beg v. Majid Ullah ...	5 L. 59; (1924) A. I. R. (L.) 432.
123	Ayodhyaprasad v. Secretary of State ...	*Nagpur Judicial Commissioner's Court.
125	Bishen Singh v. Mahindar Singh ...	*Lahore High Court.
126	East India Railway Company v. Jagpat Singh ...	51 C. 615; 28 C. W. N. 1001; (1924) A. I. R (C.) 725.
132	Bhagat Ram v. Raghbar Dial ...	*Lahore High Court.
134	Ali Husain v. Syed Mazahir Husain ..	(1924) A. I. R. (A.) 477.
137	Madras and Southern Maharatta Ry. Co. Ltd. v. Krishnaswami Chetty ...	*Madras High Court.
138	Sundar Mal v. Kamal Din ...	*Lahore High Court.
139	Vardhman v. Radhakishan ...	7 N. L. J. 74; (1924) A. I. R. (N.) 79.
140	Vir Singh v. Nihal Chand ...	*Lahore High Court.
142	Sheokabai v. Ganpat ...	20 N. L. R. 57.
143	Sardari Lal v. Mohar Singh ...	*Lahore High Court.
144	Meyyappa Chettiar v. Chidambaram Chettiar ...	46 M. L. J. 415; 34 M. L. T. 118; (1924) M. W. N. 392; (1924) A. I. R. (M.) 494; 47 M. 483.
161	Labhua Sao v. Chatan ...	20 N. L. R. 145.
165	Ali Nawaz v. Faiz Ali ...	*Lahore High Court.
168	Sheopratab Shrinivas v. Sukhdeo Kanhaiyalal ...	*Nagpur Judicial Commissioner's Court.
170	Ghania v. Phuman Singh ...	*Lahore High Court.
171	Churanji Lal v. Kartar Singh ...	*Lahore High Court.
173	Vithaldas Marwari v. Goma ...	20 N. L. R. 60.
174	Mubarak-un-nissa v. Muhammad Raza Khan ...	22 A. L. J. 307; 46 A. 377; (1924) A. I. R. (A.) 384.
178	Ram Jas v. Chani ...	4 L. L. J. 272; (1923) A. I. R. (L.) 89.
179	Sakharam Maruti v. Rajmal Girdharilal ...	25 Bom. L. R. 52; (1923) A. I. R. (B.) 173; 47 B. 298.
182	Lekha v. Bhani ...	(1923) A. I. R. (L.) 647.
183	Ramdayal Ram Narain v. Bhairo Bux Gouridatta ...	1 P. L. R. 308; (1924) A. I. R. (Pat.) 240; 5 P. L. T. 558.
185	Punjab Cotton Press Co. v. Secretary of State ...	4 L. 432; (1924) A. I. R. (L.) 192.
186	Hiraji v. Vishnu ...	(1923) A. I. R. (B.) 429.
188	Karshan Bhaban Chatalia v. Indra Narain Chandpa ...	1 P. L. R 393
191	Jinendra Nath Mookerjee v. Brahmapada Pramanick ...	(1923) A. I. R. (C.) 704.
192	Nathalal Ramdas Vaghji v. Nadiad Municipality ...	25 Bom. L. R. 58; 47 B 306; (1923) A. I. R. (B.) 456.
194	Gulab Rai-Sagar Mal v. Nirbhe Ram Nagar Mal ...	4 L. 423; (1924) A. I. R. (L.) 239.
197	Bai Parwati v. Nadiad Municipality ...	25 Bom. L. R. 63; 47 B. 315; (1923) A. I. R. (B.) 459.
199	Kesho Prasad Singh v. Ramjas Pande ...	(1923) A. I. R. (Pat.) 324; 2 Pat. 92.
200	Sakharam Balwant Peshwe v. Laxman Trimbak Purandar ...	(1923) A. I. R. (B.) 428.
201	Bahadur Chand v. Muhammad Ismail ...	4 L. 408; (1924) A. I. R. (L.) 181.
208	Nilawa Iraya Mathapati v. Ravanshidaya Shidlingya ...	(1923) A. I. R. (B.) 419.
208	Punjab Cotton Press v. Secretary of State ...	4 L. 428; (1924) A. I. R. (L.) 169.
210	Shrinivas Laxmipatirao v. Hanmant Shrinivas Deshpande ...	(1923) A. I. R. (B.) 39.
211	Prem Das v. Surbaland ...	(1923) A. I. R. (L.) 41.
213	Bishambar Nath v. Muhammad Abaidullah ...	46 A. 227; (1924) A. I. R. (A.) 550.
214	Gulab Rai v. Khudaija Bibi ...	9 O. & A. L. R. 141; 10 O. L. J. 295; (1924) A. I. R. (O.) 62.
217	Umrao v. Lachhman ...	22 A. L. J. 234; 46 A. 321; (1924) A. I. R. (A.) 448.
218	Nabadwip Chandra Nandi v. Secretary of State for India ...	50 C. 208; (1923) A. I. R. (C.) 609.
220	Badri Singh v. Gobardhan ...	(1923) A. I. R. (A.) 187.
221	Durga Dat Jagan Nath v. Ram Partab Sukh Dayal ...	(1923) A. I. R. (L.) 138.

225	Fakirullah Khan v. Baldeo Sahai	...	(1923) A. I. R. (A.) 185.
226	Shankar Sakharam Jagdale v. Ratanji Premji Shet	...	25 Bom. L. R. 328; 47 B. 607; (1923) A. I. R. (B.) 441.
232	Durga Chowdhuri v. Jagroop	...	(1923) A. I. R. (A.) 191.
233	Election Officer, Gujrat v. Abdul Ghani etc.	...	(1923) A. I. R. (L.) 47.
234	Partab Singh v. Bohra Nathu Ram	...	45 A. 49; (1923) A. I. R. (A.) 197.
237	Khunai Dewari v. Dil Kunwar	...	(1923) A. I. R. (O.) 38.
238	Kishen Singh v. Chhajju Singh	...	45 A. 80; (1923) A. I. R. (A.) 206.
242	Mohammudin and Co. v. Eastern Japan Trading Co.	...	50 C. 215; (1923) A. I. R. (C.) 639.
244	Bon Kwi v. Mayek Yon	...	2 Bur. L. J. 102; (1923) A. I. R. (R.) 236.
245	Kasturibai Bhratar Onkardas Marwadi v. G.I.P. Railway Co.	...	(1923) A. I. R. (B.) 172.
246	Masita Bibi v. Khuda Baksh	...	(1923) A. I. R. (A.) 65.
248	Jhuman v. Dulia	...	4 L. 439; (1923) A. I. R. (L.) 646.
249	Aung Kaing Saing v. Maung San	...	(1923) A. I. R. (R.) 41.
250	Jai Indra Bahadur Singh v. Bijai Raj Kunwar	...	21 A. L. J. 125; 27 C. W. N. 221 P. C.
257	Farat Chandra Das v. Sarajini Rudraja	...	27 C. W. N. 897; (1924) A. I. R. (C.) 135.
260	Muhammad Shafi v. Kalsum Bi	...	4 L. 467; (1924) A. I. R. (L.) 200.
271	Surendra Nath v. Raja Keshee Case Law	...	27 C. W. N. 893; (1924) A. I. R. (C.) 139.
273	Wiseikla v. Parama	...	(1923) A. I. R. (R) 40.
274	Muhammad Abbas v. Shahamat Husain	...	26 O. C. 64; 9 O. & A. L. R. 1; (1923) A. I. R. (O.) 246.
275	Mohan Lal v. N. W. Ry. Co-operative Stores Association Ltd., Lahore	...	5 L. L. J. 19.
278	Ma Ma Gyi v. May Nyo Po	...	(1923) A. I. R. (R) 44.
279	Balmokand v. Wazir Chand	...	5 L. L. J. 47.
280	Shaung Nyan v. Ko Maung	...	(1923) A. I. R. (R.) 98.
281	Mohammad Taqi v. Abdul Rahman	...	(1923) A. I. R. (L.) 151.
284	Burn v. Paul	...	(1923) A. I. R. (R.) 98.
284	Boondu v. Moti Chand	...	(1923) A. I. R. (L.) 652.
285	Parag Din v. Sheo Mangal	...	9 O. & A. L. R. 309.
286	Daulan v. Abdul Haq	...	5 L. L. J. 95.
287	Satchidananda Dutt v. Nritya Nath Mitter	...	50 C. 878; 27 C. W. N. 1007; (1924) A. I. R. (C.) 517.
291	Shakcor & Co. v. Finlay Fleming & Co.	...	2 Bur. L. J. 130; 1 R. 339; (1923) A. I. R. (R) 265.
294	Muhammad Ibrahim v. Muhammad Ismail	...	5 L. L. J. 111.
296	Ishdak Tewari v. Tameshar	...	*Allahabad High Court.
298	Bhairabendra Narain Deb v. Udai Narain Deb	...	50 C. 853; (1924) A. I. R. (C.) 251.
303	Chhiddu Singh v. Jhanjhan	...	(1923) A. I. R. (A) 261; 45 A. 154.
305	Bishnu Priya Chowdhurani, *In re*	...	50 C 907; (1924) A. I. R. (C.) 337.
308	Jagannath Prasad v. Chhatur Kunwar	...	45 A. 149; (1923) A. I. R. (A.) 171.
309	Ramesh Chandra Sinha v. Mohammed Elahi Buksh		50 C. 898; (1924) A. I. R. (C.) 383.
310	Ram Chand v. Maula Baksh	...	21 A. L. J. 882; 10 O. & A. L. R. 39; 46 A. 110; (1924) A. I. R. (A.) 178.
312	Sachhidananda Thakar v. Mahes Chandra Das	...	50 C. 903; 28 C. W. N. 116; (1924) A. I. R. (C.) 315.
314	Ghasi Ram v. Pandit Bhola Nath	...	21 A. L. J. 886; 10 O & A. L. R. 97; (1924) A. I. R. (A.) 153; 46 A. 115.
317	Shulachana v. Kali Bibi	...	*Calcutta High Court.
318	Aidal Singh v. Gyan Singh	...	*Allahabad High Court.
319	Jaha Baksha v. Abdul Latif	...	*Calcutta High Court.
320	Bhullan Singh v. Khushi Ram	...	21 A. L. J. 932; 10 O. & A. L. R. 349; (1924) A. I. R. (A.) 229.
322	Official Receiver of South Arcot v. Perumal Pillai	...	18 L. W. 881; 33 M. L. T. 230; (1924) A. I. R. (M) 387.
323	Chandar Sahai v. Durga Prasad	...	22 A. L. J. 427.
325	Lakshmi Ammal v. Alamelu Ammal	...	(1923) M. W. N. 859; 18 L. W. 874; 45 M. L. J. 811; (1921) A. I. R. (M.) 392;
326	Ram Sunder Ram v. Ram Charit Bhakat	...	51 C. 663.
327	Mahabir Singh v. Matabadal Singh	...	22 A. L. J. 441.
330	Prithuram Kalita v. Mayaram Sarma	...	*Calcutta High Court.
332	Ganga Prasad v. Ganeshi Lal	...	21 A. L. J. 890; 10 O. & A. L. R. 61; (1923) A. I. R. (A) 161; 46 A. 119.

333	Pran Krishna Gharai v. Nitya Gopal Maiti ...	50 C. 892; (1924) A. I. R. (C.) 239.
334	Secretary of State v. Radhey Lal ...	46 A. 455.
335	Jhobali Rai v. Sakhi Rai ...	(1923) Pat. 266; (1923) A. I. R. (Pat.) 585.
338	Abdur Rashid v. Qudratunnissa ...	22 A. L. J. 432.
340	Karuthan Chettiar v. Raman Chettiar ...	(1923) M. W. N. 838; 18 L. W. 837; 45 M. L. J. 804; 33 M. L. T. 188; (1924) A. I. R. (M) 185.
341	East Indian Railway Company v. Sri Ram Mahadeo ...	21 A. L. J. 836; 46 A. 125; (1924) A. I R. (A.) 177.
343	Karakkattidathil Kyrappan v. Kalliyat Thazhathveetil ...	46 M. L. J. 377; 19 L. W. 668; (1924) A. I. R. (M.) 621.
345	Nazir Ahmad v. Muhammad Sherif ...	46 A. 453.
346	Nalini Bhusan Gupta v. Ali Mia ...	51 C. 643.
349	Gur Prasad Mukerji v. Bishain Dutt ...	*Allahabad High Court.
351	Narendra Nath Chatterji v. Rakhaldas ...	*Calcutta High Court.
353	Bhawani Prasad Misir v. Ram Sundar ...	22 A. L. J. 301.
354	Hari Charan Das v. Taraprasanna Sen ...	*Calcutta High Court.
358	Kandhaiya Ojha v. Jagrani Kuer ...	22 A. L. J. 349; 10 O. & A. L. R. 485; 46 A. 419.
360	Mahimjan Bibi v. Mir Rahim Ali ...	*Calcutta High Court.
363	Kanhaiya v. Kanhaiya Lal ...	22 A. L. J. 345; 46 A. 372; (1924) A. I. R. (A.) 376.
365	Neyajaddin v. Akamat Ali ...	*Calcutta High Court.
367	Nohar Ahir v. Partab Ahir ...	21 A. L. J. 899; (1924) A. I. R. (A.) 231.
369	Srish Chandra Pal Chowdhury v. Debendra Nath Sinha Roy ...	*Calcutta High Court.
371	Faqir Muhammad v. Bhagu Khan ...	*Allahabad High Court.
372	Appanna v. Latchayya ...	45 M. L. J. 735; 33 M. L. T. 92; 18 L. W. 849; (1924) A. I. R. (M.) 119; 47 M. 259.
376	Gobindram Vorhomal v. Assistant Collector of Shikarpur ...	*Sind Judicial Commissioner's Court.
381	Abdulla Beg v Ramzan Khan ...	21 A. L. J. 901; (1924) A. I. R. (A.) 173.
384	Thawerdas Jethanand v. Vishendas Nihalchand ...	*Sind Judicial Commissioner's Court.
389	Lakshmi Narain Misr v. Sumarni Kuar ...	46 A. 439.
393	Ganpatlal v. Firm of Bilasrai ...	(1924) A. I. R. (N.) 18.
394	Daya Ram v. Sita Ram ...	*Allahabad High Court.
395	Ananthanaryana Iyer v. Ramasubba Aiyar ...	18 L. W. 857; 33 M. L. T. 196; (1924) A. I. R. (M.) 345.
400	Khedu Singh v. Bhagwan Singh ...	Nagpur Judicial Commissioner's Court.
402	Akbari Begam v. Zamin Ali ...	(1923) A. I. R. (A.) 364.
403	Naba Kumar Choudhury v. Higheazany ...	*Calcutta High Court.
405	Ramachari v. Sadho Saran Tewari ...	*Allahabad High Court.
407	Bindu Govind Naik Kurbet v. Hanmant Govind Bhat ...	(1924) A. I. R. (B.) 71.
408	Kabul v. Kabool Singh ...	(1923) A. I. R. (A.) 413.
408	Rangiah Chettiar v. Annaswamy Alwar Ayyangar ...	(1923) M. W. N. 840; 18 L. W. 836; (1924) A. I. R. (M) 368.
409	Allahdino v. Shikarpur Municipality ...	*Sind Judicial Commissioner's Court.
411	Abdul Quddus v. Ahmad Husain ...	(1923) A. I. R. (A) 415.
412	Chandra Mohan Maiti v. Kinarani Maiti ...	*Calcutta High Court.
414	Ramperkash Das v. Kunj Lal ...	4 P. L. T. 567; (1924) A. I. R. (Pat.) 126.
417	Nageshar Prasad v. Ram Harak Pande ...	22 A. L. J. 342; 46 A. 370; (1924) A. I. R. (A.) 541.
418	Siva Subramaniya Pillai v. Rakkumuth Moopan ...	19 L. W. 502; (1924) M. W. N. 454; (1924) A. I. R. (M.) 645.
420	Sarju Sahu v. Sukhi Lal ...	4 P. L. T. 577; (1924) A. I. R. (Pat.) 96.
422	Kushi Bai v. Manrokhan ...	(1923) A. I. R. (N.) 265.
428	Secretary of State v. Charanjit Lal ...	6 L. L. J. 237.
429	Ram Sarup v. Hardeo ...	10 O. & A. L. R. 431; (1924) A. I. R. (A.) 396.
432	Municipal Corporation of the City of Rangoon v. Surati Bara Bazar Co., Ltd. ...	1 R. 668; (1924) A. I. R. (R.) 194.
438	Gayan Singh v. Babu Lal ...	21 A. L. J. 822; 9 O. & A. L. R. 1019; (1924) A. I. R. (A.) 86.
440	Basheshar Nath v. Mehr Chand ...	(1923) A. I. R. (L) 21.
441	Maung Hman v. Ma Shin ...	2 Bur. L. J. 164; (1924) A. I. R. (R) 45.

442	Girdhari v. Mam Chand	...	6 L. L. J. 224.
443	Pitta Ramaswamiah v. Subramania Aiyer	...	*Madras High Court.
444	Pars Ram v. Hargolal and Sons	...	*Lahore High Court.
445	Central Bank of India Ltd. v. Nadirshaha Metha		(1924) A. I. R. (S.) 13.
448	Sanwal Das v. Jagio Mal	...	(1924) A. I. R. (L.) 68.
450	Kamlapat Dubey v. Ram Raj	...	(1924) A. I. R. (A.) 103.
451	Bullu Mal v. Hardwari Mall	...	6 L. L. J. 219; (1924) A. I. R. (L.) 570.
452	Kevaldas Tribhovandas v. Sakenlal Bulakhidas...		(1923) A. I. R. (P. C.) 178; 45 M. L. J. 765; 33 M. L. T. 424; 28 C. W. N. 930 P. C.
456	Standard Oil Co. v. Haridas Velji	...	16 S. L. R. 235.
461	Punjab National Bank Ltd. v. Balkishan Das	...	6 L. L. J. 230.
462	Lajja Ram v. Shambhu Nath Ram Sarup	...	5 L. L. J. 14; (1923) A. I. R. (L.) 252.
464	Sharif Khan v. Moazzum Ali Khan	...	(1923) A. I. R. (A.) 214.
466	Moosa v. Fatehullah	...	*Sind Judicial Commissioner's Court.
470	Raghunandan Singh v. Mulak Raj Singh	...	21 A. L. J. 84; (1923) A. I. R. (A.) 255.
471	Sonba v. Narayan	...	*Nagpur Judicial Commissioner's Court.
473	Ismail v. Hassan Ali	...	(1923) A. I. R. (A.) 220.
477	Donald Graham & Co. v. Kewalram	...	16 S. L. R. 245.
482	Ashrof Ali v. Morden	...	1 R. 656; (1924) A. I. R. (R.) 177.
484	Bharat Singh v. Shafi Mohammad	...	*Lahore High Court.
485	M. P. L. M. P. Chetty v. Ma Ngwe Sin	...	1 R. 655; (1924) A. I. R. (R.) 200.
486	Sadanand Pandey v. Tufail Ahmad	...	(1923) A. I. R. (A.) 115.
488	Har Phul v. Bhagmal	...	*Lahore High Court.
489	Vadilal v. Manak Lal	...	(1923) A. I. R. (B.) 41.
489	Ibrahim Mallick v. Lalit Mohan Roy	...	50 C. 974; 28 C. W. N. 322; (1924) A. I. R. (C.) 358.
491	Nanchi v. Shititi Kulsambi	...	(1923) A. I. R. (B.) 42.
491	Sukur Mahomed v. Asmot Mandol	...	50 C. 978; (1924) A. I. R. (C.) 184.
494	Mughla v. Abhe Ram	...	(1923) A. I. R. (L.) 172; 4 P. W. R. 1 23.
495	Samar Bahadur Singh v. Jit Lal	...	22 A. L. J. 292; 46 A. 359; (1924) A. I. R. (A.) 390.
497	Jawahara v. Data Ram	...	*Lahore High Court.
498	Priya Lal v. Bohra Champa Ram	...	(1923) A. I. R. (A.) 271; 45 A. 263.
500	Kahan Chand v. Jawandi	...	(1923) A. I. R. (L.) 174.
501	Ma Thein Yan v. Maung Tha Dun	...	2 Bur. L. J. 292; (1924) A. I. R. (R.) 105; 2 R. 62.
503	Kalidin v. Chandika Prasad	...	(1923) A. I. R. (A.) 182.
504	Maung Saw Kyaing v. Ma Sein	...	2 Bur. L. J. 294; (1924) A. I. R. (R.) 208.
504	Balmokand v. Wazir Chand	...	5 L. L. J. 89.
505	Mg Pe Thein v. S. Boom Kyan	...	2 Bur. L. J. 280; 1 R. 772; (1924) A. I. R. (R.) 163.
503	Bariam Singh v. Phaggu Mal	...	5 L. L. J. 90.
506	Raj Chandra Dhar v. Messrs. K. D. O. C. Ray	...	2 Bur. L. J. 282; 2 R. 108; (1924) A. I. R. (R.) 137.
508	Ram Narain v. Akbar	...	(1923) A. I. R. (A.) 180.
510	Appamma v. Chinnavadu	...	(1923) M. W. N. 825; 45 M. L. J. 637; 33 M. L. T. 146; 19 L. W. 37; (1924) A. I. R. (M.) 292; 47 M. 203.
514	Bageshar Rai v. Mahadei	...	22 A. L. J. 419; (1924) A. I. R. (A.) 461.
517	Madhavrao Visvanath v. Shrikrishan	...	(1923) A. I. R. (B.) 393.
517	Mahabir Prasad v. Amla Prasad Rai	...	22 A. L. J. 295; 46 A. 364; (1924) A. I. R. (A.) 379.
520	Dwijendra Narain Roy v. Jogesh ChandraDey	...	39 C. L. J. 46; (1924) A. I. R. (C.) 600.
532	Satdhar v. Ramchandra	...	21 A. L. J. 917; 46 A. 153; (1924) A. I. R. (A.) 261.
535	G. E. G. R. v. E. M. R.	...	16 S. L. R. 267.
538	Lachman Pande v. Tribani Sahu	...	22 A. L. J. 518.
539	Bachal Shah v. Juma Shah	...	(1923) A. I. R. (S.) 35; 16 S. L. R. 221.
542	Har Dayal Singh v. Gar Dayal Singh	...	(1923) A. I. R. (...) 181.
543	Balbir Singh v. Gobind	...	(1923) A. I. R. (...) 532.
545	Bhagwan v. Ganga Bakash	...	9 O. & A. L. R. 12; (1924) A. I. R. (O.) 301.
546	Hardatta v. Nigahia Mal	...	4 L. L. J. 25.; (1922) A. I. R. (L.) 336.
547	Bhudhar Singh v. Sheikh Sahamat	...	9 O. & A. L. R. 414.
548	Lachhman Das v. Jai Singh	...	4 L. L. J. 262; (1922) A. I. R. (L.) 349.
550	Sri Mahant Baba Hari Das Faqir v. Praduman Nath	...	9 O. & A. L. R. 419.

551	Lala Das v. Mina Mal	4 L. L. J. 266; (1922) A. I. R. (L.) 259
552	Surja v. Girindro Nath Chatterjee ...	9 O. & A. L. R. 419.
553	Sangatmal Lilaram v. Jan Mahomed Gulam Khan ...	16 S. L. R. 260.
556	Chiranji Lal v. Syed Illias Ali ...	22 A. L. J. 493; 10 O. & A. L. R. 678.
557	Shebaits of Idol Sridhar Jin v. Nalinaksha Rai ...	*Calcutta High Court.
560	Hira Lal v. Hoti Lal ...	22 A. L. J. 459.
561	Kunhan Menon v. Kannan Menon ...	46 M. L. J. 133; (1924) M. W. N. 202; (1924) A. I. R. (M.) 482.
562	Bombay, Baroda and Central India Ry., Co. v. Budh Sen Pusp Chand ...	21 A. L. J. 830; 46 A. 55; 9 O. & A. L. R. 1074; (1924) A. I. R. (A.) 180.
564	Jalal-ud-din, *In re* ...	16 S. L. R. 11.
566	Bidiya Misir v. Daryai ...	*Allahabad High Court.
567	Reshee Case Law v. Ambika Dassi ..	*Calcutta High Court.
567	Municipal Board of Bareilly v. Hafiz Ala Baksh ...	22 A. L. J. 457.
569	Hamid Ali v. Ram Charan Goldar ...	*Calcutta High Court.
571	Badri Das v. East Indian Railway Co. ...	4 P. L. T. 185; (1923) A. I. R. (Pat.) 325.
572	Jawahar Singh v. Sewa Singh ...	5 L. L. J. 487; (1924) A. I. R. (L.) 97.
575	Prag Narain v. Mathura Prasad ...	22 A. L. J. 472.
576	Ghasi Ram v. Uma Datt ...	9 O. & A. L. R. 554; 10 O. L. J. 348; 26 O. C. 327; (1924) A. I. R. (O.) 189.
577	Gulab v. Bhagwan Das ...	21 A. L. J. 907; (1924) A. I. R. (A.) 229.
578	Narayan Das v. Maheshi Lal ...	9 O. & A. L. R. 567.
579	Tahan v. Shadi ...	(1923) A. I. R. (L.) 601.
579	Ma Shin v. Maung Hman ...	1 R. 651; (1924) A. I. R. (R.) 102.
582	Dipchand Dowlatram v. Permanand Chimandas ...	16 S. L. R. 273.
584	Babban Panday v. Lachhman Chaudhri ...	22 A. L. J. 62; 46 A. 205; (1924) A. I. R. (A.) 371.
586	Kabir-ud-din Mondol v. Entaj Mondol ...	*Calcutta High Court.
587	Har Sarup v. Brijnandan Lal ...	(1924) A. I. R. (A.) 479.
588	Jnanendra Nath Roy Chaudhury v. Ram Ranjan Banerji ...	*Calcutta High Court.
590	Ram Chander v. Bhagwati ...	22 A. L. J. 576.
592	Malireddi Ayyareddi v. Adusumilli Gopalakrishnayya ...	22 A. L. J. 45; 46 M. L. J. 164; (1924) A. I. R. (P. C.) 36; 19 L. W. 215; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 P. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 47 M. 190; 28 C. W. N. 1025 **P. C.**
594	Lachhman Lal v. Padarath Singh ...	4 P. L. T. 735; (1924) A. I. R. (Pat.) 346.
596	Rajaram v. Bapu ...	20 N. L. R. 154.
598	Thakur Prasad Lal v. Sukhlal Singh ...	5 P. L. T. 567.
599	Man Singh v. Madho Singh ...	22 A. L. J. 70; (1924) A. I. R. (A.) 430.
601	Pahalan Garain v. Chotu Kunja ...	2 P. L. R. 24; (1924) A. I. R. (Pat.) 522; 5 P. L. T. 614.
602	Mulchand v. G. I. P. Ry., Co., Bombay ...	*Nagpur Judicial Commissioner's Court.
605	Surajman Chaube v. Anjore Shukul ...	21 A. L. J. 861; 9 O. & A. L. R. 989; 46 A. 73; (1924) A. I. R. (A.) 263.
608	Secretary to the Board of Revenue (Income Tax) Madras v. Ramanathan Chettiar ...	19 L. W. 34; 46 M. L. J. 42; (1924) M. W. N. 142; (1924) A. I. R. (M.) 455.
609	Bhaironprasad v. Laxmi Narain Das ..	*Nagpur Judicial Commissioner's Court.
612	Sharif Ahmad Alvee v. Muhammad ...	46 A. 148; (1924) A. I. R. (A.) 375.
614	Balaji Vinayak Buti v. Vithoba ...	*Nagpur Judicial Commissioner's Court.
617	Chidambaragurukkal v. Sivagnana Sundaram Pillai ...	(1924) M. W. N. 487; 47 M. L. J. 598.
621	Tularam v. Sumrati ...	*Nagpur Judicial Commissioner's Court.
623	Chockalingam Pillai v. Sami Battar ...	*Madras High Court.
625	Gani v. Sitaram ...	*Nagpur Judicial Commissioner's Court.
626	Ram Charan Lal v. Dharam Singh ...	22 A. L. J. 10; 46 A. 173; (1924) A. I. R. (A.) 414.
627	Jaikrishna v. Savitri ...	7 N. L. J. 187.

630	Nandan v. Guptar Singh ...	22 A. L. J. 7; (1924) A. I. R. (A.) 424.
632	Thayuman Pillai v. Ramaswamy Chettiar ...	19 L. W. 681.
633	Thakur Kallusingh v. Bhuraji ...	*Nagpur Judicial Commissioner's Court.
634	Babu Ram v. Kokla ...	22 A. L. J. 68; 10 O. & A. L. R. 204; 46 A. 210; (1924) A. I. R. (A.) 391.
635	Mautina Ramachandra Raju v. Mautipragada Bujanga Bahadur Zemindar Garu ...	46 M. L. J. 46; 19 L. W. 63; (1924) M. W. N. 115; (1924) A. I. R. (M.) 473.
636	Sunderbai v. Shrikishan Ramdhan ...	20 N. L. R. 170.
639	Damini Dasi v. Fatimani Dasi ...	2 P. L. R. 34; 5 P. L. T. 564; (1924) A. I. R. (Pat.) 520.
640	Bindeshwari Prasad Tiwari v. Hanuman Prasad Tiwari ...	22 A. L. J. 65; (1924) A. I. R. (A.) 445.
641	Pitam v. Baboosingh ...	*Nagpur Judicial Commissioner's Court.
644	Amjad Hosain v. Ummatul Askari ...	10 O. L. J. 403; (1924) A. I. R. (O.) 232.
645	Puran Singh v. Dat Ram ...	22 A. L. J. 5; 46 A. 165; (1924) A. I. R. (A.) 447.
646	Bodu Anna Naidu v. Varada Jaggu Naidu ...	*Madras High Court.
648	Sulaiman Khan v. Uma Charan Sil ...	*Calcutta High Court.
651	Gopalakrishna Pillai v. Kunjithapatham Pillai ...	(1923) M. W. N. 811; 18 L. W. 844; 45 M. L. J. 849; (1924) A. I. R. (M.) 324; 33 M. L. T. 106; 47 M. 543.
654	Duber v. Ram Sahai ...	10 O. L. J. 305; (1924) A. I. R. (O.) 56.
658	Thavasamuthu Nadar v. Balaguruswamy Nadar ...	*Madras High Court.
660	Asharfi Lal v. Deputy Commissioner, Gonda ...	10 O. & A. L. R. 553; 11 O. L. J. 448.
662	Umar Sharif v. Jwala Prasad ...	*Nagpur Judicial Commissioner's Court.
663	Bashiruddin Khan v. Mahadeo Singh ...	27 O. C. 26; (1924) A. I. R. (O.) 306.
665	Sri Kantoo Singh v. Imdad Ali ...	*Allahabad High Court.
666	Oudh Behari Lal v. Dal Singh ...	10 O. L. J. 404; (1924) A. I. R. (O.) 205.
668	Krishnarao v. Chandrabhagabai ...	*Nagpur Judicial Commissioner's Court.
670	Tehl Kaur v. Amar Nath ...	17 P. W. R. 1923.
685	Yasin Ali Khan v. Ali Bahadur ...	10 O. L. J. 443; (1924) A. I. R. (O.) 230.
687	Ragho v. Dwarka Das ...	10 P. W. R. 1923.
691	Mahmood Hasan v. National Bank of Upper India in Liquidation ...	*Oudh Judicial Commissioner's Court.
692	Abdullah *alias* Masita v. Girdhari ...	8 P. W. R. 1923.
693	Kashi Nath v. Emperor ...	9 O. & A. L. R. 696.
695	Shankar Dayal v. Binayak Prasad ...	27 O. C. 1; (1924) A. I. R. (O.) 305.
696	Ashaj Khalifa v. Ramlal Marwari ...	(1923) Pat. 271; (1924) A. I. R. (Pat.) 40.
697	Badri Sah v. Balbhaddar Singh ...	10 O. L. J. 468; (1924) A. I. R. (O.) 145.
704	Rustomjee Heerjibhai v. Cowsjee Dadabhai ...	26 Bom. L. R. 209; 48 B. 348; (1924) A. I. R. (B.) 317.
705	Ma Hmon v. Maung Tin Kauk ...	1 R. 722; (1924) A. I. R. (R.) 182.
716	Sher Khan v. Kamal-ul-Nissa ...	10 O. & A. L. R. 537.
718	Ma Hla Gyi v. Maung Seik Po ...	1 R. 700; (1924) A. I. R. (R.) 192.
718	Areti Subbayya v. Venkataramiah ...	34 M. L. T. 233; 19 L. W. 626; (1924) M. W. N. 630; 47 M. L. J. 469.
719	Jones v. Jones ...	1 R. 705; (1924) A. I. R. (R.) 193.
722	Rudra Partap Singh v. Hansla Prasad ...	10 O. L. J. 524; (1924) A. I. R. (O.) 295.
723	Valli Asmal v. Valli Asmal ...	26 Bom. L. R. 171; (1924) A. I. R. (B.) 321.
724	Naikwara v. Ma Aya Byu ...	1 R. 770; (1924) A. I. R. (R.) 181.
725	Awadh Ram Singh v. Mahbub Khan ...	10 O. L. J. 525; (1924) A. I. R. (O.) 255.
729	Lee Lim Ma Hock v. Saw Mah Hone ...	2 R. 4; (1924) A. I. R. (R.) 221.
740	Daulat Ram v. Bharat National Bank Ltd., Delhi ...	5 L. 27; (1924) A. I. R. (L.) 135.
742	Ma Mya v. Ko Po Sa ...	2 Bur. L. J. 163; (1924) A. I. R. (R.) 60.
743	Rakhi v. Boza ...	5 L. 34; (1924) A. I. R. (L.) 452.
745	Bindubashini Roy Chowdhury v. Secretary of State ...	51 C. 70; 40 C. L. J. 163.
747	Maung Chit Hlaing v. N. A. R. M. Chetty ...	2 Bur. L. J. 165; (1924) A. I. R. (R.) 84.
749	Bai Jayagavri v. Ramanlal Chhotalal ...	26 Bom. L. R. 187; 48 B. 355; (1924) A. I. R. (B.) 302.
750	Foucar and Co. v. M. C. T. Mudaliar ...	2 R. 45; (1924) A. I. R. (R.) 232.

753	Achyut Vishnu Patankar v. Tapibai Krishnaji Joshi ...	26 Bom. L. R. 103; 48 B. 210; (1924) A. I. R. (B.) 310.
755	Ahmed Sahib and Co. v. Pakir Mahomed Rowther ...	1 R. 694; 2 Bur. L. J. 169; (1924) A. I. R. (R.) 145.
757	Chandanmull Benganey v. National Bank of India, Ltd. ...	51 C. 43; (1924) A. I. R. (C.) 552.
766	Ma Lon v. Ma Nyo ...	1 R. 714; (1924) A. I. R. (R.) 204.
769	Chaturbhuj v. Deokaran ...	26 Bom. L. R. 84; (1924) A. I. R. (B.) 370.
779	Surayya v. Venkataratnam ...	45 M. L. J. 822; 19 L. W. 20; (1924) A. I. R. (M.) 210; 47 M. 176.
780	Mahomedally Adamji v. Abdul Hussein Adamji	26 Bom. L. R. 163; 48 B. 331; (1924) A. I. R. (B.) 313.
784	Bishunath Saran Singh v. Sitla Baksh Singh ...	10 O. L. J. 315; (1924) A. I. R. (O.) 69.
794	Somar Singh v. Premdei ...	5 P. L. T. 21; (1924) Pat. 105; 3 Pat. 327.
798	Strathie v. Chidambaram Chettiar ...	(1924) M. W. N. 35; 19 L. W. 129; (1924) A. I. R. (M.) 485.
799	Jamwanti Kunwar v. Mohan Dei ...	10 O. & A. L. R. 72; 11 O. L. J. 379.
800	Ponnuswamy Iyer v. Damodar Hunsraj ...	46 M. L. J. 82; 19 L. W. 168; (1924) M. W. N. 178; 34 M. L. T. 7; 47 M. 403; (1924) A. I. R. (M.) 464.
803	Ram Prasad v. Mahabir ...	22 A. L. J. 91; 46 A. 220; (1924) A. I. R. (A.) 310.
806	Manavikaraman v. Ananthanarayana Ayyan ...	19 L. W. 16; (1924) M. W. N. 38; 46 M. L. J. 250; (1924) A. I. R. (M.) 457.
808	Ralla v. Harnam Singh ...	(1923) A. I. R. (L.) 208.
809	Abrubammal v. Official Assignee of Madras ...	45 M. L. J. 817; 19 L. W. 54; 33 M. L. T. 217; (1924) A. I. R. (M.) 214; 47 M. 215.
812	Nazks v. Gopal ...	(1923) A. I. R. (L.) 208.
813	Saddik Ahmed v. M. K. M. Firm ...	2 Bur. L. J. 52; (1923) A. I. R. (R.) 149.
814	Abdul Ghani v. Ishar Singh ...	(1923) A. I. R. (L.) 239
815	Maung Po Kin v. Maung Kyauk Ye ...	2 Bur. L. J. 47; (1924) A. I. R. (R.) 143.
816	Mahabir v. Manohar ...	22 A. L. J. 67; 46 A. 208; (1924) A. I. R. (A.) 540.
817	Maung Pein v. Maung Po Maung ...	2 Bur. L. J. 15; (1923) A. I. R. (R.) 138.
818	Ramappa Chettiar v. Ekambara Padayachi ...	19 L. W. 685; 47 M. L. J. 13; (1924) M. W. N. 479; 47 M. 651.
818	Maung San Ya v. Maung Ngwa Hla ...	2 Bur. L. J. 29; (1923) A. I. R. (R.) 250.
819	Pir Makhdum v. Malik Boola Khan ...	16 S. L. R. 87.
825	Narain Singh v. Niranjan Chakrayarti ...	(1924) A. I. R. (P. C.) 5; 28 C. W. N. 351; 5 P. L. T. 171; 3 Pat. 183 **P. C.**
841	Vazir v. Dwarkomal ...	16 S. L. R. 133; (1922) A. I. R. (S.) 41.
845	Chellamma v. Pentayya ...	(1924) M. W. N. 440; 20 L. W. 478.
847	Motumal Perumal v. Lekhumal ...	16 S. L. R. 106; (1922) A. I. R. (S.) 18.
848	Mohanya v. Panna Lal ...	10 O. & A. L. R. 534; 10 O. L. J. 513.
850	Kanniappa Mudaliar v. Raju Chettiar ...	47 M. L. J. 16; 20 L. W. 45; (1924) M. W. N. 520; 47 M. 605.
852	Manindra Chandra Nandi v. Kaulat Shaik ...	50 C. 957; 28 C. W. N. 264; (1924) A. I. R. (C.) 374.
857	Chelmayya v. Lakshmi Devamma ...	*Madras High Court.
858	Partap Narain Singh v. Nathan Singh ...	(1924) Pat. 173.
860	Venkata Seshamma v. Gunneswara Rao ...	(1924) M. W. N. 58; 19 L. W. 113; 46 M. L. J. 129; (1924) A. I. R. (M.) 622.
861	Jawahir Lal v. Jarau Lal ...	22 A. L. J. 49; 46 A. 192; (1924) A. I. R. (A.) 350.
869	Veeresalingam v. Kondayya ...	*Madras High Court.
870	Rama v. Waman Rao ...	*Nagpur Judicial Commissioner's Court.
874	Potti Nayakar v. Suppammal ...	20 L. W. 31.
880	Rudur Partab Singh v. Sheo Prasad ...	10 O. & A. L. R. 413.
881	Ramaswami Thevan v. Alaga Pillai ...	*Madras High Court.
884	Jed Prasad v. Nakchhed Prasad ...	*Nagpur Judicial Commissioner's Court.
886	Chathoth Parkum v. Parambath Chathenkandi...	34 M. L. T. 238; 20 L. W. 41; (1924) M. W. N. 480.
888	Sharf-uz-zaman v. Deputy Commissioner, Barabanki ...	10 O. & A. L. R. 514.
891	Kothandaramaswami Naidu v. Pappammal ...	*Madras High Court.

893	Moti Lal v. Agent, O. R. Railway	...	*Allahabad High Court.
894	Angavalathammal v. Janaki Ammal	...	19 L. W. 119; (1924) M. W. N. 207; (1924) A. I. R. (M.) 466.
897	Reshma Kuari v. Rameshwar Ojha	...	*Patna High Court.
899	Perayya v. Vaikayamma	...	34 M. L. T. 201; 19 L. W. 627; 47 M. L. J. 14.
900	Ramcharun Singh v. Jang Bahadur Singh	...	*Patna High Court.
902	Nidadavolu Achutam v. Veerina Suryya	...	(1924) M. W. N. 485.
903	Vithal Singh v. Agarchand	...	*Nagpur Judicial Commissioner's Court.
906	Ahmed v. Rahimunnissa	...	*Patna High Court.
907	Zaitun v. Kommal	...	22 A. L. J. 423.
908	Ram Mandar v. Nawlakhbati	...	(1924) Pat. 206; 3 Pat. 815.
910	Official Assignee of Madras v. Official Assignee of Rangoon	...	19 L. W. 316; 34 M. L. T. 99; 46 M. L. J. 580; (1924) M. W. N. 458; (1924) A. I. R. (M.) 662.
911	Anwar Khan v. Yakubkhan	...	*Nagpur Judicial Commissioner's Court.
913	Basuki Behary Pandey v. Chatter Pandey	...	(1924) Pat. 210.
914	Ralliaram Shewaram v. Budhuram Parmanand	...	*Sind Judicial Commissioner's Court.
916	Raghunandan Prasad v. Ghulam Alauddin Beg		22 A. L. J. 464.
917	Vellayan Asari v. Sivagnanam Asari	...	34 M. L. T. 193.
920	Gunnis & Co., Ltd. v. Amanmal Tulsidas	...	17 S. L. R. 133; (1924) A. I. R. (S.) 75.
922	Ismail v. Karam Ali	...	10 O. & A. L. R. 579.
923	Motiomal v. Molap Bai	...	*Sind Judicial Commissioner's Court.
924	Elahinewaj Khan v. Biseswar Baisya.	...	*Calcutta High Court.
928	Best & Co., Ltd. v. Corporation of Madras	...	19 L. W. 142; 46 M. L. J. 217; (1924) M. W. N. 249; 47 M. 262; (1924) A. I. R. (M.) 420.
940	Baijnath Singh v. Jamal Brothers & Co., Ltd.	...	22 A. L. J. 42; (1924) A. I. R. (P. C.) 48; 19 L. W. 345; (1924) M. W. N. 196; 10 O. & A. L. R. 288; 51 C. 354; 2 R. 99; 28 C. W. N. 1029 **P. C.**
942	Kuar Behari Lal v. Beni Madho	...	10 O. & A. L. R. 371.
944	Ram Singh v. Ramchand	...	(1924) A. I. R. (P. C.) 2; 19 L. W. 4; 22 A. L. J. 14; (1924) M. W. N. 76; 46 M. L. J. 158; 26 Bom. L. R. 196; 10 O. & A. L. R. 156; 2 P. L. R. 94; 28 C. W. N. 566; 5 L. 23; 40 C. L. J. 276 **P. C.**
945	Narain Singh v. Chiranji Lal	...	22 A. L. J. 461.
946	Kaju Mal v. Salig Ram	...	(1924) A. I. R. (P. C.) 1; 22 A. L. J. 10; (1921) M. W. N. 172; 10 O. & A. L. R. 261; 46 M. L. J. 536; 5 L. 50 **P. C.**
947	Gurunadha Rama Seshayya v. Tirupurasundri Cotton Press, Bezwada	...	46 M. L. J. 563; 19 L. W. 623.
948	Khanderao Vithoba Kore v. Municipal Corporation of Bombay	...	(1924) A. I. R. (P. C.) 3; 19 L. W. 1; 22 A. L. J. 11; (1924) M. W. N. 77; 46 M. L. J. 169; 33 M. L. T. 462; 28 C. W. N. 375; 26 Bom. L. R. 193; 10 O. & A. L. R. 121; 2 P. L. R. 108; 39 C. L. J. 201; 48 B. 185 **P. C.**
950	Sarabjit Singh v. Jaikaran Singh	...	10 O. & A. L. R. 240; 11 O. L. J. 423; 27 O. C. 137.
951	Basu v. Nanhi	...	*Allahabad High Court.
953	Subramania Mudaliar v. Parasuramaiyer	...	(1924) M. W. N. 51; (1924) A. I. R. (M.) 644.
954	Champa Kunwar v. Tulshi Ram	...	*Allahabad High Court.
955	Sheoratan Singh v. Kali Charan	...	10 O. & A. L. R. 543; 11 O. L. J. 198.
957	Chuni Lal v. Chuni Lal	...	(1923) A. I. R. (L.) 659.
958	Ellammal v. Venkataramana Rao	...	*Madras High Court.
960	Kundan Lal v. Parshadi	...	22 A. L. J. 166.
961	Obala Kondama v. Kandasamy	...	22 A. L. J. 16; 19 L. W. 107; (1924) M. W. N. 86; 46 M. L. J. 172; (1924) A. I. R. (P. C.) 56; 26 Bom. L. R. 198; 10 O. & A. L. R. 176; 39 C. L. J. 194; 47 M. 181; 28 C. W. N. 1050 **P. C.**
964	Gur Sahai Kandu v. Chhedi	...	10 O. & A. L. R. 67; 11 O. L. J. 251; 27 O. C. 130.
966	Subbramian v. Bansilal Abeerchand	...	19 L. W. 46; (1924) M. W. N. 164; (1924) A. I. R. (M.) 595.
968	National Bank of Upper India, Ltd. v. Sheo Mangal Bajpai	...	10 O. & A. L. R. 115; 11 O. L. J. 349.
968	Bava Levvai Sahib v. Ammeenammal	...	45 M. L. J. 805; (1924) A. I. R. (M.) 107.

970	Kishen Lal v. Kanhya	...	5 L. L. J. 106.
971	Kalyandappa v. Chanbasappa	...	22 A. L. J. 508; 46 M. L. J. 598; 28 C. W. N. 666; 26 Bom. L. R. 509; (1924) A. I. R. (P. C.) 137; (1924) M. W. N. 414; 34 M. L. T. 111; 20 L. W. 109; 11 O. L. J. 181; 48 B. 411 P. C.
977	Madho Parshad v. Ahsam Ilahi Abdul Hafiz	...	5 L. L. J. 108.
978	Abdul Manuaf v. Muslim	...	*Calcutta High Court.
980	Anokh Singh v. Sapuran Singh	...	(1923) A. I. R, (L.) 660.
982	Rajabala Dasi v. Radhika Charan Roy	...	40 C. L. J. 150.
984	Ghannu Ram v. Hotu Ram	...	(1923) A. I. R. (L.) 54.
986	Adamji Lukmanji *In re*	...	*Sind Judicial Commissioner's Court.
990	Ram Dyal v. Ghamandi Lal	...	(1923) A. I. R. (L) 56.
991	Asmati Bibi v. Saimuddi Pathan	...	*Calcutta High Court.
995	Chiranji Lal v. Dost Mahomed	...	(1923) A. I. R. (L) 634.
997	Tota Ram v. Panna Lal	...	22 A. L. J. 583.
998	Thakur Das v. Bishan Das	...	(1923) A. I. R. (L) 636.
1001	Chetan Singh v. Sartaj Singh	...	22 A. L. J. 702.
1002	Chitnavis v. Nath Sao	...	20 N. L. R. 106; 7 N. L. J. 170.
1007	Todar Mal v. Kishen Lal	...	*Allahabad High Court.
1008	Gauri Shankar v. Jang Bahadur Singh	...	10 O. & A. L. R. 49; 11 O. L. J. 246; 27 O. C. 124.
1010	Sanket Narain Pande v. Ram Bharos	...	*Allahabad High Court.
1011	Srinivasachariar v. Raghavachariar	...	46 M. L. J. 560; 19 L. W. 621 (1924) M. W. N. 628; (1924) A. I. R. (M.) 676.
1012	Bank of Marvi, Ltd. v. Baerlein Bros.	...	26 Bom. L. R. 155; 48 B. 374; (1924) A. I. R. (B.) 325.
1017	Sattaya Pandayachi v. Soundrathatchi	...	46 M. L. J. 78; (1924) M. W. N. 162; 19 L. W. 468; 47 M. 312 (1924) A. I. R. (M) 448.
1019	Dhanraj Rai v. Ram Naresh Rai	...	*Allahabad High Court.
1022	Sheonandan Singh v. Jai Ram Singh	...	10 O. & A. L. R. 445.
1023	Madho Singh v. Mangal Singh	...	(1924) A. I. R. (A.) 536.
1024	Badri Singh v. Lalta Singh	..	10 O. & A. L. R. 437.
1025	Lagan Rai v. Raja Rai	...	(1924) A. I. R. (A.) 507.
1026	Agnes Harriel David v. Murray and Co., Ltd.	....	11 O. L. J. 459.
1029	Behari Lal v. Amin Chand	...	*Allahabad High Court.
1031	Rajindra Puri v. Beni Madho	...	10 O. & A. L. R. 823; 11 O. L. J. 351.
1033	Ejaz Rasul Khan v. Mubarac Husain	...	10 O. & A. L. R. 685.
1036	Chandrika Ram Tiwari v. Narain Prasad Rai	...	22 A. L. J. 468.
1038	Kali Prosanna Bahaduri v. Hemanta Kumari Debi	...	*Calcutta High Court.
1041	Chandradip Tewari v. Jadunandan Singh	...	*Allahabad High Court.
1042	Manindra Chandra Nandi v. Provas Chandra Mitter	...	39 C. L. J. 58; 51 C. 279.
1047	Harpal v. Mohan	...	*Allahabad High Court.
1048	Jamini Kumar Seal v. Thakur Dhan Baishnab	...	39 C. L. J. 88.
1049	Jawala Prasad v. Hoti Lal	...	22 A. L. J. 558.
1051	Jai Indar Bahadur Singh v. Bachun Singh	...	*Oudh Judicial Commissioner's Court.
1053	Abdul Rahman v. Ayyub	...	22 A. L. J. 817.
1055	Harihar Prasad v. Mahabir Pandey	...	10 O. & A. L. R. 893.

K UNIVERSITY
Accession No 754.48...

TABLE

OF

Cases Applied, Approved, Considered, Disapproved, Dissented from, Distinguished, Explained, Followed, Not Followed, Overruled and Relied upon in Volume 79 of Indian Cases, 1924.

A

Page.

Abdul Hamid v. Riaz-ud-Din, 30 A. 32; A. W. N. (1907) 273; 4 A. L. J. 691. (*Relied on*) ... 816

Abdul Majeeth Khan Sahib v. Krishnamachariar, 40 Ind. Cas. 210; 40 M. 243; 32 M. L. J. 195; (1917) M. W. N. 346; 5 L. W. 767. (*Followed*) ... 491

Abdul Rahman v. Cassum Ebrahim, 11 Ind. Cas. 726; 36 B. 168; 13 Bom. L. R. 583. (*Distinguished*) ... 539

Abdul Shakur v. Mahomed Yusuf, 62 Ind. Cas. 456; 43 A. 456. (*Not followed*) ... 920

Abdul Shakur v. Mendai, 23 A. 260; A. W. N. (1901) 63. (*Followed*) ... 612

Abdur Rahim v. Narayan Das Aurora, 71 Ind. Cas. 646; 28 C. W. N. 121; (1923) A. I. R. (P. C.) 44; 17 L. W. 509; 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; (1923) M. W. N. 441; 38 C. L. J. 242; 50 C. 329 (P. C.). (*Followed*) ... 360

Abiruddin Ahmed, *In re*, 8 Ind. Cas. 1108; 38 C. 309; 12 C. L. J. 625; 15 C. W. N. 357; 12 Cr. L. J. 22. (*Relied on*) ... 564

Abu Mahimed v. S. C. Chunder, 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384. (*Distinguished*) ... 384

Adem Umar Sale v. Bapu Bawaji, 1 Ind. Cas. 663; 33 B. 116; 10 Bom. L. R. 1128. (*Relied on*) ... 117

Adhar Chandra Das v. Lal Mohandas, 24 C. 778; 1 C. W. N. 676; 12 Ind. Dec. (N. S.) 1188. (*Relied on*) ... 880

Ahmad v. Ahmad, 6 Ind. Cas. 1003; 75 P. W. R. 1910. (*Followed*) ... 84

Ahmad v. Raja, 39 Ind. Cas. 44; 50 P. W. R. 1917. (*Relied on*) ... 955

Ahmed Husain v. Govind Krishna Narain, 9 Ind. Cas. 932; 33 A. 391; 8 A. L. J. 192. (*Distinguished*) ... 87

Ahmed Sahib Shutari v. Magnesite Syndicate, Limited, 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598. (*Followed*) ... 59

Aiyasamier v. Venkatachela Mudali, 37 Ind. Cas. 741; 40 M. 989; 31 M. L. J. 513; (1916) 2 M. W. N. 296; 20 M. L. T. 391; 4 L. W. 507. (*Followed*) ... 605

Ajodhya Mahton v. Phul Kuar, 65 Ind. Cas. 341; 1 Pat. 277; (1922) Pat. 61; (1922) A. I. R. (Pat.) 479. (*Relied on*) ... 997

A—contd.

Page.

Akkanna v. Venkayya, 25 M. 351 at p. 359; 12 M. L. J. 5. (*Followed*) ... 627

Akora Sooth v. Borcanee, 11 W. R. 82; 2 B. L. R. A. C. 199. (*Followed*) ... 1048

Alathoor Badrudeen v. Gulam Mohideen, 12 Ind. Cas. 562; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541. (*Followed*) ... 89

Allahrakhio Abdulla v. Ladkih Sachoo, 51 Ind. Cas. 567; 13 S. L. R. 71. (*Followed*) ... 89

Amin-ud-Din Dafadar v. Ananda Chandra Palit, 46 Ind. Cas. 924; 28 C. L. J. 507. (*Followed*) ... 317

Ammu v. Rama Krishna Sastri, 2 M. 226; 1 Ind. Dec. (N. S.) 429. (*Followed*) ... 881

Ammu Ammal v. Puthiah Parambath Moidin, 43 Ind. Cas. 677; (1918) M. W. N. 28. (*Relied on*) ... 881

Ana Sheikh Mohidin Tharagan v. Vadivalagia Nambia Pillai, 22 Ind. Cas. 37; (1914) M. W. N. 92. (*Distinguished*) ... 958

Ananda Hait v. Khudiram Hait, 25 Ind. Cas. 558; 19 C. L. J. 532. (*Relied on*) ... 510

Anandamoyee Chaudhurani v. Gokulchandra Roy, 14 Ind. Cas. 290; 16 C. W. N. 763. (*Distinguished*) ... 298

Anant Kalwar v. Ram Prasad Tewari, 78 Ind. Cas. 619; 22 A. L. J. 182. (*Relied on*) ... 1019

Anderson v. Delhi Cotton Mills, 69 P. R. 1903; 155 P. L. R. 1903. (*Distinguished*) ... 275

Appi Reddi v. Appi Reddi, 66 Ind. Cas. 271; 45 M. 189; 14 L. W. 639; 41 M. L. J. 606; (1921) 1 M. W. N. 816; (1922) A. I. R. (M.) 246. (*Followed*) ... 395

Arumbati v. Ram Narain, 58 Ind. Cas. 299; 2 P. L. T. 38. (*Followed*) ... 418

Arunachela Ayyar v. Subbaramiah, 68 Ind. Cas. 971; 46 M. 60; (1922) M. W. N. 600; 31 M. L. T. 257; 16 L. W. 583; 43 M. L. J. 632; (1923) A. I. R. (M.) 63. (*Considered*) ... 651

Arunachella Ambalam v. R. G. Orr, 29 Ind. Cas. 634; 32 M. L. J. 407; 40 M. 722. (*Followed*) ... 843

Arunachellam Chetty v. Perinsami Servai, 70 Ind. Cas. 439; 44 M. 902; (1921) M. W. N. 569; 41 M. L. J. 252; 14 L. W. 645. (*Followed*) ... 917

A—concld.

Page.

Asadali Chowdhury v. Mahamad Hossain Chowdhury, 36 Ind Cas. 177; 43 C. 986; 20 C. W. N. 1009. (*Distinguished*) ... 363
Asher v. Whitlock, (1866) 1 Q. B. D. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26. (*Explained*) ... 874
Ashfaq Husain v. Gauri Sahai, 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; 38 I. A. 37; (1911) 2 M. W. N. 177 (P. C.). (*Followed*) ... 477
Asima Bibi v. Shamalanand, 17 Ind. Cas. 758; 40 C. 378; 17 C. W. N. 121; 13 M. L. T. 159; (1913) M. W. N. 125; 11 A. L. J. 169; 17 C. L. J. 303; 15 Bom. L. R. 423; 25 M. L. J. 55 (P. C.). (*Distinguished*) ... 174
Ataullah v. Shamsuddin, 11 Ind. Cas. 278. (*Followed*) ... 417
Ayappa Nainar v. Manicka Asari, 27 Ind. Cas. 241; 40 M. 636. (*Distinguished*) ... 340
Ayya Mudali Velan v. Veerayee, 58 Ind. Cas. 498; (1920) M. W. N. 467; 12 L. W. 188; 39 M. L. J. 218; 43 M. 812. (*Distinguished*) ... 860
Aziz Khan v. Duni Chand, 20 Ind. Cas. 812; 305 P. L. R. 1913; 195 P. W. R. 1913. (*Relied on*) ... 995

B

Baba Din v. Bansraj, 27 Ind. Cas. 567; 2 O. L. J. 55; 18 O. C. 84. (*Relied on*) ... 517
Babu Ram v. Said-un-nissa, 20 Ind. Cas. 916; 35 A. 499; 11 A. L. J. 783. (*Distinguished*) ... 471
Badri Kasodhan v. Sarju Misr, 22 Ind. Cas. 668; 36 A. 55; 12 A. L. J. 29. (*Followed*) ... 318
Badvel Chinna Asethu v. Vattipalli Kesavayya, 60 Ind. Cas. 215; 39 M. L. J. 697; 12 L. W. 507; (1920) M. W. N. 780; 29 M. L. T. 63. (*Followed*) ... 968
Bai Keser Bai v. Hansraj, 33 I. A. 176; 30 B. 431; 10 C. W. N. 802; 4 C. L. J. 9; 8 Bom. L. R. 446; 3 A. L. J. 484; 1 M. L. T. 211; 16 M. L. J. 446 (P. C.). (*Followed*) ... 861
Baijamna Bai, *In re*, 11 Ind. Cas. 534; 13 Bom. L. R. 487; 36 B. 20. (*Distinguished*) ... 363
Baijnath Das v. Sohan Bibi, 3 Ind. Cas. 967; 6 A. L. J. 786; 6 M. L. T. 94; 31 A. 545. (*Distinguished*) ... 87
Balambal Ammal v. Arunachala Chetti, 18 M. 255; 6 Ind. Dec. (N. S.) 527. (*Followed*) ... 520
Baldeo Misir v. Ram Logan Shukul, 77 Ind. Cas. 691; 21 A. L. J. 648; (1924) A. I. R. (A.) 82; 45 A. 709. (*Followed*) ... 217
Balla Mal v. Ahad Shah, 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.) (*Followed*) ... 995
Balvant Santaram v. Babaji, 8 B. 602; 9 Ind. Jur. 227; 4 [illegible] Dec. (N. S.) 778. (*Relied on*) ... 1019

B—contd.

Page.

Balwant Rao v. Baji Rao, 57 Ind. Cas. 545; 47 I. A. 213; 39 M. L. J. 166; (1920) M. W. N. 483; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 16 N. L. R. 187; 25 C. W. N. 243; 48 C. 30 (P. C.). (*Relied on*) ... 861
Balwant Rao v. Baji Rao, 57 Ind. Cas. 545; 47 I. A. 213; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 3 N. L. J. 251; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 16 N. L. R. 187; 25 C. W. N. 243; 48 C. 30 (P. C.). (*Followed*) 861, 862
Bama Charan Chakravarti v. Kishore Mohan Roy, 64 Ind. Cas. 903; 35 C. L. J. 58. (*Relied on*) ... 520
Bank of Multan, Limited in Liquidation v. Hukam Chand, 71 Ind. Cas. 899. (*Considered*) 740
Barrs v. Jackson, (1842) 1 Y. & C. C. C. 401 at pp. 585, 597; 57 R. R. 461 at p. 465; 1 Phillips 582; 65 R. R. 457; 14 L. J. Ch. 433; 9 Jur. 609. (*Followed*) ... 520
Basappa v. Ragava, 29 B. 91; 6 Bom. L. R. 779. (*Followed*) ... 1048
Bazlul Karim v. Satish Chandra Giri, 10 Ind. Cas. 325; 15 C. W. N. 752; 13 C. L. J. 418. (*Followed*) ... 1038
Begg Dunlop & Co. v. Jagannath Marwari, 11 Ind. Cas. 417; 14 C. L. J. 228 at p. 231; 39 C. 104; 16 C. W. N. 402. (*Relied on*) ... 806
Behari Lal v. Haluba Bibi, 8 A. 267; A. W. N. (1896) 91; 5 Ind. Dec. (N. S.) 58. (*Relied on*) 260
Bemala Dossee v. Mohu Dossee, 5 C. 792; 6 C. L. R. 34; 2 Ind. Dec. (N. S.) 1112. (*Relied on*) ... 517
Beningfield v. Kynaston, (1887) 3 T. L. R. 279. (*Followed*) ... 287
Benode Beharaj Mookerjee v. Raj Narain Mitter, 30 C. 699; 7 C. W. N. 651. (*Distinguished*) ... 66
Benode Behari Mookerjee v. Raj Narain Mitter, 30 C. 699; 7 C. W. N. 651. (*Relied upon*) ... 914
Bhagwan Singh v. Kherag Singh, 4 A. L. J. 756; A. W. N. (1907) 280. (*Followed*) ... 495
Bhagwan Singh v. Raj Kumar, 38 Ind. Cas. 157. (*Followed*) ... 495
Bhagwandas Parasram v. Burjorji Ruttonji Bomanji, 44 Ind. Cas. 284; 42 B. 373; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211; 45 I. A. 29 (P. C.). (*Relied on*) ... 578
Bhagwant v. Tursi Ram, 51 Ind. Cas. 130; 1 U. P. L. R. (A.) 48. (*Relied on*) ... 1055
Bhagwant Appaji v. Kedari Kashinath, 25 B. 202; 2 Bom. L. R. 986. (*Not followed*) ... 625
Bhagwant Gopal v. Appaji Govind, 36 Ind. Cas. 598; 18 Bom. L. R. 803. (*Distinguished and discussed*) ... 226
Bhagwarsa v. Maroti, 43 Ind. Cas. 395. (*Followed*) ... 50
Bhagwat Das v. Debi Dei, 16 A. 218; A. W. N. (1894) 45; 8 Ind. Dec. (N. S.) 141. (*Relied on*) ... 143

B—contd.

Bhagwat Koer v. Dhanukdhari Prasad Singh, 53 Ind. Cas. 347; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.). (*Relied on*) ... 25

Bhagwati v. Banwari Lal, 1 Ind. Cas. 416; 31 A. 82; 5 M. L. T. 185; 6 A. L. J. 71 (F. B.). (*Distinguished*) ... 486

Bhajan Lal v. Chedda Lal, 24 Ind. Cas. 215; 12 A. L. J. 825. (*Relied on*) ... 799

Bhausing v. Choganiram Hurchand, 45 Ind. Cas. 552; 42 B. 363; 20 Bom. L. R. 348. (*Relied on*) ... 997

Bhoja Chowdhury v. Chuni Lal Marwari, 5 C. L. J. 95; 11 C. W. N. 284. (*Relied on*) ... 520

Bholanath Sen v. Balaram Das, 70 Ind. Cas. 932; (1923) M. W. N. 525; 31 M. L. T. 306; (1922) A. I. R. (P. C.) 382; 27 C. W. N. 607; 18 L. W. 48 (P. C.). (*Followed*) ... 466

Bhujabalappa v. The Collector of Dharwar, 1 Bom. L. R. 454. (*Relied upon*) ... 376

Bhup v. Ram Lal, 11 Ind. Cas. 268; 8 A. L. J. 1009; 33 A. 795. (*Followed*) ... 367

Bhup Kumar v. Balbir Sahai, 64 Ind. Cas. 885; 44 A. 190; 19 A. L. J. 978; (1922) A.I.R. (A) 342. (*Distinguished*) ... 296

Bhupal Singh v. Mohan Singh, 19 A. 324; A. W. N. (1897) 72; 9 Ind. Dec. (N. S.) 212. (*Followed*) ... 220

Bhupati Nath Smrititirthe v. Ram Lal Maitra, 3 Ind. Cas. 642; 37 C. 128; 10 C. L. J. 355; 14 C. W. N. 18. (*Relied on*) ... 173

Bhutaneswar Prasad Singh v. Tilakdhari Lal, 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.). (*Followed*) ... 351

Bibi Sahibzadi v. Syed Mir Mahomed, 32 Ind. Cas. 548; 9 S. L. R. 143. (*Relied upon*) ... 914

Bijoy Gopal Mukerji v. Kishori Mahishi Debi, 34 I. A. 87; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 C. 329 (P. C.). (*Followed*) ... 961

Bijoy Gopal Mukerji v. Krishna Mahaishi Debi, 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.). (*Distinguished*) ... 1011

Bilas Kunwar v. Desraj, 30 Ind. Cas. 299; 37 A. 557 at 562; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248, 13 A.L.J. 991; 17 Bom. L. R. 1606; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.). (*Distinguished*) ... 59

Binayakdas Acharjee v. Nalivi Kumar Chakravarty, 70 Ind. Cas. 459; 26 C. W. N. 804. (*Relied on*) ... 67

Biroo Garain v. Jaimurat Koer, 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J. 174. (*Followed*) ... 89

Biru v. Samanda, 67 Ind. Cas. 276; 2 L. L. J. 669. (*Followed*) ... 543

Bismillah Begam v. Hiralal, 37 Ind. Cas. 832. (*Followed*) ... 504

Bissa Mal v. Kesar Singh, 58 Ind. Cas. 789; 1 L. 363. (*Relied on*) ... 997

B—concld.

Bissesuri Dabeea v. Baroda Kanta Roy, 10 C. 1076; 9 Ind. Jur. 226; 5 Ind. Dec. (N. S.) 719 (*Followed*) ... 1038

Biswanath Prasad v. Chandra Narayan Chowdhury, 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.). (*Followed*) ... 869

Blide Kamayya v. Pragada Papayya, 37 Ind. Cas. 414; 40 M. 259; 21 M. L. T. 82; (1911) M. W. N. 217 & 246; 5 L. W. 558; 32 M. L. J. 471. (*Relied on*) ... 92

Bohal Singh v. Mubarak-un-Nissa, 5 A. L. J. 52; A. W. N. (1908) 16; 30 A. 77. (*Dissented from*) ... 612

Blake Mal v. T. G. Heres, 151 P. L. R. 1901; 96 P. R. 1901. (*Followed*) ... 995

B. B. & C. I. Railway Co., v. Ranchodlal Chotalal & Co., 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779. (*Relied on*) ... 137

Bonamali Roy v. Jagat Chundra, 32 C. 669; 1 C. L. J. 319; 9 C. W. N. 673; 15 M. L. J. 267; 2 A. L. J. 794; 32 I. A. 80; 8 Sar. P. C. J. 784 (P. C.) (*Relied on*) ... 117

Brij Bhukan v. Durga Dat, 20 A. 258; A. W.N. (1898) 41; 9 Ind. Dec. (N. S.) 527. (*Relied on*) ... 281

Brij Narain Rai v. Mangala Prasad Rai, 77 Ind. Cas. 689; 28 C. W. N. 253; 21 A. L. J. 934; 45 M. L. J. 23; 5 P. L. T. 1; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457 (P. C.). (*Followed*) 21, 35, 104

Brij Narain Rai v. Mangala Prasad Rai, 77 Ind. Cas. 689; 21 A. L. J. 934; 45 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457 (P. C.). (*Relied on*) ... 1041

Brocklebank v. Kings Lynn Steamship Co., (1878) 3 C. P. D. 365; 47 L. J. C. P. 321. (*Distinguished*) ... 298

Brood v. Thomas, (1831) 7 Bing. 99; 33 R. R. 339. (*Followed*) ... 287

Bryant v. La Banque du peuple, (1893) A. C. 170; 62 L. J. P. C. 68; 1 R. 336; 68 L. T. 546; 41 W. R. 600. (*Relied on*) ... 48

C

Chajju Ram v. Neki, 72 Ind. Cas. 566; 49 I. A. 144; 26 C. W. N 697; 3 L. 127; 43 M. L. J. 322; 24 Bom. L. R. 1238; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.). (*Followed*) ... 745

Chalavadi Kotiah v. Poloori Alamelammah, 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329. (*Followed and applied*) ... 779

Challa Gundla Varamma v. Madala Gopaldasayya, 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461 (F. B.). (*Relied on*) ... 484

Chander Coomar Mandal v. Bakar Ali Khan, 9 W. R. 508. (*Relied on*) ... 161

Chandra Kanta Ganguly v. Sarojini Debi, 32 Ind. Cas. 786. (*Distinguished*) ... 298

C—concld.

Charanjit Singh v. Beshan Singh, 23 Ind. Cas. 462; 167 P. L. R. 1914; 78 P. W. R. 1914. (*Relied on*) ... 211
Charitter Rai v. Kailash Behari, 44 Ind Cas. 422; 3 P. L. J. 306; (1918) Pat. 145; 4 P. L. W. 213. (*Relied on*) ... 1029
Charu Chandra Ghosh v. Chandi Charan Roy, 27 Ind. Cas. 492; 19 C. W. N. 25. (*Followed*) ... 351
Chattan Lal v. Kallu, 8 Ind. Cas. 719; 33 A. 283; 8 A. L. J. 15. (*Followed*) ... 234
Chaturbhuj v. Chandirmool, 5 Ind. Cas. 705; 6 N. L. R. 27 at p. 29. (*Followed*) ... 161
Chhagan Lal v. Muhammad Husain Khan, 51 Ind. Cas, 133; 41 A. 456; 1 U. P. L. R. (A.) 1; 17 A. L. J. 741. (*Followed*) ... 308
Chhatter Singh v. Tej Singh, 59 Ind. Cas. 671; 18 A. L. J. 956; 2 U. P. L. R. (A.) 384; 43 A. 104. (*Followed*) ... 572
Chhitar Mal v. Jagan Nath Prasad, 29 A. 213; A. W. N. (1907) 25; 4 A. L. J. 24. (*Relied on*) 201, 471
Chidambaram Chettiar v. Sami Aiyar, 30 M. 6; 16 M. L. J. 427; 1 M L. T. 351. (*Relied on*) ... 625
Chidambaram Chettiar v. Srinivasa Sastrial, 23 Ind. Cas. 714; 37 M. 227; 26 M. L. J. 473; 18 C. W. N. 841; 16 M. L. T. 286; 20 C. L. J. 571; (1914) M. W. N. 754; 16 Bom. L. R. 783; 1 L. W. 963 (P. C.). (*Relied on*) ... 625
Chinnaji Govind Godbole v. Dinkar Donder Godbole, 11 B. 320; 11 Ind. Jur 342; 6 Ind. Dec. (N. S.) 209. (*Relied on*) ... 1029
Chintamani Bhatla Venkata Reddi v. Rani Saheb of Wadhwan, 55 Ind. Cas. 538; 47 I. A. 6; 38 M. L. J. 393; 11 L. W. 451; 18 A. L. J. 367; (1920) M. W. N. 315; 22 Bom. L. R. 541; 2 U. P. L. R. (P. C.) 77; 43 M. 541; 28 M. L. T. 457. (*Followed*) ... 296
Chokalinga Pillai v. Kumara Viruthalam, 4 M. H. C. R. 334; 17 W. R. 381 *note*. (*Distinguished*) 729, 755
Chokhey Singh v. Hardu Singh, 64 Ind. Cas. 757; 24 O. C. 330; 8 O. L. J. 667; 4 U. P. L. R. (O.) 10. (*Relied on*) ... 1019
Chowdhury Chuttarsal Singh v. The Government, 3 W. R. 57. (*Distinguished*) ... 1002
Chuttan Lal v. Jai Ram, 8 Ind. Cas. 719; 8 A. L. J. 15; 33 A. 283. (*Followed*) ... 1019
Clegg v. Fishwick, (1849) 1 Mac. & G. 294; 41 E. R. 1278; 1 H. & T. 399; 19 L. J. Ch. 49; 13 Jur. 993; 84 R. R. 61. (*Followed*) ... 658
Coburn v. College, (1897) 1 Q. B. 702; 66 L. J. Q. B. 462; 76 L. T. 603; 45 W. R. 488. (*Followed*) ... 520
Colonial Bank v. Whinney, (1887) 11 A. C. 426; 56 L. J. Ch. 43; 55 [illegible]. 362; 34 W. R. 705; 3 Morrell 207. (*Followed*) ... 809
Corea v. Appuhamy, (1915) A. C. 230; 81 L. J. P. C. 151; 105 L. T. [illegible]. (*Relied on*) 174
Cunningham v. Earl of Salisbury, (1843) 3 Hare 627; at p. 638 66 E. R. 530. (*Relied on*) ... 22
Culley v. Doed Taylerson, (1840) 11 A. & E. 1008; 3 P. & D. 539; 9 L. J. Q. B. 288; 113 E. R. 697; 52 R. R. 566. (*Relied on*) 951

D

Dadoba v. Krishna, 7 B. 34; 4 Ind. Dec. (N. S.) 22. (*Relied upon*) ... 59
Daryao Singh v. Jahan Singh, 3 Ind. Cas. 903; 6 A. L. J. 735; 31 A. 539. (*Distinguished*) ... 495
Daudbhai Allibhai v. Daya Rama, 51 Ind. Cas. 109; 43 B. 568; 21 Bom L. R. 363. (*Relied on*) ... 666
Daya Khushal v. The Assistant Collector of Surat, 21 Ind. Cas. 320; 38 B. 37; 15 Bom. L. R. 845. (*Relied upon*) ... 376
Daya Kishen v. Mohammad Wazir Ahmad, 30 Ind. Cas. 565; 13 A. L. J. 833. (*Distinguished*) ... 577
Debi Charan Lal v. Mehdi Husain, 35 Ind. Cas. 888; 1 P. L. J. 485; 1 P. L. W. 209; 20 C. W. N. 1303. (*Relied on*) ... 281
Debi Prasad v. Bhagwan Din, 16 Ind. Cas. 399; 35 A. 27; 10 A. L. J. 437. (*Relied on*) ... 1025
Delhi Cloth & General Mills Co. v. Kanhaiya Lal, 19 Ind. Cas. 93; 80 P. R. 1913; 344 P. L. R. 1913; 111 P. W. R. 1913. (*Followed*) ... 221
Devi Ditta v. Saudagar Singh, 65 P. R. 1900 P. L. R. 1900 p. 322 (F. B.). (*Followed*) 543, 980
Dhanjishah v. Fforde, 11 B. 649; 6 Ind. Dec. (N. S.) 427. (*Relied upon*) ... 30
Dhanmur v. Govind, 8 B. 99 at p. 102; 8 Ind. Jur. 261; 4 Ind. Dec. (N. S.) 439. (*Relied upon*) ... 914
Dhanpati Srinivasacharlu v. A. Perindevamma, 33 Ind. Cas. 602; 39 M. 725; 30 M. L. J. 402 (F. B.). (*Followed*) ... 923
Dhapi v. Ram Pershad, 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. S.) 509. (*Relied on*) 168
Dharam Chand v. Karm Devi, 6 P. R. 1893 (*Not followed*) ... 171
Dhareesamma v. The Deputy Collector of Cochin, 77 Ind. Cas. 347; 45 M. L. J. 339; 18 L. W. 356; (1923) M. W. N. 682; 33 M. L. T. 48. (*Followed*) ... 376
Digambar Singh v. Ahmed Sayeed Khan, 28 Ind. Cas. 34; 37 A. 129; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L. J. 237; 28 M. L. J. 556; 17 Bom. L. R. 391; (1915) M. W. N. 581; 42 I. A. 10 (P. C.). (*Followed*) ... 41
Din Ram v. Hari Das, 14 Ind. Cas. 744; 34 A. 482; 9 A. L. J. 743. (*Relied on*) ... 1017
Dinobundhu Shaw Chowdhury v. Jogmaya Dasi, 29 I. A. 9; 29 C. 154; 12 M. L. J. 73; 4 Bom. L. R. 228; 6 C. W. N. 209 (P. C.). (*Followed*) ... 592
Diwali v. Apaji Ganesh, 10 B. 342; 5 Ind. Dec. (N. S.) 615. (*Distinguished*) ... 117
Diwan Ran Bijai Bahadur Singh v. Indarpal Singh, 26 C. 871; 26 I. A. 226; 4 C. W. N. 1; 2 Bom. L. R. 1; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158 (P. C.). (*Followed*) ... 627
Diwan Singh v. Amir Singh, 5 Ind. Cas. 814; 16 P. R. 1910; 18 P. W. R. 1910; 62 P. L. R. 1910. (*Followed*) ... 155
Dobson v. Bengal Spinning and Weaving Coy., 21 B. 126; 11 Ind. Dec. (N. S.) 86. (*Relied upon*) ... 30

D—concld.

Page.

Donda v. Dwarka Prasad, 78 Ind. Cas. 121. (*Relied on*) ... 1031

Doraiya Solagyan v. Venkatarama Naicker, 60 Ind. Cas. 123; 12 L. W. 535. (*Followed*) 443

Dular Chand v. Balram Das, 1 A. 453; 1 Ind. Dec. (N. S.) 311. (*Followed*) ... 914

Duni Chand v. Muhammad Bakhsh, 8 P. L.R. 1907; 36 P. W. R. 1907. (*Distinguished*) ... 84

Durbar Kachar v. Kachar Harsur, 32 B. 348; 10 Bom. L. R. 227. (*Distinguished*) ... 1036

Durga v. Tota Ram, 19 Ind. Cas. 738; 16 O. C. 45. (*Distinguished*) ... 848

Durga Sundari Sen Gupta v. Ramkrishna Poddar, 21 Ind. Cas. 714; 18 C. L. J. 162. (*Relied on*) ... 1011

Dwarkanath Pal v. Tarini Sankar Roy, 34 C. 199; 5 C. L. J. 294; 11 C. W. N. 513. (*Relied on*) ... 106

E

Earl of Darnley v. London Chatham and Dover Railway, (1867) 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817. (*Relied on*) ... 769

East Indian Railway Co. v. Jethmull Ramanand, 26 B. 669; 4 Bom. L. R. 495. (*Distinguished*) ... 428

——— v. Kali Charan Ram Prasad, 60 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106. (*Followed*) ... 602

——— v. Nathmal Behari Lal, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321. (*Relied on*) ... 341

Edathil Thavazhi v. Eliangattial Sankara Valia, 45 Ind. Cas. 656; (1918) M. W. N. 376; 7 L. W. 574; 8 L. W. 44; 24 M. L. T. 79. (*Distinguished*) ... 881

Emanuel v. Symon, (1908) 1 K. B. 303; 77 L. J. K. B. 180; 98 L. T. 304; 24 T. L. R. 85. (*Relied on*) ... 332

Eslis Jenas Panloo v. Kitter Philip Gowrya, 64 Ind. Cas. 490; 23 Bom. L. R. 981; 46 B 226; (1922) A. I. R. (B) 380. (*Followed*) ... 89

F

Faiyaz Ali v. Rekhab Das, 61 Ind. Cas. 24; 19 A. L. J. 104. (*Followed*) ... 134

Faqirchand Motichand v. Motichand Harruchchund, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294. (*Followed*) ... 548

Fateh Chand v. Kirpa Singh, 13 Ind. Cas. 561; 48 P. R. 1912; 76 P. W. R. 1912; 45 P. L. R. 1912. (*Distinguished*) ... 149

Filip v. Mahomedally, 55 Ind. Cas. 822; 13 S. L. R. 183. (*Relied upon*) ... 914

Firm of Jai Narain Babulal v. Firm of Naraindas Jamimal, 65 Ind. Cas. 796; 16 S. L. R. 79; (1922) A. I. R. S. 6. (*Relied upon*) ... 986

Flight v. Bolland, (1828) 4 Russ. 298; 28 R. R. 101; 38 E. R. 817. (*Relied on*) ... 201

F—concld.

Page.

Ford Automobiles v. Delhi Motor and Engineering Co., 70 Ind. Cas. 138; 24 Bom. L. R. 1140; (1923) A. I. R. (B.) 125. (*Relied on*) ... 194

Fox v. Mackerth Pitt v. Mackerth, (1789-91) 2 Wh. & T. L. C. (7th Ed.) 709; 2 Cox. 158; 2 Br. C. C. 400; 4 Brro. P. C. 258; 2 R. R. 55; 29 E. R. 224. (*Followed*) ... 658

Fraser v. Krishnasami Ayyar, 71 Ind. Cas. 293; 43 M. L. J. 211; 16 L. W. 322; 31 M. L. T. 230; (1922) M. W. N. 745; (1923) A. I. R. (M.) 144. (*Followed*) ... 632

French & Co. v. Leeston Shipping Co., (1922) 1 A. C. 451; 91 L. J. K. B. 655; 127 L. T. 169; 27 Com. Cas. 257; 38 P. L. R. 459. (*Followed*) ... 287

Fukera Pashan v. Bibi Azima Nissa, 27 C. 540; 4 C. W. N. 459; 14 Ind. Dec. (N. S.) 355. (*Not followed*) ... 914

G

Gadadhar Ramanuj Das v. Ghanashyam Das, 47 Ind. Cas. 212; 3 P. L. J. 533. (*Distinguished*) ... 238

Gajadhar Bakhsh Singh v. Baijnath, 65 Ind. Cas. 967; 8 O. L. J. 605. (*Followed*) ... 104

Gajja Nund v. Emperor, 64 Ind. Cas. 500; 2 L. 288; 23 Cr. L. J. 20; 8 P. L. R. 1922. (*Followed*) ... 451

Gajraj Mati Tewarin v. Swami Nath Rai, 36 Ind. Cas. 307; 39 A. 13; 14 A. L. J. 853. (*Relied on*) ... 281

Galloway v. London Corporation, (1863) 1 H.L. 34; 35 L. J. Ch. 177; 12 Jur. (N. S.) 747; 14 L. T. 865. (*Relied on*) ... 948

Ganapathi v. Chatu, 12 M. 223; 24 Ind. Dec. (N. S.) 505. (*Followed*) ... 343

Ganesh Tewari v. Sakib Pande, 25 Ind. Cas. 42; 12 A. L. J. 949. (*Followed*) ... 345

Ganga Dayal v. Mani Ram, 1 Ind. Cas. 824; 31 A. 156; 6 A. L. J. 62. (*Followed*) ... 296

Ganga Dei v. Badam, 5 A. L. J. 99; 3 M. L. T. 194; A. W. N. (1908) 51; 30 A. 134. (*Distinguished*) ... 577

Gangadhara Ramarao v. Surya Rao (Raja of Pittapur), 19 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. J. 184. (*Distinguished*) ... 860

Ganpat Rai v. Munni Lal, 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 51. (*Distinguished*) ... 517

Gaya Din v. *Musammat* Dulari, 2 Ind. Cas. 839; 6 A. L. J. 693 (*Dissented from*) ... 945

Gerimal Hariram v. Raghnath Kalianji, 66 Ind. Cas. 873; 16 S. L. R. 71. (*Distinguished*) ... 384

Ghasiram v. Raja Mohan Bikram Sha, 6 C. L. J. 639 at p. 647. (*Relied on*) ... 48

Ghummanmal Pessumal v. Dayal Kanji, 1 S. L. R. 86. (*Followed*) ... 920

Girish Chandra Bit v. Bipin Behari Khan, 44 Ind. Cas. 750; 27 C. L. J 535. (*Relied on*) ... 520

Gobind Lal Seal v. Debendranath Mullick, 6 C. 311; 7 C. L. R. 181; 3 Ind. Dec. (N. S.) 203. (*Followed*) ... 59

G—concld.

Page.

Gobind Ram v. Kakim, 24 Ind. Cas. 880; 76 P. W. R. 1914; 174 P. L. R. 1914. (*Followed*) ... 107
Gobindlal Seal v. Debendranath Malik, 5 C. 679 at p. 680; 5 C. L. R. 527; 2 Ind. Dec. (N. S.) 1040. (*Followed*) ... 59
Gokal Prasad Har Prasad v. Ram Kunwar, 64 Ind. Cas. 878; 44 A. 176; 19 A. L. J. 971; (1922) A. I. R. (A) 254. (*Distinguished*) ... 482
Gokaldas Dwarkadas v. Otandas Dwarkadas, 2 S. L. R. 33. (*Distinguished*) ... 477
Gokaldas Gopaldas v. Puranmal Premsukh Das, 11 I. A. 126; 10 C. 1035; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.). (*Followed*) ... 592
Golak Nath Roy Chowdhry v. Mathura Nath Roy Chowdhry, 20 C. 273; 10 Ind. Dec. (N. S.) 185. (*Relied on*) ... 117
Golamee Chowkeedar v. Shaik Paela, 18 W.R. 298. (*Distinguished*) ... 576
Gopi v. Jaldhara, 7 Ind. Cas. 697; 33 A. 41; 7 A. L. J. 941. (*Relied on*) ... 86
Gopi Kishen v. Sorabjee, 68 Ind. Cas. 226; (1922) A. I. R. (N) 262. (*Followed*) ... 303
Gour Chandra Roy v. Janardan Prashad Thakur, 68 Ind. Cas. 337; 4 P. L. T. 204; (1923) A. I. R. (Pat.) 180. (*Relied on*) ... 188
Gouri Pattra v. Reily, 20 C. 579; 10 Ind. Dec. (N. S.) 392. (*Followed*) ... 852
Government of Bombay v. Karim Tar Mahomed, 3 Ind. Cas. 273; 33 B. 325; 10 Bom. L. R. 660. (*Relied on*) ... 74
Government of Bombay v. Merwanji Muncherji, 10 Bom. L. R. 907. (*Relied upon*) 74, 376
Grish Chandar v. Dwarkanath, 24 C. 640; 2 Ind. Dec. (N. S.) 1096. (*Not followed*) ... 914
Gujar Shah v. Barkat Ali Shah, 56 Ind. Cas. 744; 1 L. 213. (*Not followed*) ... 340
Gulab Kunwar v. Thakur Das, 24 A. 461; A. W. N. (1902) 136. (*Followed*) 69
Gunga Narain Gopo v. Kali Churn Goala, 22 C. 179; 11 Ind. Dec. (N. S.) 121. (*Followed*) 394
Gur Bakhsh Sahoo v. Birj Lal Benka, 26 C. 275; 3 C. W. N. 243; 13 Ind. Dec. (N. S.) 80. (*Followed*) ... 1024
Gurdeo Singh v. Chandrikah Singh, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611. (*Relied on*) ... 766
Gurelit Singh v. Ishar Kuer, 68 Ind. Cas. 551; 3 L. 257; (1922) A. I. R. (L.) 392. (*Followed*) 170

H

Habibul Rahman v. *Musammat* Rasul Bandi, 62 Ind. Cas. 859; 19 A. L. J. 376. (*Followed*) 391
Haidri Begam v. Nathu, A. W. N. (1891) 106; 8 Ind. Dec. (N. S.) 353; 17 A. 45. (*Followed*) ... 106
Hamraj Champa Lall v. Ram Kishan Ram, 38 Ind. Cas. 369; 2 P. L. J. 101; 1 P. L. W. 752; (1917) Pat. 304. (*Followed*) ... 395
Hance v. Harding, (1888) 20 Q. B. D. 732; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629. (*Relied on*) ... 888
Hancock and Hancock v. [illegible]aty, (1867) 1 P. & D. 335; 36 L. J. Mat. 51; 6 [illegible]2; 16 W. R. 719. (*Followed*) ... 535
Hanmant Lakshman v. Jan[illegible]ao Narasimha, 13 B. 50; 7 Ind. Dec. (N. S.) 33. (*Relied on*) 955

H—contd.

Page.

Hansa Godhaji v. Bhawa Jagaji, 33 Ind. Cas. 232; 40 B. 333; 18 Bom. L. R. 22. (*Dissented from*) ... 89
Hanuman Prasad Narain Singh v. Harak, 58 Ind. Cas. 551; 18 A. L. J. 59; 1 U. P. L. R. (A.) 142; 42 A. 142. (*Followed*) ... 532
Haraka v. Ram Sarup, 12 A. 579; A. W. N. (1890) 206; 6 Ind. Dec. (N. S.) 1115. (*Relied on*) ... 605
Harendra Kumar Ray Chowdhury v. Hara Kishore Pal, 70 Ind. Cas. 166; 26 C. W. N. 389; (1922) A. I. R. (C.) 201. (*Distinguished*) 648
Harendra Lal Roy Chowdhury v. Haridasi Bibi, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.). (*Followed*) ... 869
Hari Charan Ghosh v. Manmatha Nath Sen, 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343. (*Followed*) ... 351
Hari Lal v. Manman Kunwar, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819. (*Followed*) 1001
Hari Mohan Mandal v. Mohini Mohan Banerji, 33 Ind. Cas. 994; 22 C. W. N. 130. (*Relied on*) ... 955
Hari Nath Singh v. Ram Kumar Bagchi, 20 Ind. Cas. 703; 18 C. W. N. 119; 19 C. L. J. 59. (*Distinguished*) ... 298
Hari Prasad Singh v. Surendra Mohan Sinha, 66 Ind. Cas. 945; 3 P. L. T. 709; 1 Pat. 506; (1922) A. I. R. (Pat.) 450. (*Relied on*) ... 1019
Hari Ram v. Bishnath Singh, 22 A. 408; A. W. N. (1900) 158; 9 Ind. Dec. (N. S.) 1308. (*Distinguished*) ... 238
Haribhat v. Damodarbhat, 3 B. 171; 2 Ind. Dec. (N. S.) 115. (*Relied on*) ... 861
Haridas v. Baroda Kishore, 27 C. 38; 4 C. W. N. 87; 1 Ind. Dec. (N. S.) 126. (*Distinguished*) ... 384
Harish Chunder Neogy v. Secretary of State for India in Council, 11 C. W. N. 875 at p. 877. (*Relied on*) ... 74
Hassan Alli v. Ekambaram, 5 M. L. J. 29. (*Followed*) ... 520
Hazari Lal v. Ugra Rai, A. W. N. (1884) 103. (*Dissented from*) ... 645
Hedayet Ali v. Kamalanand Singh, 20 Ind. Cas. 332; 17 C. L. J. 411. (*Distinguished*)... 648
Heera Lall v. Dhunput Singh, 4 C. 500; 3 C. L. R. 554; 2 Ind. Dec. (N. S.) 317. (*Followed*) 489
Hemanta Kumari Debi v. Midnapore *Zemindari* Company Limited, 53 Ind. Cas. 534; 46 I. A. 240; 47 C. 485; 24 C. W. N. 177; 37 M. L. J. 525; 17 A. L. J. 1117; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 31 C. L. J. 298; 22 Bom. L. R. 488 (P. C.). (*Followed*) 257
Henry Maseyk v. Lyons, 5 W. R. (Mis.) 49. (*Distinguished*) ... 191
Het Ram v. Shadi Ram, 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.). (*Relied on*) ... 554

H—concld.

Page.

Hodgkinson, *Ex parte*, (1815) 19 Ves. Jun. 291; 34 E. R. 525; 13 R. R. 199. (*Relied on*) 966
Huminy v. Aziz-ud-din, 36 Ind. Cas. 277; 39 A. 143; 14 A. L. J. 1226. (*Relied on*) ... 506
Husaina v. Sahib Nur, 7 Ind. Cas. 505; 86 P. W. R. 1910; 113 P. L. R. 1910. (*Relied on*) 211
Husaini Khanam v. Husain Khan, 29 A. 471 at p. 475; (1907) A. W. N. 133; 4 A. L. J. 375. (*Followed*) ... 303
Husen v. Rajaram, 26 Ind. Cas. 813; 10 N. L. R. 133 at p. 137. (*Followed*) ... 48

I

Idris v. Skinner, 56 Ind. Cas. 723; 82 P. R. 1919; 45 P. W. R. 1919; 126 P. L. R. 1920 (P. C.). (*Distinguished*) ... 140
Imambandi v. Mutsaddi, 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73. (*Followed*) ... 260
Imamudin v. Liladhar, 14 A. 524; A. W. N. (1892) 104; 7 Ind. Dec. (N. S.) 705. (*Followed*) 914
Indubala Debi v. Atul Chandra Ghosh, 57 Ind. Cas. 344; 31 C. L. J. 507. (*Relied on*) 520
Indur Subbarami Reddy v. Kandadai Rajamannar Ayyangar, 26 M. 47; 12 M. L. J. 396. (*Relied on*) ... 48
Ishar Das v. Ladha Ram, 62 Ind. Cas. 924. (*Followed*) ... 395
Ismail Khan Mahomed v. Jaigun Bibi, 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374. (*Relied on*) ... 619

J

Jagan Nath v. Ajudhia Singh, 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 408. (*Followed*) ... 367
Jagannath v. Balwant Singh, 68 Ind. Cas. 247; 44 A. 692; 20 A. L. J. 570; (1922) A. I. R. (A.) 372; 4 U. P. L. R. (A.) 194. (*Followed*) 960
Jagannath Marwari v. Chandni Bibi, 67 Ind. Cas. 31; 26 C. W. N. 65; 34 C. L. J. 432. (*Relied on*) ... 26
Jagannath Prasad (Raja of Deo) v. Abdullah, 45 Ind. Cas. 770; 45 C. 909; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 I. A. 97 (P. C.). (*Followed*) ... 945
Jagat Chunder Roy v. Iswar Chunder Roy, 20 C. 693; 10 Ind. Dec. (N. S.) 468. (*Relied upon*) ... 384
Jagdeo Narain Singh v. Baldeo Singh, 71 Ind. Cas. 984; 49 I. A. 399; 3 P. L. T. 605; (1922) A. I. R. (P. C.) 272; 36 C. L. J. 499; 33 M. L. T. 1; (1923) M. W. N. 361; 2 Pat. 32; 27 C. W. N. 925; 45 M. L. T. 460 (P. C.). (*Relied upon*) ... 59
Jagdish Chandra Sanyal v. Lal Mohan Paddar, 7 Ind. Cas. 864; 13 C. L. J. 318. (*Distinguished*) ... 26
Jaggannath Prasad v. Tori, 3 A. L. J. 611; A. W. N. (1906) 253; 29 A. 18. (*Followed*) ... 560

J—concld.

Page.

Jagunath v. Khuba, 4 Ind. Cas. 795; 5 N. L. R. 176 at p. 179. (*Followed*) ... 161
Jahangira v. Karrar Hussain, 44 Ind. Cas. 513; 16 A. L. J. 212. (*Distinguished*) ... 665
Jalesar Sahu v. Raj Mangal, 63 Ind. Cas. 437; 19 A. L. J. 616; 43 A. 606. (*Followed*) 577, 599
Jamahar Kumari Bibi v. Askaran Boid, 30 Ind. Cas. 865; 22 C. L. J. 27. (*Followed*) ... 899
Jaman Ram. v. Kishen Ram, 25 Ind. Cas. 642; 79 P. W. R. 1914; 234 P. L. R. 1914; 42 P. R. 1914. (*Followed*) ... 125
Jamna Pershad v. Balbhada, 74 Ind. Cas. 353; 9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O.) 147. (*Followed*) ... 725
Janakee Debee v. Gopal Acharyia, 9 C. 766; 13 C. L. R. 30; 10 I. A. 32; 4 Sar. P. C. J. 411; 7 Ind. Jur. 218; 4 Ind. Dec. (N. S.) 1159. (*Relied on*) ... 891
Janaki Ammal v. Narayanasami Aiyar, 37 Ind. Cas. 167; 39 M. 634; 31 M. L. J. 225; 20 M. L. T. 168; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. C.). (*Relied on*) ... 484
Jang Bahadur Singh v. Hanwant Singh, 43 Ind. Cas. 212; 43 A. 520; 19 A. L. J. 469. (*Distinguished*) ... 1047
Jankee Debee v. Acharyia, 2 C. 365; 1 Ind. Jur. 737; 1 Ind. Dec. (N. S.) 523. (*Relied on*) ... 891
Jethalal Girdhar v. Varajlal Bhanismba, 63 Ind. Cas. 478; 46 B. 184; 23 Bom. L. R. 769; (1922) A. I. R. (B.) 237. (*Followed*) ... 482
Jewan Ram v. Rattan Chand Kissen, 70 Ind. Cas. 498; 26 C. W. N. 285. (*Distinguished*) ... 384
Jhamphu v. Kutramani, 42 Ind. Cas. 713; 15 A. L. J. 761; 39 A. 696. (*Followed*) ... 394
Jhamplu v. Kutramani, 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761. (*Relied on*) ... 26
Jhanda Singh v. Wahid-ud-din, 14 Ind. Cas. 269. (*Distinguished*) ... 213
Jhitibai v. Tejmal, 41 Ind. Cas. 35; 13 N. L. R. 109. (*Followed*) ... 22
Jogendra Nath Singh v. Secretary of State for India, 17 Ind. Cas. 921; 16 C. L. J. 385; 17 C. W. N. 235. (*Followed*) ... 1038
Johurra Bibee v. Sreegopal Misser, 1 C. 470; 1 Ind. Dec. (N. S.) 293. (*Relied on*) ... 517
Jonardhan Dobey v. Ramdone Singh, 23 C. 738 at p. 743; 12 Ind. Dec. (N. S.) 491. (*Relied on*) ... 506
Joshi Shib Prakasha v. Jhinguria, 78 Ind. Cas. 416; 46 A. 144. (*Relied on*) ... 997
Joy Prokash Lall v. Sheo Golam Singh, 11 C. 37; 5 Ind. Dec. (N. S.) 782. (*Relied on*) 48
Jugal Keshori Chowdhrani v. Anunda Lal Chowdhuri, 22 C. 515 at p. 549; 9 Ind. Dec. (N. S.) 353. (*Relied on*) ... 201

K

Kadiri Kana Abdurehman v. Kochipalli, 58 Ind. Cas. 262; 42 M. 761 at p. 768; 10 L. W. 204; 26 M. L. T. 195; 37 M. L. J. 316; (1919) M. W. N. 600. (*Distinguished*) ... 633

K—contd.

Page.

Kailas Chandra v. The Secretary of State for India in Council, 18 Ind. Cas. 638; 17 C. L. J. 34. (*Followed*) ... 376
Kaji Ahmad v. Kaji Mahamad, 9 B. 308; 5 Ind. Dec. (N. S.) 205. (*Relied on*) ... 143
Kajimal v. Pannalal, 28 Ind. Cas. 262; 7 P. R. 1915; 15 P. L. R. 1916. (*Followed*) ... 923
Kalee Pershad Tewarree v. Rajah Sahib Pershad Seer, 12 M. I. A. 282; 12 W. R. 6 (P. C.); 2 B. L. R. 111 (P. C.); 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 429; 20 E. R. 345. (*Relied on*) ... 260
Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi, 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217. (*Followed*) ... 365
Kalicharan v. Lal Indar Shah, 48 Ind. Cas. 923; 15 N. L. R. 31. (*Followed*) ... 19
Kalipada Sarkar v. Hari Mohun Dalal, 35 Ind. Cas. 856; 44 C. 627; 24 C. L. J. 375; 21 C. W. N. 1104. (*Followed*) ... 916
Kalka Singh v. Himayat Ali, 10 O. C. 218. (*Distinguished*) ... 955
Kalliani Amma v. Govinda Menon, 12 Ind. Cas. 492; 35 M. 648; 10 M. L. T. 399; (1911) 2 M. W. N. 487; 22 M. L. T. 23. (*Relied on*) ... 886
Kalyan Das v. Maqbul Ahmed, 46 Ind. Cas. 548; 40 A. 497; 22 C. W. N. 866; 16 A. L. J. 693; 5 P. L. W. 159; 35 M. L. J. 169; 23 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 55; 24 M. L. T. 110; 20 Bom. L. R. 864 (P. C.). (*Followed*) ... 1049
Kandarpa v. Banwari, 60 Ind. Cas. 864; 33 C. L. J. 244 at p. 250. (*Relied on*) ... 958
Kanhaya Lal v. Girdhari Lal, 13 Ind. Cas. 956; 9 A. L. J. 103. (*Dissented from*) ... 945
Kanhaya Lal v. Sardar Singh, 29 A. 284; 4 A. L. J. 171; A. W. N. (1907) 46. (*Followed*) ... 520
Kanji Mal v. Panna Lal, 28 Ind. Cas. 262; 7 P. R. 1915; 15 P. L. R. 1916. (*Followed*) 582
Kantee Chandra Mukerji v. Ali Nabi, 9 Ind. Cas. 935; 33 A. 414; 8 A. L. J. 199. (*Followed*) ... 514
Kartar Singh v. Kirpa Singh, 30 P. L. R. 1922; 3 P. W. R. 1922. (*Followed*) ... 543
Kashirao v. Ukarda, 31 Ind. Cas. 290; 11 N. L. R. 116. (*Followed*) ... 48
Katwari v. Sita Ram Tewari, 63 Ind. Cas. 264; 3 U. P. L. R. (A.) 99; 43 A. 517; 19 A. L. J. 473. (*Distinguished*) ... 106
Katwari v. Sita Ram Tewari, 63 Ind. Cas. 264; 19 A. L. J. 473; 3 U. P. L. R. (A.) 99; 43 A. 517. (*Followed*) ... 532
Kearsley, *Ex parte*, Genese, *In re*, (1886) 17 Q. B. D. 1; 55 L. J. Q. B. 325; 34 W. R. 474; 3 Morrell 57. (*Followed*) ... 395
Kedar Nath Mitter v. Denobandhu Shaha, 31 Ind. Cas. 626; 42 C. 1043; 19 C. W. N. 724. (*Distinguished*) 729, 755
Kedar Singh v. Matabadal Singh, 1 Ind. Cas. 703; 31 A. 41; A. W. N. (1908) 276; 5 A. L. J. 713. (*Followed*) ... 303
Kewalram Ghanshamdas v. Donald Graham, 10 Ind. Cas. 211; 5 S. L. R. 61. (*Followed*) 920

K—contd.

Page.

Khiarajmal v. Daim, 32 C. 296; 32 I. A. 23; 1 C. L. J. 584; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.). (*Followed*) ... 491
Khushaliram v. Bholar Mal, 28 Ind. Cas. 573; 27 A. 252; 13 A. L. J. 270. (*Followed*) 395
Khwaja Muhammad Khan v. Muhammad Ibrahim, 26 A. 490. (*Relied on*) ... 174
Kirpal Singh v. Sardar Balwant Singh, 17 Ind. Cas. 666; 26 P. R. 1913; 13 M. L. T. 5; 11 A. L. J. 1; 9 P. W. R. 1913; 17 C. L. J. 137; 15 Bom. L. R. 79; 17 C. W. N. 302; 28 P. L. R. 1913; 24 M. L. J. 318; (1913) M. W. N. 58; 40 C. 288 (P. C.). (*Followed*) ... 980
Kisandas Rupchand v. Bachappa Vithoba Shilwant, 4 Ind. Cas. 726; 33 B. 644; 11 Bom. L. R. 1042. (*Relied on*) ... 287
Kishan Lal v. Ishri, 28 A. 237; A. W. N. (1905) 269. (*Distinguished*) ... 140
Kishari Dubain v. Mundra Dubain, 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757. (*Relied on*) ... 86
Knight and Tabernacle Permanent Building Society, *In re*, (1892) 2 Q. B. 613; 62 L. J. Q. B. 33; 4 R. 67; 67 L. T. 403; 41 W. R. 35; 57 J. P. 229. (*Relied upon*) ... 986
Kodumal Kalumal v. Messrs. Volkart Brothers, 48 Ind. Cas. 434; 12 S. L. R. 31. (*Distinguished*) ... 920
Koilpillai Samban v. Sapparimuthu Samban, 72 Ind. Cas. 220; 17 L. W. 187; 44 M. L. J. 247; (1923) A. I. R. (M.) 254. (*Considered*) ... 651
Kong Yee Lone and Company v. Lowjee Nanjee, 29 C. 461; 28 I. A. 239; 5 C. W. N. 714; 3 Bom. L. R. 476; 8 Sar. P. C. J. 101 (P. C.). (*Relied on*) ... 578
Krishna Aiyar v. Kuppan Aiyangar, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 4.9 (P. C.). (*Followed*) ... 968
Krishna Das Laha v. Haricharan Banerji, 10 Ind. Cas. 865; 14 C. L. J. 47; 15 C. W. N. 823. (*Distinguished*) ... 982
Krishna Jiva Tewari v. Bishnath Kalwar, 16 Ind. Cas. 392; 34 A. 615; 10 A. L. J. 217. (*Relied on*) ... 1001
Krishna Pillai v. Rangasami Pillai, 18 M. 462; 5 M. L. J. 187; 6 Ind. Dec. (N. S.) 672. (*Distinguished*) ... 510
Krishna Swamy v. Rama Swamy, 43 Ind. Cas. 493; 45 I. A. 25; 41 M. 412; 22 C. W. N. 481; 31 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 20 Bom. L. R. 541; 11 Bur. L. T. 121; (1918) M. W. N. 906 (P. C.). (*Followed*) ... 924
Krishna Valji Marwadi v. Bhan Mansaram, 18 B. 61; 9 Ind. Dec. (N. S.) 549. (*Relied on*) ... 168
Krishnaji Ramchandra v. Antaji Pandurang, 18 B. 256; 9 Ind. Dec. (N. S.) 679. (*Relied upon*) ... 59
Krishnaji Reddiar v. Muthuveera Reddiar, 72 Ind. Cas. 449; 44 M. L. J. 344; (1923) M. W. N. 199; 18 L. W. 299; (1923) A. I. R. (M.) 490. (*Considered*) ... 651

K—concld.

Page.

Krishnammal v. Soundaraja Aiyar, 22 Ind. Cas. 912; 38 M. 698; 15 M. L. T. 103; (1914) M. W. N. 200; 1 L. W. 147. (*Followed*) ... 520
Krishnaswamy Naidu v. Chengalraya Naidu, 76 Ind. Cas. 836; 47 M. 171; 18 L. W. 870; 45 M. L. J. 813; 33 M. L. T. 207; (1924) A. I. R. (M.) 114. (*Relied on*) ... 997
Krishnayya v. The Bellary Municipal Council 15 M. 292; 5 Ind. Dec. (N. S.) 555. (*Followed*) ... 197
Kristnama Chariar v. Mangammal, 26 M. 91 (F. B.). (*Relied on*) ... 92
Kulsoomenessa v. Ram Prasad, 67 Ind. Cas. 713; 44 A. 492; 20 A. L. J. 321; (1922) A. I. R. (A.) 226; 4 U. P. L. R. (A.) 168. (*Distinguished*) ... 482
Kumarappa Chettiar v. Murugappa Chettiar, 36 Ind. Cas. 771. (*Followed*) ... 395
Kumud Nath Roy Chowdhry v. Jatindra Nath Chowdhry, 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399. (*Relied on*) ... 381
Kunja Mal v. Gauri Shankar, 3 A. L. J. 30; A. W. N. (1905) 274; 1 M. L. T. 52. (*Followed*) ... 69
Kunjo Behari Bardhan v. Goto Behari Bardhan, 42 Ind. Cas. 590; 22 C. W. N. 66; 27 C. L. J. 486. (*Relied on*) ... 718
Kyin Wet v. Ma Gyoke, 9 L. B. R. 179. (*Relied on*) ... 729

L

Lachhman Prasad v. Sarman Singh, 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 30 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.). (*Followed*) ... 171
Lachmi Narain Prasad v. Kishan Kishore Chand, 33 Ind. Cas. 913; 14 A. L. J. 25; 38 A. 126. (*Distinguished*) ... 1010
Lachmi Prasad v. Baldeo Dube, 44 A. 458; 20 A. L. J. 390; (1923) A. I. R. (A.) 14. (*Distinguished*) ... 471
Lachmi Prasad Chaudhury v. Jag Mohun Lal Chaubey, 22 Ind. Cas. 594; 18 C. L. J. 633. (*Discussed*) ... 412
Lahibai v. Valiram Ghaneshamdar, 24 Ind. Cas. 861; 7 S. L. R. 192. (*Distinguished*) ... 477
Lakshmi Achi v. Subbarama Ayyar, 29 Ind. Cas. 142; (1915) M. W. N. 327; 39 M. 488; 2 L. W. 403; 28 M. L. J. 191; 17 M. L. T. 385. (*Followed*) ... 860
Lakshmi Narain Roy v. Secretary of State, 44 Ind. Cas. 497; 45 C. 866; 28 C. L. J. 285. (*Distinguished*) ... 218
Lal Baijnath Singh v. Thakur Chandrapal Singh, 73 Ind. Cas. 529; 21 A. L. J. 457; (1923) A. I. R. (A.) 553. (*Followed*) ... 599
Lal Gopal Datta Chowdhury v. Kharooriah Majozilla Zemindary Syndicate Ltd., 13 Ind. Cas. 673; 16 C. W. N. 297. (*Relied on*) ... 201

L—concld.

Page.

Lala Ram v. Thakur Prasad, 47 Ind. Cas. 947; 40 A. 680; 16 A. L. J. 691. (*Relied on*) ... 103
Lalta Prasad v. Sheo Sahai, 1 A. W. N. (1885) 193. (*Distinguished*) ... 605
Lani Mia v. Muhammad Easin, 33 Ind. Cas. 448; 20 C. W. N. 948. (*Followed*) ... 317
Latifa Bi v. Mattai Ammal, 72 Ind. Cas. 141; 46 M. 836; 44 M. L. J. 271; 17 L. W. 341; (1923) M. W. N. 233; 32 M. L. T. 290; (1923) A. I. R. (M.) 320. (*Relied on*) ... 92
Levenia Ashton v Madhabmoni Dassi, 5 Ind. Cas. 390; 11 C. L. J. 489; 14 C. W. N. 560. (*Followed*) ... 632
Lloyd v. Grace Smith & Co., (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547. (*Relied on*) 139
Lokanathsingh v. Gaju Singh, 31 Ind. Cas. 426; 20 C. W. N. 178; 22 C. L. J. 333. (*Followed*) ... 477
Louis Dreyfus and Coy. v. Miran Bux, 2 S. L. R. 37. (*Distinguished*) ... 30

M

Ma Gywa v. Ma Thi Da, 2 U. B. R. (1892-96) 194. (*Relied on*) ... 501
Ma Hmon v. Maung Puw Dun, 2 U. B. R. (1897-1901) 138. (*Relied on*) ... 501
Ma U Byu v. Ma Hmyin, 2 U. B. R. (1897-1901) 160. (*Relied on*) ... 501
Machaima v. Usman Beari, 17 M. L. J. 78. (*Distinguished*) ... 955
Madan Lal v. Kishan Singh, 15 Ind. Cas. 138; 34 A. 572; 9 A. L. J. 814. (*Relied on*) 1001
Maddisson v. Alderson, (1883) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821. (*Relied on*) ... 26
Madhab Koeri v. Baikuntha Karmaker, 52 Ind. Cas. 338; 4 P. L. J. 682; (1919) Pat. 343. (*Relied on*) ... 955
Madhavrao Harisharrao v. Anusuya Bai Eknath Jope, 36 Ind. Cas. 505; 40 B. 666; 18 Bom. L. R. 768. (*Followed*) ... 621
Madho Rao Bhan Jamindar v. Govindbhat Brahman, 46 Ind. Cas. 794. (*Relied on*) ... 814
Madhodas v. Ramji Pattak, 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N. S.) 186. (*Distinguished*) ... 384
Madras & Southern Maharatta Ry. Co. Ltd. v. Mattai Subba Rao, 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49. (*Relied on*) ... 137
Magdalen Hospital v. Alfred Knotts, 4 A. C. 324; 48 L. J. Ch. 579; 40 L. T. 446; 27 W. R. 602. (*Relied on*) ... 117
Mahabeer Pershad v. Ramyad Singh, 12 B. L. R. 90; 20 W. R. 192. (*Not followed*) ... 171
Mahadeo v. Nago, 12 Ind. Cas. 357; 7 N. L. R. 130 at p. 133. (*Followed*) ... 168
Mahadeo v. Nago, 12 Ind. Cas. 357; 7 N. L. R. 130 at p. 133. (*Relied on*) ... 168
Mahananda Chakravarti v. Mongala Kantani, 31 C. 937; 8 C. W. N. 804. (*Distinguished*) 648

M—contd.

	Page.
Mahomed Ibrahim Hossein Khan v. Amrika Pershad Singh, 14 Ind. Cas. 496; 39 I. A. 68; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 C. 527; (P. C.). (*Followed*) ..	592
Mahomed Ismail Ariff v. Hajee Ahmed Moolla Dawood, 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517; 43 I. A. 127 (P. C.). (*Followed*)	120
Malkarjan v. Narhari, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.). (*Followed*)	106
Mana Lal v. Karu Singh, 56 Ind. Cas. 766; 1 P. L. T. 6; 13 L. W. 652 (P. C.). (*Followed*)	35
Manada Sundari Dehi v. Muhammad Sarnokar, 2 C. W. N. 367. (*Followed*) ...	627
Manindra Nath Mandal v. Mohanunda Roy, 13 Ind. Cas. 161; 15 C. L. J. 369. (*Relied on*)	67
Maniram v. Seth Rupchand, 2 N. L. R. 130; 4 C. L. J. 94 (P. C.); 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 33 C. 1047; 33 I. A. 165. (*Followed*) ...	66
Maniram Seth v. Seth Rupchand, 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.). (*Distinguished*) ...	279
Mariappa Pillai v. Raman Chettiar, 57 Ind. Cas. 519; 42 M. 322; 10 L. W. 59. (*Distinguished*) ...	395
Massey v. Allen, (1879) 12 Ch. D. 807; 48 L. J. Ch. 692; 41 L. T. 788; 28 W. R. 243. (*Distinguished*)	298
Mathews, *In re*, Oates v. Mooney, (1905) 2 Ch. 460; 71 L. J. Ch. 656; 93 L. T. 158; 54 W. R. 75. (*Discussed*) ...	298
Mathura Prasad v. Ram Charan Lal, 28 Ind. Cas. 261; 37 A. 208; 13 A. L. J. 283. (*Distinguished*) ...	381
Maung Kyin v. Ma Shwe La, 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 1 Bur. L. T. 21; 44 I. A. 236 (P. C.). (*Distinguished*) ...	81
Maung Kyir v. Ma Shwe Lal, 42 Ind. Cas. 642; 45 C. 320; 41 I. A. 236; 15 A. L. J. 825; 34 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21 (P. C.). (*Followed*) ..	186
Maung Po Tox v. Ma Swe Mi, 49 Ind. Cas. 62; 3 U. B. R. (1918-20) 109. (*Dissented from*) ..	718
Maung Shew Goh v. Maung Irn, 38 Ind. Cas. 938; 44 C. 542; 15 A. L. J. 82; 21 M. L. T. 18; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.). (*Followed*) ...	429

M—contd

	Page.
Mayamal v. Sanday Patrick & Co., 12 Ind. Cas. 662; 5 S. L. R. 97. (*Followed*) ..	30
McLaren Morrison v. Verschoyle, 6 C. W. N. 429 at p. 458. (*Distinguished*)	517, 633
Mercantile Bank of India Ltd., Madras v. The Official Assignee of Madras, 35 Ind. Cas. 942; 39 M. 250. (*Followed*)	809
Mi Kin Gale v. Mi Kin Gyi, 8 Ind. Cas. 1169; 1 U. B. R. (1910-13) 42. (*Relied on*) ...	501
Mi Shwe Ma v. Mi Me, 12 Ind. Cas. 191; 1 U. B. R. (1910-13) 114; 4 Bur. L. T. 235. (*Relied on*) ...	591
Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri, 13 Ind. Cas. 331; 39 C. 232; 16 C. W. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 156; 11 M. L. T. 8; 39 I. A. 1 (P. C.). (*Distinguished*) ..	955
Mirabita v. Imperial Ottoman Bank, (1878) 3 Ex. D. 164; 47 L. J. Ex. 418; 38 L. T. 597; 3 Asp. M. C. 591. (*Relied on*) ...	194
Mirza Muhammad Askari v. Lalu, 45 Ind. Cas. 594; 21 O. C. 68. (*Followed*) ..	414
Mohari Bibee v. Dharmadas Ghose, 30 C. 539; 30 I. A. 114; 5 Bom. L. R. 421; 7 C. W. N. 441; 8 Sar. P. C. J. 374 (P. C.). (*Distinguished*) ...	955
Mohendrasundar v. Dinabandhu, 21 Ind. Cas. 771; 19 C. L. J. 15. (*Relied on*) ...	982
Mohesh Chandra Banerji v. Prosanna Lal Singh, 31 C. 83; 8 C. W. N. 66. (*Distinguished*) ...	271
Mohini Mohan Bannerji v. Secretary of State for India, 67 Ind. Cas. 25; 25 C. W. N. 1002; 34 C. L. J. 188. (*Followed*)	376
Mohini Mohun Das v. Bungsi Buddon Saha Das, 5 Sar. P. C. J. 498; 8 Ind. Dec. (N. S.) 926; 17 C. 580. (*Followed*) ..	5
Monica Kitheria v. Subraya Hebborn, 30 M. 410; 17 M. L. J. 258; 20 M. L. T. 363. (*Dissented from*) ...	557
Moonshee Buzloor Ruheem v. Shumsoon Nissa Begum, 11 M. I. A. 551; 8 W. R. 3 (P. C.); 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; Marsh 286; 20 E. R. 208 (P. C.). (*Relied on*) ...	260
Moonshee Golam Ali v. Sowlanteenissa, W. R. (1864) 242. (*Distinguished*) ..	360
Motilal Pratabchand v. Surajmal Joharmal, 30 B. 167; 6 Bom. L. R. 1038. (*Distinguished*) ..	800
Motion Mark, *In re*, v. Davis, (1874) 9 Ch. App. 192 at p. 210; 43 L. J. K. B. 59; 29 L. T. 757; 22 W. R. 225. (*Followed*) ...	910
Muhammad Aziz-ud-Din Ahmad Khan v. The Legal Remembrancer to Government, N. W. P. and Oudh, 15 A. 321; A. W. N. (1893) 109; 7 Ind. Dec. (N. S.) 922. (*Distinguished*) ...	120
Muhammad Kamil v. Imtiaz Fatima, 4 Ind. Cas. 457; 31 A. 557; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 19 M. L. J. 697; 13 O. C. 183; 36 I. A. 210 (P. C.). (*Distinguished*) ..	134

M—concld.

Page.

Muhammad Musa v. Aghore Kumar, 28 Ind. Cas. 930; 42 C. 801 at p. 818; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. T. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.). (*Relied on*) .. 26

Muhammad Suddiq v. Abdul Majeed, 10 Ind. Cas. 478; 33 A. 616; 8 A. L. J. 636. (*Relied on*) .. 287

Muhammad Sulaiman v. Sakina Bibi, 69 Ind. Cas. 701; 20 A. L. J. 654; (1922) A. I. R. (A.) 392; 44 A. 674. (*Distinguished*) ... 174

Muhammad Syedol Ariffin v. Yeah Col Gark, 39 Ind. Cas. 401; 43 I. A. 256; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 534; 32 T. L. R. 678 (P. C.). (*Relied on*) .. 1026

Mummadi Venkatiah v. Boganatham Venkata Subbiah, 69 Ind. Cas. 366; 42 M. L. J. 51; (1922) M. W. N. 11; 30 M. L. T. 228; (1922) A. I. R. (M.) 65; 16 L. W. 198. (*Distinguished*) ... 635

Mumtaz-un-Nissa v. Tufail Ahmed, 28 A. 264; A. W. N. (1905) 269. (*Distinguished*) .. 716

Munji Khetsey, Land Acquisition Act, *In the matter of the*, 15 B. 279; 8 Ind. Dec. (N. S.) 189. (*Relied upon*) ... 376

Munni v. Madan Gopal, 27 Ind. Cas. 733; 13 A. L. J. 185. (*Distinguished*) .. 955

Munni v. Umrao Singh, 1 Ind. Cas. 720; 39 P. R. 1909; 55 P. W. R. 1909; 59 P. L. R. 1909. (*Relied on*) .. 86

Munni Koer v. Madan Gopal, 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1084. (*Relied on*) 955

Mylappa Chettiar v. Aga Mirza Mohamed Shirazee, 54 Ind. Cas. 550; 37 M. L. J. 712; 26 M. L. T. 504. (*Distinguished*) .. 800

N

Nagabhushanam v. Ramachandra Row, 70 Ind. Cas. 659; 45 M. 537; 15 L. W. 470; 30 M. L. T. 231; 42 M. L. J. 449; (1922) M. W. N. 331; (1923) A. I. R. (M.) 241. (*Distinguished*) .. 947

Nagappa v. Venkat Rao, 24 M. 265. (*Distinguished*) .. 958

Nagar Valab Narsi v. Municipality of Dhandhuka, 12 B. 490; 6 Ind. Dec. (N. S.) 810. (*Distinguished*) .. 8

Nagardas Vachraj v. Anandrao Bhai, 31 B. 590; 9 Bom. L. R. 495. (*Relied on*) .. 471

Nandigam Subbarayulu v. Kannam Saheb, 54 Ind. Cas. 22; (1919) M. W. N. 836. (*Relied on*) .. 845

Narain Prasad v. Sarman Singh, 40 Ind. Cas. 284; 44 I. A. 163; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.). (*Followed*) .. 35

Narasingdas v. Ratanlal, 34 Ind. Cas. 471; 12 N. L. R. 75 at p. 79. (*Distinguished*) .. 117

N—concld.

Page.

Narayan v. Amgaude Malgauda, 62 Ind. Cas. 104; 45 B. 1094; 23 Bom. L. R. 455. (*Explained*) .. 874

Narayan Kutti Goundan v. Pachiammal, 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 353; 22 M. L. J. 364. (*Explained*) .. 874

Narayan Parmanand v. Naginda Bhaidas, 30 B. 113; 7 Bom. L. R. 641. (*Relied on*) .. 605

Narayana Aiyar v. South Indian Railway Co., Ltd., 75 Ind. Cas. 260; 18 L. W. 322; (1923) M. W. N. 731. (*Relied on*) .. 137

Naro Gopal v. Paraganda, 39 Ind. Cas. 23; 41 B. 347; 19 Bom. L. R. 69. (*Relied on*) .. 1002

Nathan v. Kamala Kaur, 13 A. 571; A. W. N. (1891) 167; 7 Ind. Dec. (N S.) 361. (*Followed*) .. 599

Nathu v Batan Singh, 67 Ind. Cas. 759; 4 L. 102. (*Followed*) .. 488

Nathu v. Ghansham Singh, 49 Ind. Cas. 737; 17 A. L. J. 177; 41 A. 259. (*Followed*) .. 1049

Nattu Krishnamachariar v. Annangara Chariar, 30 M. 353; 2 M. L. T. 330; 17 M. L. J. 301. (*Relied on*) .. 654

Naushani Begum v. Intizar Begum, A. W. N. (1899) 25. (*Relied on*) .. 260

Navakoti Narayana Chetty v. Logalinga Chetty, 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233. (*Distinguished*) .. 955

Nawab v. Arjan Das, 13 P. R. 1904; 78 P. L. R. 1904. (*Not followed*) .. 520

Nawab Mir Sadruddin v. Nawab Nuruddin, 29 B. 79; 6 Bom. L. R. 834. (*Followed*) .. 489

Nawab Nazir Begam v. Rao Raghunath Singh, 50 Ind. Cas. 434; 46 I. A. 145 (P. C); 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 493; 1 U. P. L. R. (P. C.) 49; 41 A. 571; 11 L. W. 188 (P. C.). (*Followed*) .. 35

New Beerbhoom Coal Co. v. Buloram Mahata, 2 C. L. R. 268; 4 Ind. Jur. 570; 2 Ind. Dec. (N. S.) 722; 5 C. 175. (*Relied on*) .. 278

Niamat Bibi v. Asmat Bibi, 7 A. 626; A. W. N. (1885) 183; 4 Ind. Dec. (N. S.) 740. (*Followed*) .. 495

Nidha Lal v. The Collector of Bulandshahr, 35 Ind. Cas. 209; 14 A. L. J. 610. (*Followed*) .. 69

Nidhi Krishna Bose v. Ramdas Sen, 20 W. R. 341. (*Distinguished*) .. 648

Nikka Mal v. Marwar Bank, Ltd., 52 Ind. Cas. 188; 151 P. R. 1919. (*Followed*) .. 395

Nilkanth v. Kasubai, 63 Ind. Cas. 46. (*Relied on*) .. 903

Nilmani Kar v. Sati Prasad Garga Bahadur, 61 Ind. Cas. 82; 48 C. 553; 32 C. L. J. 302; 25 C. W. N. 230 (F. B.). (*Followed*) .. 852

Nogendra Lal Chowdhury v. Kani Bhusan Das, 44 Ind. Cas. 265; 45 C. 785; 23 C. W. N. 375. (*Followed*) .. 1002

Norfolk, *Ex parte*, (1815) 19 Ves. Jun. 454; 34 E. R. 585. (*Relied on*) .. 333

O

Page.

Official Assignee of Trichinoply v. Somasundram Chettiar, 34 Ind. Cas. 602; 30 M. L. J. 415 at p. 416. (*Relied on*) .. 888
Ollivant v. Rahimtula Nur Mahomed, 12 B. 474; 6 Ind. Dec. (N. S.) 793. (*Distinguished*) 8

P

Palakdhari Rai v. Mankaran Rai, 6 Ind. Cas. 205; 7 A. L. J. 508. (*Distinguished*) .. 381
Palaniappa Chetty v. Subramania Chetty, 62 Ind. Cas. 755; 41 M. 731; 13 L. W. 519; (1921) M. W. N. 309; 41 M. L. J. 90; 30 M. L. T. 151. (*Relied on*) .. 381
Palaniappa Chetty v. Subramaniam Chetty, 54 Ind. Cas. 710; 11 L. W. 145; (1920) M. W. N. 135; 38 M. L. J. 338. (*Not followed*) .. 340
Palaniyandi Melevarayan v. Vadamalai Odayan, 28 Ind. Cas. 956; 2 L. W. 723. (*Relied on*) .. 619
Palchur Mahalakshmama v. Vemi Reddi Balu Reddi, 69 Ind. Cas. 529; 17 L. W. 8; 44 M. L. J. 60; (1923) A. I. R. (M.) 367. (*Relied on*) .. 1011
Pandurang Balaji v. Dnyanu Balaji, 12 Ind. Cas. 926; 36 B. 135; 13 Bom. L. R. 1169. (*Distinguished*) .. 466
Pandurang Balaji v. Krishnaji, 28 Bom. L. R. 125; 5 Bom. L. R. 799. (*Relied on*) .. 105
Parbati Kumari Debi v. Jagadesh Chunder, 29 I.A. 82; 29 C. 433; 6 C. W. N. 190; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205. (*Followed*) .. 861
Parbati Kunwar v. Deputy Commissioner of Kheri, 47 Ind. Cas. 394; 45 I. A. 111; 20 Bom. L. R. 1005; 5 O. L. J. 433; 21 M. L. T. 292; 35 M. L. J. 525; 16 A. L. J. 865; 8 L. W. 586; 5 P. L. W. 302; 28 C. L. J. 219; 41 A. 541; (1918) M. W. N. 880; 23 C. W. N. 125 (P. C.). (*Distinguished*) .. 250
Parma Sao v. Goprya, 14 C. P. L. R. 109. (*Followed*) .. 621
Partap Chand v. Saiyida Bibi, 23 A. 442; A. W. N. (1901) 137. (*Distinguished*) .. 174
Parvatheesam v. Bapana, 13 M. 447; 4 Ind. Dec. (N. S.) 1023. (*Relied upon*) .. 384
Patchu Ramajagayya v. Vajjulu Jagannadham, 49 Ind. Cas. 672; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 143 (F. B.). (*Relied on*) .. 22
Pathukutti v. Avathalakutti, 13 M. 66; 1 Ind. Dec. (N. S.) 756. (*Distinguished*) .. 120
Peare Lal v. Sundar Singh, 68 Ind. Cas. 805; 20 A. L. J. 658; 44 A. 756; (1922) A. I. R. (A.) 436. (*Followed*) .. 296
Peare Lal v. Sundar Singh, 68 Ind. Cas. 805; 20 A. L. J. 658; (1922) A. I. R. (A.) 436; 44 A. 756. (*Relied on*) .. 1019
Peari Lal Singh v. Chandi Charan Singh, 5 C. L. J. 80; 11 C. W. N. 163. (*Followed*) .. 1036
Peary Lal v. Hanifunnissa Bihar, 31 Ind. Cas. 303; 38 A. 240; 14 A. L. J. 302. (*Relied on*) 57
Peary Mohan Mukherji v. Narendra Nath Mukerji, 5 Ind. Cas. 404; 37 C. 229; 14 C. W. N. 261; 7 A. L. J. 125; 7 M. L. T. 63; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27 (P. C.) (*Distinguished*) .. 403

P—concld.

Page.

Peary Mohun Mukerjee v. Ambica Churn Bandopadhya, 24 C. 900; 12 Ind. Dec. (N. S.) 1269. (*Followed*) .. 520
Periavenkan Udaya Tevar v. Subramanian Chetti, 20 M. 239; 6 M. L. J. 266; 7 Ind. Dec. (N. S.) 170. (*Distinguished*) .. 66
Perumalla Satyanarayana v. Perumalla Venkata, 27 M. 112. (*Relied on*) .. 67
Pirbhu v. Ram Chand, 5 P. R. 1904; 42 P. L. R. 1904. (*Relied on*) .. 957
Pitambar Chandra Saha Chaudhuri v. Nisikanta Saha, 55 Ind. Cas. 5; 31 C. L. J. 52; 24 C. W. N. 215. (*Explained*) .. 309
Ponnamma v. Arumugam, (1905) A. C. 383; 74 L. J. P. C. 102; 92 L. T. 740; 21 T. L. R. 524. (*Dissented from*) .. 92
Ponniah Nadan v. Deivanai Ammal, 52 Ind. Cas. 247; 36 M. L. J. 463, 9 L. W. 453; 26 M. L. T. 311. (*Relied on*) .. 619
Pranal Anace v. Lakshmi Annee, 26 I. A. 101; 3 C. W. N. 485; 22 M. 508; 1 Bom. L. R. 394; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.). (*Distinguished*) .. 257
Pranjwandas Tulsidas v. Devkunvarbai, 1 B. H. C. R. 139 at p. 133. (*Relied on*) .. 861
Prem Sukhdas v. Lachmi Tewari, 46 Ind. Cas. 542. (*Distinguished*) .. 471
Premsukhdas v. Bhupia, 2 A. 517; 4 Ind. Jur. 650; 1 Ind. Dec. (N. S.) 901. (*Relied upon*) .. 59
Priya Sakhi Debi v. Manbodh Bibi, 37 Ind. Cas. 277; 44 C. 425; 21 C. W. N. 177; 27 C. L. J. 212. (*Relied on*) .. 520
Promode Narain Ghosh v. Aswini Kumar Nag, 26 Ind. Cas. 23; 18 C. W. N. 1138. (*Relied on*) .. 117
Prosunno Coomar Sandyal v. Mothoora Nath Banerjee, 15 W. R. 487; 8 B. L. R. App. 26. (*Followed*) .. 520
Puninthavelu Mudaliar v. Bhashyam Ayyangar, 25 M. 406; 12 M. L. J. 282. (*Followed*) 809
Puran Lal v. Venkatrao Gujar, 45 Ind. Cas. 192. (*Relied on*) .. 201
Purna Sashi Bhattacharjee v. Kalidha Rai Chaudhary, 11 Ind. Cas. 412; 8 A. L. J. 681; 15 C. W. N. 693; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 2 M. W. N. 403; 38 C. 603; 10 M. L. T. 361; 21 M. L. J. 1119 (P. C.). (*Distinguished*) .. 514
Pusingham v. King, 14 T. L. R. 392. (*Distinguished*) 750

Q

Qadar Bakhsh v. Manghamal, 73 Ind. Cas. 889; 4 L. 249; 5 L. L. J. 175; (1923) A. I. R. (L.) 495. (*Followed*) .. 394

R

R. M. A. R. Firm v. M. R. S. Firm, 25 Ind. Cas. 220; 7 Bur. L. T. 308. (*Relied on*) .. 742
Radha Kishen v. Katan Lal, 56 Ind. Cas. 7. (*Relied on*) .. 957
Radhibai v. Shane, (1867) 4 Bom. High Court Appellate Judgment 155. (*Relied upon*) ... 59

R—contd.

Page.

Raghava Chariar v. Srinivasa Raghava Chariar, 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363 (F. B.). (*Relied on*) .. 955
Raghunath Bakhsh v. Haji Sheik Mohamed Bakhsh, 30 Ind. Cas. 200; 18 O. C. 115 at p. 116; 2 O. L. J. 200. (*Relied on*) 955
Rai Charan Mandal v. Biswanath Mandal, 26 Ind. Cas. 410; 20 C. L. J. 107. (*Relied on*) 92
Raj Krishna v. Bepin, 17 Ind. Cas. 162; 17 C. W. N. 591; 40 C. 245; 16 C. L. J. 194. (*Distinguished*) .. 982
Raj Lakhi Ghose v. Debendra Chandra Majumdar, 24 C. 668; 1 C. W. N. 444; 12 Ind. Dec. (N. S.) 1174. (*Followed*) .. 520
Raja Hemendralal Singh Das v. Fakir Chand Dutt, 74 Ind. Cas. 929; 27 C. W. N. 621; 5 O. C. 650; (1923) A. I. R. (C.) 626. (*Followed*) .. 418
Raja of Venkatagiri v. Ayyapareddi, 21 Ind. Cas. 532; 38 M. 738 at pp. 740, 741; 14 M. L. T. 405; (1913) M. W. N. 919; 25 M. L. J. 578. (*Relied on*) .. 718
Raja Reshee Case Law v. Chintamani Dalai, 70 Ind. Cas. 535; 36 C. L. J. 305; (1922) A. I. R. (C.) 510; 27 C. W. N. 962. (*Relied on*) .. 567
Rajah Kavali Arunachella Row v. Rangiahappa Row, 29 M. 519; 1 M. L. T. 318; 16 M. L. J. 563. (*Distinguished*) .. 279
Rajani Kant Mukerjee v. Yusuf Ali, 34 Ind. Cas. 92; 21 C. W. N. 188. (*Distinguished*) 648
Rajaram v. Ganesh, 21 B. 91 at p. 94; 11 Ind. Dec. (N. S.) 63. (*Relied on*) .. 814
Rajeswara Sethupati Avergal Raja of Ramnad v. Velusami Tevar, 59 Ind. Cas. 880; 48 I. A. 45; 19 A. L. J. 168; 40 M. L. J. 197; 13 L. W. 210; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345. (*Followed*) .. 520
Rajkrishna Dey v. Bepin Bihari Roy, 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591. (*Not followed*) ... 668
Ram Bilas v. Lal Bahadur, 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169. (*Followed*) .. 134
Ram Bujhawan Prosad Singh v. Nathu Ram, 71 Ind. Cas. 933; 50 I. A. 14; 4 P. L. T. 29; (1923) A. I. R. (P. C.) 37; 32 M. L. T. 129; 44 M. L. J. 615; 25 Bom. L. R. 568; (1923) M. W. N. 382; 2 Pat. 285; 38 C. L. J. 25; 18 L. W. 767; 1 P. L. R. 445; 28 C. W. N. 446 (P. C.). (*Followed*) .. 35
Ram Chandra Chatterjee v. Paramathanath Chatterjee, 63 Ind. Cas. 754; 35 C. L. J. 146; (1922) A. I. R. (C.) 237. (*Followed*) 881
Ram Chhattar v. Ram Lal, 65 Ind. Cas 950; 24 O. C. 395. (*Followed*) .. 104
Ram Coomar Coondoo v. Chunder Canto Mukerjee, 22 C. 233 at p. 259; 4 I. A. 23; 1 Ind. Dec. (N. S.) 442. (*Distinguished*) .. 298
Ram Das v. Amir Shah, 113 P. L. R. 1901; 34 P. L. R. 1902. (*Followed*) 84
Ram Kinker Biswas v. Akhil Chundra Chaudhri, 11 C. W. N. 350; 5 C. L. J. 242; 2 M. L. T. 137; 35 C. 519 (F. B.). (*Followed*) .. 914

R—contd.

Page.

Ram Nandan Dhar Dube v. Kaniz Fatima, 39 Ind. Cas. 902; 39 A. 379; 15 A. L. J. 369. (*Relied on*) .. 520
Ram Narain v. Ramdhan Singh, 72 Ind. Cas. 668; 4 P. L. T. 647. (*Followed*) .. 598
Ram Piari v. Budhsain, 61 Ind. Cas. 546; 43 A. 164; 18 A. L. J. 995; 2 U. P. L. R. (A.) 332. (*Distinguished*) .. 466
Ram Prasad Pramanik v. Sricharan Mandal, 41 Ind. Cas. 276; 27 C. L. J. 594; 21 C. W. N. 1109. (*Relied on*) .. 138
Ram Prasad Roy v. Sham Narain, 6 C. L. J. 22. (*Discussed*) .. 412
Ram Sarup v. Jagan Nath Prasad, 15 Ind. Cas. 523; 15 O. C. 234. (*Followed*) .. 799
Ram Sarup Singh v. Jageshar Singh, 73 Ind. Cas. 466; 26 O. C. 341; 9 O. & A. L. R. 157; (1923) A. I. R. (O) 150. (*Followed*) .. 104
Ram Sukul Pathak v. Kesho Prasad Singh, 43 Ind. Cas. 925; 3 P. L. J. 218; (1918) Pat. 17; 4 P. L. W. 57 (F. B.). (*Relied on*) .. 188
Ramalinga Chetty v. Sivachidambara Chetty, 49 Ind. Cas. 742; 42 M. 440; 9 L. W. 224; 25 M. L. T. 253; (1919) M. W. N. 426; 36 M. L. J. 572. (*Relied on*) .. 173
Ramanujulu Naidu v. Apparanji Ammal, 9 Ind. Cas. 417; (1911) M. W. N. 251; 9 M. L. T. 383; 21 M. L. J. 313. (*Relied on*) 572
Ramappa v. Ganpat, 30 B. 81; 7 Bom. L. R. 289. (*Relied upon*) .. 30
Ramchancha v. Dattaraya, 48 Ind. Cas. 742. (*Followed*) .. 107
Ramchandra Govind Thamare v. Jayantee Ravji, 59 Ind. Cas. 715; 45 B. 503 at p. 507; 22 Bom. L. R. 1409. (*Relied on*) .. 997
Rameshwar Baksh Singh v. Mirza Rasul Beg, 45 Ind. Cas. 603; 21 O. C. 66. (*Relied on*) .. 1031
Rameshwar Singh v. Homeshwar Singh, 59 Ind. Cas. 636; 40 M. L. J. 1; 1 P. L. T. 731; 19 A. L. J. 26; (1921) M. W. N. 21; 33 C. L. J. 109; 25 C. W. N. 337; 13 L. W. 546; 6 P. L. J. 132; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.). (*Followed and applied*) .. 779
Rameshwar Singh v. Homeshwar Singh, 59 Ind. Cas. 636; 19 A. L. J. 26; 1 P. L. T. 731; 40 M. L. J. 1; (1921) M. W. N. 21; 33 C. L. J. 109; 25 C. W. N. 337; 13 L. W. 546; 6 P. L. J. 132; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.) (*Followed*) .. 605
Ramji Das v. Ajodhia Prasad, 25 A. 628. (*Followed*) .. 670
Ramnath v. Goturam, 51 Ind. Cas. 115; 21 Bom. L. R. 1179; 44 B. 179. (*Relied on*) .. 19
Rampal Singh v. Ram Prasad Singh, 27 A. 37; 1 C. L. J. 46; 2 A. L. J. 237; 32 I. A. 17; 8 Sar. P. C. J. 727 (P. C.). (*Followed*) .. 520
Rampartab v. Pransukh, 15 B. 93; 8 Ind. Dec. (N. S.) 63. (*Relied upon*) .. 30
Ramsing Bhagwan v. Balubai, 5 Bom. L. R. 651. (*Distinguished*) ... 298
Ramzan v. Bhukhal Roy, 17 Ind. Cas. 852; 16 A. L. J. 747. (*Followed*) 232
Rangasami Chetti v. Tangavelu Chetti, 50 Ind. Cas. 380; 42 M. 637; (1919) M. W. N. 448; 26 M. L. T. 147; 10 L. W. 333. (*Distinguished*) ... 66

R—concld.

Page.

Rangasami Goundan v. Nachiappa Goundan, 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105 (P. C.). (*Followed*) 588, 1007

Rangasami Goundan v. Nachiappa Goundan, 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.). (*Relied on*) ... 25

Rani v. Aidal Singh, 78 Ind. Cas. 1041; 22 A. L. J. 1133. (*Relied on*) .. 1025

Rani Anand Kunwar v. The Court of Wards on behalf of Chandra Shekhar, 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shme L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63; 3 Ind. Dec. (N. S.) 495 (P. C.). (*Distinguished*) .. 497

Ranmali Pande v. Bisheshar Singh, 3 A. L. J. 731; 29 A. 129; A. W. N. (1906) 300. (*Distinguished*) .. 232

Rash Behary Sarkar v. Mahendra Nath Ghose, 21 Ind. Cas. 979; 19 C. L. J. 34. (*Dissented from*) .. 520

Rewa Mahton v. Ram Kishen Singh, 14 C. 18; 13 I. A. 106; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.). (*Relied on*) .. 57

Ripon Press and Sugar Mill and Co., Ltd. v. Nama Venkatarama Chetty, 48 Ind. Cas. 903; 42 M. 33; 35 M. L. J. 253; 8 L. W. 354; 24 M. L. T. 246. (*Distinguished*) .. 947

Roy Radha Kissen v. Nauratan Lall, 6 C.L.J. 490 at p. 500. (*Relied on*) .. 48

Rungoo Lal v. Abdool Guffoor, 4 C. 314; 3 C. L. R. 119; 3 Ind. Jur. 461; 2 Ind. Dec. (N. S.) 199. (*Relied upon*) .. 59

Rup Narain v. Badri Prasad, 3 Ind. Cas. 667; 12 O. C. 225. (*Followed*) .. 1051

Ruttonjee Eduljee Shet v. Collector of Tanna, 10 W. R. 13 (P. C.); 11 M. I. A. 295; 2 Sar. P. C. J. 292; 20 E. R. 113 (*Followed*) ... 819

S

Sabhanatha v. Lakshmi, 7 M. 80; 2 Ind. Dec. (N. S.) 641. (*Distinguished*) .. 891

Sabitri Thakurain v. Sari, 60 Ind. Cas. 274; 48 C. 481 at p. 491; 40 M. L. J. 308; (1921) M. W. N. 159; 19 A. L. J. 281; 48 I. A. 76; 33 C. L. J. 307; 25 C. W. N. 557; 23 Bom. L. R. 681; 14 L. W. 362; 3 U. P. L. R. (P. C.) 57 (P. C.). (*Relied on*) ... 997

Sadho Charan Miser v. Birj Raj Miser, 11 Ind. Cas. 274. (*Followed*) .. 417

Sadhu Krishna Ayyar v. Kuppan Ayyangar, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479. (*Dissented from*) .. 506

Sadubar Singh v. Sheo Saran Singh, 21 A. 26; A. W. N. (1890) 161; 9 Ind. Dec. (N. S.) 728. (*Distinguished*) .. 1023

S—contd.

Page.

Safdar Ali v. Dost Muhammad, 12 A. 426; A. W. N. (1890) 117; 6 Ind. Dec. (N. S.) 1016. (*Followed*) .. 645

Sahadarim Mudali v. Sarbosobha Dasi, 27 Ind. Cas. 258; 42 C. 638; 20 C. L. J. 494; 19 C. W. N. 1030. (*Followed*) ... 557

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.). (*Followed*) 21, 238

Saiyid Muzhar Hossein v. Bodha Bibi, 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P. C. J. 580; 8 Ind. Dec. (N. S.) 397. (*Followed*) ... 87

Salah v. Bakhtawas, 36 Ind. Cas. 601; 3 P. R. 1917; 200 P. W. R. 1916. (*Followed*) .. 84

Salamat-ul-Zamani v. Masha Allah Khan, 43 Ind. Cas. 649; 16 A. L. J. 98; 40 A. 187. (*Distinguished*) .. 429

Samiya Mavali v. Minammal, 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744. (*Followed*) 582, 923

Sant Singh v. Nathumal, 18 Ind. Cas. 480; 115 P. L. R. 1913; 94 P. W. R. 1913. (*Distinguished*) .. 582

Sant Singh v. Saddu, 14 Ind. Cas. 23; 63 P. R. 1912; 222 P. W. R. 1912. (*Followed*) .. 115

Sarada Sundari Dassya v. Gangadhar Shala, 52 Ind. Cas. 801; 46 C. 738. (*Followed*) ... 482

Sardar Sarup Singh v. Sundar, 9 P. R. 1898. (*Followed*) .. 91

Saroda Kanto Das v. Goband Mohan Das, 6 Ind. Cas. 912; 12 C. L. J. 91 at p. 97. (*Followed*) .. 44

Sarup Singh v. Jawabhri, 44 Ind. Cas. 732; 8 P. R. 1918. (*Followed*) .. 488

Sawan Mal v. Kanhaya Lal Gopal Das, 59 Ind. Cas. 680. (*Relied on*) 168

Sayad Husein Miya v. Collector of Kaira, 21 B. 257; 11 Ind. Dec. (N. S.) 174. (*Distinguished*) ... 539

Seraj-ud-din Haldar v. Isab Haldar, 70 Ind. Cas. 203; 49 C. 161; 25 C. W. N. 833; (1922) A. I. R. (C.) 258. (*Distinguished*) ... 81

Seshagiri Rao v. Nawab Asker Jung, 27 M. 494. (*Relied on*) ... 30

Setappa Goundan v. Muthia Goundan, 31 M. 268; 4 M. L. T. 77. (*Relied on*) ... 92

Seturatnam Aiyar v. Venkatachala Goundan, 56 Ind. Cas. 117; 43 M. 567 at p. 577; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485; 47 I. A. 76 (P. C.). (*Relied on*) ... 619

Shahzadi Begam v. Secretary of State for India, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 628; 2 M. L. T. 439; 34 I. A. 194 (P. C.). (*Relied on*) .. 1029

Shahzadi Begum v. Mahbub Ali Shah, 55 Ind. Cas. 809; 42 A. 353; 18 A. L. J. 328; 2 U. P. L. R. (A.) 149. (*Distinguished*) .. 343

Sham Behari Lal v. Ram Kali, 74 Ind. Cas. 495; 21 A. L. J. 656; (1924) A. I. R. (A.) 15; 45 A. 715. (*Followed*) .. 389

S—contd.

	Page.
Sham Sunder Lal v. Achhan Kunwar, 25 I. A. 183 at p. 191; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417. (*Followed*) ..	961
Shama Sundram Iyer v. Abdul Latif, 27 C. 61; 4 C. W. N. 92; 14 Ind. Dec. (N. S.) 41. (*Relied on*) ..	816
Shambati Koeri v. Jago Bibi, 29 C. 749; 29 I. A. 127; 6 C. W. N. 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304. (*Distinguished*) ..	260
Shanmugam Pillai v. Syed Gulam Ghose, 27 M. 116. (*Distinguished*)	729, 755
Sheo Narain v. Ram Din, 11 Ind. Cas. 526; 14 O. C. 129. (*Followed*) ..	848
Sheonandan Ahir v. Ram Logan Singh, 30 Ind. Cas. 908; 13 A. L. J. 921. (*Distinguished*) ..	405
Sher Singh v. Ram Singh, 42 P. L. R. 1919. (*Followed*) ..	543
Sherjan Khan v. Almuddi, 34 Ind. Cas. 598; 43 C. 511; 20 C. W. N. 268; 23 C. L. J. 225. (*Relied on*) ..	139
Shersing v. Sriram, 30 A. 246; A. W. N. (1908) 601; 5 A. L. J. 251; 4 M. L. J. 10. (*Distinguished*) ..	384
Shib Dayal v. Meharban, 69 Ind. Cas. 981; 45 A. 27; 20 A. L. J. 819; (1923) A. I. R. (A.) 1. (*Followed*) ..	848
Shrinivas Sarjerao v. Balwant Venkatesh, 20 Ind. Cas. 162; 37 B. 513; 15 Bom. L. R. 533. (*Disapproved*) ..	971
Siatal Prasad v. Amtul Bibi, 7 A. 633; A. W. N. (1885) 185; 4 Ind. Dec. (N. S.) 754. (*Followed*) ..	645
Sidebotham, *Ex parte*, Sidebotham, *In re*, (1880) 14 Ch. D. 458; 49 L. J. B. K. 41; 42 L. T. 783; 28 W. R. 715. (*Followed*) ..	395
Sita Ram v. Ram Lal, 18 A. 440; A. W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999 (F. B.). (*Followed*) ..	1038
Sivagan Chetty v. Krishna Aiyangar, 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 587; 22 M. L. J. 139. (*Relied on*) ..	287
Sivagnanathammal v. Arunachelam Pillai, 11 Ind. Cas. 870; 10 M. L. T. 490; (1911) 2 M. W. N. 75; 21 M. L. J. 821. (*Followed*) ..	561
Soodamini Dasi v. The Administrator-General of Bengal, 20 C. 433 at p. 442; 20 I. A. 12; 6 Sar. P. C. J. 272; 17 Ind. Jur. 223; 10 Ind. Dec. (N. S.) 293 (P. C.). (*Followed*) ..	627
Soundaram Ayyar v. Sennia Naicken, 23 M. 547; 10 M. L. J. 329 (F. B.); 8 Ind. Dec. (N. S.) 785. (*Distinguished*) ..	557
Sri Girdhariji Maharaj v. Chote Lal, 20 A. 218; A. W. N. (1898) 27; 9 Ind. Dec. (N. S.) 520. (*Followed*) ..	285
Sri Girdhariji Maharaja v. Chote Lal, 20 A. 218; A. W. N. (1898) 27; 9 Ind. Dec. (N. S.) 520. (*Relied on*) ..	954
Sri Gopal v. Pirthi Singh, 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118; 8 Sar. P. C. J. 293 (P. C.). (*Relied on*) ..	654
Sri Ram v. Ramji Das, 2 Ind. Cas. 949; 5 P. R. 1909; 86 P. L. R. 1909; 94 P. W. R. 1909. (*Followed*) ..	170

S—concld.

	Page.
Srimanthi Raja Yarlagadda Durga Prasada Nayudu v. Srimathi Raja Yarlagadda Mullikarjuna Prasada Nayudu, 24 M. 358. (*Dissented from*) ..	109
Srinivasacharlu v. Perindevamma, 33 Ind. Cas. 602; 30 M. L. J. 402; 30 M. 725. (*Followed*)	582
Sripat Singh v. Pradyat Kumar Tagore, 39 Ind. Cas. 252; 21 M. L. T. 222; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. W. 442; 25 C. L. J. 220; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P. C.). (*Distinguished*) ..	238
Subbayya v. Madduletiah, 17 M. L. J. 469; 3 M. L. T. 187. (*Not followed*) ...	510
Subbiyah Pandaram v. Mahamad Mustafa Maracayar, 40 Ind. Cas. 50; 32 M. L. J. 85 at p. 93; 21 M. L. T. 62; 5 L. W. 690. (*Explained*) ..	874
Subhag Singh v. Dip Narain Singh, 64 Ind. Cas. 431; 44 A. 74; 19 A. L. J. 865; (1922) A. I. R. (A.) 158. (*Followed*) ...	345
Subramania Aiyar v. Gopala Aiyar, 7 Ind. Cas. 898; 33 M. 308; 8 M. L. T. 321; 20 M. L. J. 633. (*Relied on*) ...	1002
Sudevi Devi v. Movaram Agarwallah, 10 C. W. N. 306. (*Relied on*) ...	188
Sukumari Debi v. Kalipada Mukherjee, 45 Ind. Cas. 13. (*Distinguished*) ...	81
Sultan Singh v. Hashmat Ullah, 29 Ind. Cas. 804; 109 P. R. 1915; 119 P. W. R. 1915; 38 P. L. R. 1916. (*Relied on*) ...	471
Sultanat Jahan Begam v. Sundar Lal, 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431. (*Relied on*) ..	168
Sundar Roy v. Hema Mahton, 41 Ind. Cas. 191; (1917) Pat. 189; 2 P. L. J. 386. (*Followed*) ...	601
Sunder Koer v. Rai Sham Krishen, 34 C. 150; 34 I. A. 9; 17 M. L. J. 43; 11 C. W. N. 249; 9 Bom. L. R. 304; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106 (P. C.). (*Followed*) ...	995
Supdu Dhodhu v. Mathavaram Jivaram, 57 Ind. Cas. 534; 22 Bom. L. R. 780; 44 B. 544. (*Distinguished*) ..	958
Suragati Roy v. Ram Narayan Mukerji, 73 Ind. Cas. 193; 39 C. L. J. 26; (1923) A. I. R. (P. C.) 88; 45 M. L. J. 219; 50 C. 680; 18 L. W. 681; 33 M. L. T. 314; 28 C. W. N. 517. (*Followed*) ..	557
Surjan v. Lalu, 175 P. R. 1883. (*Explained*) ..	91
Suryanarayan v. Patanna, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.). (*Relied on*) ..	845
Syed Ahmed Saheb Shulari v. The Magnesite Syndicate Limited, 29 Ind. Cas. 60; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598; 30 M. 591. (*Relied on*) ...	808
Syud Tuffuzzool Hussain Khan v. Rughoonath Pershad, 14 M. I. A. 40; 7 B. L. R. 185; 2 Suth. P. C. J. 431; 2 Sar. P. C. J. 656; Rafique & Jackson's P. C. N. 10; 20 E. R. 701. (*Distinguished*) ...	384

T

Page.

Tasadduq Husain v. Hayat-un-Nissa, 25 A. 280; A. W. N. (1903) 39. (*Followed*) .. 69
Thabba Lal v. Shib Charan Das, 37 Ind. Cas. 76; 39 A. 152; 15 A. L. J. 1. (*Distinguished*) 395
Thakore Fatehsingji Dipsengji v. Bamanji Ardesher Dalal, 27 B. 215; 5 Bom. L. R. 274. (*Relied on*) 26, 117
Thamman Singh v. Jamal-ud-din, 7 A. 442; A. W. N. (1885) 70; 4 Ind. Dec. (N. S.) 689. (*Relied on*) .. 140
Thevaraya Reddy v. Venkatachalam Paddither, 37 Ind. Cas. 444; 40 M. 804; 4 L. W. 433; 31 M. L. J. 548; (1916) 2 M. W. N. 321; 20 M. L. T. 403. (*Followed*) 40
Tiruvambala Desikhar v. Chinna Pandaram, 34 Ind. Cas. 57; 40 M. 177 at p. 189; 30 M. L. J. 274; (1916) 2 M. W. N. 43; 4 L. W. 306. (*Followed*) .. 891
Tmaya v. Timapa Gampaya, 7 B. 262; 4 Ind. (N. S.) 177. (*Relied on*) .. 117
Trimback Ramkrishna Ranade v. Hari Laxman, 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686. (*Dissented from*) .. 89
Trimback Ramkrishna v. Hari Laxman, 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686. (*Followed*) .. 89
Trustees for the Improvement of City of Bombay v. Karsendas, 1 Ind. Cas. 451; 33 B. 28; 10 Bom. L. R. 688. (*Relied upon*) .. 376
Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. 1; 8 M. L. J. 453; (1910) M. W. N. 697; 21 M. L. J. 1. (*Followed*) .. 109
Tulshi Ram v. Babu, 10 Ind. Cas. 908; 8 A. L. J. 733; 33 A. 651. (*Distinguished*) .. 1010

U

Udey Narayan Jana v. Secretary of State, 47 Ind. Cas. 297; 22 C. W. N. 823. (*Distinguished*) .. 218
Umatul Batul v. Nanji Koer, 11 C. W. N. 705; 6 C. L. J. 427. (*Followed*) .. 982
Umed v. Jas Ram, 29 A. 612; A. W. N. (1907) 193; 4 A. L. J. 519. (*Relied on*) .. 106
Umed Singh v. Seth Sobhag Mal Dhadha, 32 Ind. Cas. 161; 43 C. 290; 20 C. W. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 108; 23 C. L. J. 130; (1916) 1 M. W. N. 67; 18 Bom. L. R. 308; 43 I. A. 1 (P. C.). (*Relied on*) .. 816
Unnedda Persad Roy v. Erskine, 12 B. L. R. 370; 21 W. R. 68 .. 333
Upendra Chandra v. Sakhi Chand, 15 Ind. Cas. 709; 16 C. L. J. 3. (*Distinguished*) .. 635

V

Vairavan Chettiar v. Ramanathan Chettiar, 11 L. W. 701. (*Dissented from*) .. 109
Varada Pillai v. Jeevarathanamal, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.). (*Followed*) .. 51

V—concld.

Page.

Varada Pillai v. Jeevaratnammal, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.). (*Relied on*) 26, 117
Veerappa Chetty v. Findal Ponnen, 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12. (*Relied on*) .. 284
Venkata v. Krishnaswami, 6 M. 344; 7 Ind. Jur. 358; 2 Ind. Dec. (N. S.) 520. (*Relied upon*) .. 30
Venkata Lakshmi Kantaraju Garu v. Pada Venkata Jagannadha Raju Garu, 77 Ind. Cas. 464; 46 M. L. J. 12; (1924) M. W. N. 125; 33 M. L. T. 243; (1924) A. I. R. (M.) 281. (*Followed*) .. 869
Venkata Narasimha Appa Row v. Parthasarathy Appa Row, 23 Ind. Cas. 166; 37 M. 199; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328; 41 I. A. 51 (P. C.). (*Relied on*) .. 1026
Venkatanarayana Pillay v. Subbammal, 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125 (P. C.). (*Relied on*) .. 484
Venkataramanayya v. Srinivasa Rao, 6 M. 182; 2 Ind. Dec. (N. S.) 406. (*Relied upon*) 914
Venkataratnam v. Ranganayakamma, 48 Ind. Cas. 270; 41 M. 985; 21 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.). (*Followed*) .. 1002
Veyindramuthu Pillai v. Maya Nadan, 54 Ind. Cas. 209; 43 M. 107 (F. B.); (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32. (*Followed*) .. 636
Vidya Varuthi Thirtha v. Balusami Ayyar, 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.). (*Followed*) .. 360
Vithal v. Gopal Rao, 1 Ind. Cas. 240; 5 N. L. R. 8. (*Followed*) .. 66

W

Wahidullah v. Kanhaya Lal, 25 A. 174; A. W. N. (1802) 222. (*Followed*) .. 1024
Walian v. Panke Behari Pershad Singh, 30 C. 1021 (P. C.) 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512. (*Distinguished*) .. 365
Wasi-ul-Zaman Khan v. Faiza Bibi, 32 Ind. Cas. 348; 38 A. 131; 14 A. L. J. 38. (*Followed*) .. 246
Wazir Mahton v. Lulit Singh, 9 C. 100; 4 Ind. Dec. (N. S.) 718. (*Followed*) .. 477
Webb, *In re*, Walter, *Ex parte*, (1876) 2 Ch. [illegible] 45 L. J. Bk. 105; 74 L. T. 701; 24

W—concld.

	Page.
Wilmott v. Freehold House Property Co., (1885) 33 W. R. 554; 52 L. T. 743. (*Distinguished*) ...	298
Wilson v. Volkart Brothers, 27 Ind. Cas. 129; 8 S. L. R. 107. (*Relied upon*) ...	30
Winder, *Ex parte*, (1877) 6 Ch. D. 696; 46 L. J. Ch. 572; 25 W. R. 768. (*Explained*)	874
Woomesh Chunder Goopta v. Raj Narain Roy, 10 W. R. 15. (*Relied on*) ...	529

Y

	Page.
Yarlagadda Mallikarjuna Prasad Naidu v. Mallapalli Virayya, 47 Ind. Cas. 1000; 35 M. L. J. 231; 41 M. 849; 24 M. L. T. 134; 8 L. W. 197; (1918) M. W. N. 699 (F. B.). (*Dissented from*) ...	917
Yuruva Venkata Reddy v. Maddi Veeranna, 23 Ind. Cas. 376; 15 M. L. T. 192. (*Not followed*) ...	510

Z

Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan, 10 A. 166; 15 I. A. 13; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112. (*Relied on*)	57
Zemindar of Ettiyapuran v. Chidambaram Chetty, 58 Ind. Cas. 871; 43 M. 675 at p. 687; (1920) M. W. N. 460; 28 M. L. T. 75; 12 L. W. 217; 39 M. L. J. 203. (*Followed*) ...	891

Borrower's No.	Issue Date	Borrower's No.	Issue Date

INDIAN CASES

1924.

VOLUME 79.

PATNA HIGH COURT.

CIVIL REVISION NO. 294 OF 1923.

November 13, 1923.

Present :—Mr Justice Kulwant Sahay.

HIRA LAL—PETITIONER

versus

CHUNI SAH—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution—Notice to decree-holder, whether necessary—Possession delivered before stay, effect of.

Before a final order for stay of execution is passed under O. XLI, r. 5 of the Civil Procedure Code, it is necessary that notice of the application should be given to the decree-holder and he should be called upon to show cause why execution should not be stayed.

A stay of execution cannot be ordered after possession has been delivered in execution, as there is nothing left to stay.

Appeal from an order of the District Judge, Gaya, dated the 19th June 1923.

Messrs. *S. M. Mullick* and *Kailaspati*, for the Petitioner.

Messrs. *S. N. Ray* and *D. N. Varma*, for the Opposite Party.

JUDGMENT.

Kulwant Sahay, J.—The petitioner obtained a decree from the Court of the Additional Munsif of Gaya on the 11th June 1923 for ejectment of the opposite-party from a certain house which was used as a shop by the opposite-party in the town of Gaya. On the 18th June 1923 the petitioner applied for execution of the decree and asked the Court to deliver possession to him of the house in dispute. Thereupon the executing Court made an order to issue a writ for delivery of possession. On the 19th June 1923 the opposite-party perferred an appeal against the decree before the District Judge of Gaya and on the same day he made an application before the District Judge praying for stay of delivery of possession pending the hearing of the appeal. The learned District Judge thereupon made an order in these words : "Put up to-morrow. Meanwhile, stay execution." It is alleged by the petitioner that, before this order of the 19th June was made by the learned District Judge, possession had already been delivered by the peon to him about 9 o' clock in the morning on the 19th June On the next day, *i. e.*, the 20th June 1923, the oppoite party filed another application before the District Judge in which he complained that, although execution had been stayed by the order of the previous day and the said order was communicated to the peon before possession had actually been delivered, the peon, notwithstanding that order, put the decree-holder in possession and dispossessed the judgment-debtor and he prayed that it might be declared that the proceeding of the peon in delivering possession after the order for stay had been passed was invalid and that possession may be re-delivered to him. The learned District Judge thereupon made the following order: "An order to stay execution was passed. Any delivery of possession effected yesterday is, therefore, invalid. Execution will be stayed pending disposal of the appeal, as if the appellant is once ejected, the object of the appeal would be frustrated. The Munsif Additional Court will please at once hold an enquiry into the conduct of the peon. The appellant must make a statement before him." It appears that, in compliance with this

order, possession has again been delivered to the judgment-debtor and he is now in possession. The decree-holder, who is the petitioner in this case, comes up to this Court against this order of the District Judge and his case is that possession having once been delivered the District Judge had no jurisdiction to stay execution. This matter came up for hearing before me on the 14th August 1923 and as the exact time of the delivery of possession by the peon was disputed between the parties I thought it necessary to enquire from the District Judge as to the exact time when he had passed the order for stay on the 19th June and also the time when possession was actually delivered by the peon. The District Judge has sent a report to the effect that he is unable to state the exact time of the order to stay execution passed by him, but he says that, as far as he remembers, it was stated that the peon was in the middle of executing delivery of possession when the petition for stay was filed, or else that he was just about to do it. Anyhow, it was stated before him that the matter was urgent. As matters stand, it is impossible for me here to determine as to whether possession had already been delivered before the order for stay was passed by the learned District Judge on the 19th June, 1923. However, the learned District Judge in dealing with the applications filed before him on the 19th and the 20th June, has proceeded *ex parte* without giving any notice to the decree-holder. Before an order for stay is passed under O. XLI, r. 5 of the Civil Procedure Code, it is necessary that notice of the application should be given to the decree-holder and he should be called upon to show cause as to why execution should not be stayed. In the present case the learned District Judge has passed the final order on the 20th June 1923, staying execution of 'the decree until the disposal of the appeal without giving any notice to the decree-holder. The District Judge could certainly pass an *ad interim* order for stay pending the hearing of the application ; but he ought not to have passed the final order for stay till the disposal of the appeal without giving an opportunity to the decree-holder to show cause against the application.

I think the proper procedure in the present case would be to set aside the order of the learned District Judge of the 20th June 1923. He should be asked to deal with the application filed before him on the 19th June 1923 after giving notice to the decree-holder. His order for stay of execution passed on the 19th June will be treated as an *ad interim* order till the disposal of the application. It will, no doubt, be open to the decree-holder to show before the District Judge that, before the order of the 19th June had been passed, possession had already been delivered. If that is shown to him, then there would be nothing to stay and the application of the 19th June will be dismissed. If he is satisfied that possession was not delivered at the time, then he will deal with the application according to law.

Each party will bear his own costs in this Court.

Z. K. *Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 141 OF 1921.

July 23, 1923.

Present :—Mr. Justice Odgers and
Mr. Justice Hughes.

GNANAMUTHU NADAN—
PLAINTIFF—APPELLANT

versus

VEILUKANDA NADATHI, WIFE OF GURUSWAMI NADAN—AND OTHERS—
DEFENDANTS —RESPONDENTS.

Registration Act (*XVI of* 1908), *s.* 17—*Division of status—Document containing list of properties falling to each share—Admissibility in evidence*—Othi *deed of palmyra trees—Registration, whether necessary*

A document containing merely a list of properties which have fallen to the share of each sharer in a partition but not containing any operative words of division must be treated as merely a *de facto* division into specific shares following a prior division of status. Such a document, therefore, would be admissible in evidence without registration. [p. 4, col. 1]

An *Othi* deed for over Rs. 100 of palmyra trees does not create any interest in immoveable property and is admissible in evidence without registration.

[p. 4, col. 2]

Second Appeal against the decree of the Court of the Additional Subordinate Judge, Tinnevelly, in A. S. No. 9 of 1920, preferred against the decree of the Court of the Temporary Additional District Munsif, Tinnevelly, in O. S. No. 29 of 1917.

Mr. *K. V. Sesha Ayengar*, for the Appellant.

Mr. *S. Anantarama Ayer*, for the Respondents.

GNANAMUTHU NADAN *v.* VEILUKANDA NADATHI

JUDGMENT.—This is a suit for a declaration that certain lands in Schedules A and B belong to plaintiff and for an injunction against the defendants' enjoyment of the same. Over 20 years before suit, plaintiff's younger brother, Guruswamy Nadan, died leaving a widow and a daughter, defendants Nos. 1 and 2. The A and C schedule properties belonged to the family of plaintiff and his brother and the B schedule properties (except item 5) were brought to sale under a decree and bought by one Israel Nadan who conveyed to his brother in 1883 under Ex. B. The plaintiff and his cousins were undoubtedly divided but plaintiff alleges that the properties in question are his by right of survivorship as his deceased brother and himself were never divided. C schedule properties are admittedly in the possession of defendant No. 1. This the plaintiff accounts for by saying that it was in pursuance of an arrangement for the maintenance of 1st defendant. Both Courts have found that the plaintiff's case is false and that the brothers were divided. Mr. Sesha Iyengar for the plaintiff-appellant in second appeal takes three points.

(*i*) That Ex. XXI is the primary and only possible evidence of partition and being unregistered it is inadmissible under section 91 of the Evidence Act, no other evidence of partition is admissible and there is, therefore, no legal evidence upon which the Courts below could have come to a finding that plaintiff and his brother were divided.

(*ii*) Exs. XVIII and III are inadmissible.

(*iii*) Ex. J has been attested by plaintiff and a divided cousin but that is no evidence of knowledge of its contents.

To take these points in order—Ex. XXI is a *cadjan* document much torn and largely indecipherable. It is undoubtedly a list of properties. The question is "Is it anything more." It is headed Nayinar.....shares." He is D. W. 5. It is signed by the plaintiff, his divided brother and his two cousins. The document is dated 1880. The facts of its containing Nayinar's name and its being signed and attested are said by Mr. Sesha Iyengar to show that it is a formal partition-deed. The circumstances under which these lists came to be drawn up are detailed by D. W. 5 himself. The lands were divided by ridges and the chits prepared. Four lists were drawn up and a boy took the chits and placed them on the lines. A person, apparently unconnected with the family, called Aiyaperumal wrote the chits and left spaces for names and attestations. This man also wrote in the names as the chits were taken up. The witness adds: 'We had no idea of writing a partition-deed. The chits were regarded as the partition.' Ex. XXI is a mere list of properties and there are no operative words of division at all. It may be a division of properties subsequent to an oral division of status. That such a written deed can be treated as minutes of agreement and not as a completed partition, and that though unregistered it can be admitted in evidence is clear from *Gundapaneni Gopayya* v. *Gundapaneni Krishnayya* (1). Of course, if Ex. XXI is the partition, it will be inadmissible. In *Ayya Kutti Mankondan* v. *Periasami Koundan* (2) the deed, after detailing the distribution of property among the sharers, concluded : "In the presence of the witnesses named hereunder we divided." This we take to mean "divided by this instrument." The Full Bench held that this required registration but merely directed it and the evidence relating thereto to be expunged from the record. As laid down by the Privy Council in *Grija Bai* v. *Sadashiv Dhundiraj* (3), "severance of status is quite distinct from the *de facto* division into specific shares of the property" hitherto held jointly, and a deed of partition, though inadmissible to issue partition for want of registration, is still admissible to prove an intention among all members to become divided in status (cf. *Sarasvathamma* v. *Paddayya* (4) and in *Chotalal Aditram* v. *Mahakore* (5) it was held that the *fact of* partition may be proved by oral evidence though the partition-deed may be inadmissible. The terms of section 91 of the Evidence Act are

(1) 69 Ind. Cas. 562; 16 L. W. 784; (1922) M. W. N. 833; (1923) A. I. R. (M.) 160.

(2) 31 Ind. Cas. 615 ; 30 M. L. J. 404; 2 L. W. 1184.

(3) 37 Ind. Cas. 321, 43 C. 1031 at p. 1047 ; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; U. L. T. 114 ; 24 C. L. J. 207; 31 M. L. J. 455 ; 43 I. A. 151 (P. C.).

(4) 71 Ind. Cas. 274; 46 M. 349; 44 M. L. J. 45; 18 L. W. 418; (1923) A. I. R. (M.) 297.

(5) 40 Ind. Cas. 83 ; 41 B. 466 ; 19 Bom. L. R. 322.

not transgressed by this course of action as all the Courts had been concerned with was to find out whether particular properties claimed by the plaintiff to be joint family properties were at the date of suit joint or separate, that is precisely the case here. In our opinion the question under section 91 of the Evidence Act does not really arise as we hold, confirming the view of the Munsif (the lower Appellate Court does not base its decision on Ex. XXI) that Ex. XXI can only be regarded as a list of properties handed to each sharer by an independent person either by lot or in order of seniority and that as it contains no words from which we can construe that it was intended to effect a partition of status; we come to the conclusion that it was a *de facto* division into specific shares following a prior division of status. No question of its inadmissibility accordingly arises.

The next point is the objection to Ex. XVIII.

Exhibit XVIII is another deed for Rs. 152 of 100 Palmyra trees by Guruswami Nadar on 10th February 1884. It is witnessed by plaintiff and son and one of the cousins. It is said this ought to be registered under section 17 of the Registration Act either of 1871 or 1908 as creating an interest in immoveable property of the value of Rs. 100. Reliance for appellants is placed on *Sukry Kurdeppa* v. *Goondakull Nagi Reddi* (6) where a lease of palm and date trees for 5 years was held to require registration. Holloway, A. C. J., observed that a document with respect to trees may or may not require registration according to the character of the transaction. This may contemplate the trees in a state of attachment to or detachment from the soil and the interest passed will be respectively moveable or immoveable. The case was decided under the terms of the Registration Act, 1864, section 13. There was in that Act no definition of immoveable property exempting standing timber, growing crops or grass as is the case in the Acts of 1871, section 3 and 1908 section 2 (6). In *Seeni Chettiar* v. *Santhanatham Chettiar* (7) it was held to be more than a sale of standing timber as it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land.' Vaughan Williams, J., in *Marshall* v. *Green* (8). As pointed in *Natesa* v. *Thangavelu* (9) which concerned a lease for two years of Palmyra trees—there was in the case in *Seeni Chettiar* v. *Santhanatham Chettiar* (7) a limitation on the transferor's enjoyment of the land as such, there was none in that case [*Natesa* v. *Thangavelu* (9)] and there is none, as far as we are able to see, here. In the latter Madras case both the case in *Sukry Kurdeppa* v. *Goondakull Nagi Reddi* (6); and *Seeni Chettiar* v. *Santhanatham Chettiar* (7) are distinguished and, in our opinion, Ex. XVIII falls distinctly under the law as laid down in *Natesa* v. *Thangavelu* (9) and that the latter ought to be followed. It follows that this objection fails.

As to Ex. III.—This is a similar *Othi* deed of the same day the same reasoning applies. It is executed by Nainar Nadar, one of the divided cousins, and attested by the plaintiff and his cousins. It is objected that as Ex. III contains a recital between third parties it is not admissible to prove title. But in our opinion there is no ground for this objection as the question really is whether the brothers were divided and whether the attesting brother must be taken to know the contents of the document.

As to Ex. J—This is an *Othi* deed executed on 10th July 1891 by Gurusami Nadan of land "remaining under my enjoyment as ancestral property" and is witnessed by plaintiff and D. W. 5 (a divided cousin). This is utilised to prove an individual dealing with land which had formally formed part of the family property. It will be observed that Exs. XVIII, III (and it is said also Ex. C) in the case are *Othi* deeds of even date each mortgaging trees on the shares of three out of four of the sharers. In so far as the deeds are attested by the other sharers, it appears to us that this shows that they assented to the alienations and acknowledged that they have no interest in the subject-matter of the document each attests; though

(6) 6 M. H. C. R. 71.

(7) 20 M. 58; 6 M. L. J. 281; 7 Ind. Dec. (N. S.) 1 (F. B.).

(8) (1876) 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 404; 24 W. R. 175.

(9) 23 Ind. Cas. 102; 38 M. 883; 15 M. L. T. 237; (1914) M. W. N. 327.

they before partition would have had an interest in such subject-matter. This appears to us to be a statement against interest in the case of each such attestor, and to be, therefore, admissible under section 32 of the Evidence Act. It is clear we think that the attestors, in the circumstances of the case, must have known the contents of these documents. They were all made on the same day and each of the divided attestors was, certainly as to three and most probably as to all, the executant of a similar document himself. It is suggested that they executed these deeds for the purpose of liquidating each of his share of the family debt—it may be so. The plaintiff's evidence was entirely discredited in both the lower Courts and, in our opinion, the evidence objected to was rightly admitted. His evidence as to the properties acquired under Ex. B also discredited. The matter is then resolved into a simple question of fact on the evidence and the defendant's version has been accepted.

There is a patent mistake in the decree of the Lower Appellate Court. The appeal was dismissed with costs except as regards item 5 as to which there was no order as to costs. The decree, however, directs that each party shall bear his own costs. We must, therefore, dismiss the appeal with costs both here and in the lower Appellate Court. Memorandum of objections is allowed, but there will be no order as to costs.

V. N. V. *Appeal dismissed.*
S. D. *Cross-objection allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1288 OF 1921.

July 23, 1923.

Present :—Sir Dawson Miller and Mr. Justice Kulwant Sahay.

HAZARI LAL SAHU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMBICA GIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 107—Civil Procedure Code (Act V of 1908), s. 141, O. VI, r. 14—Landlord and tenant—Enhancement of rent, application for—Signing and verification—Application on behalf of all landlords—Subsequent withdrawal of same, effect of.

Section 141 of the Civil Procedure Code does not apply to applications under section 105 of the Bengal Tenancy Act. Section 107 of the Bengal Tenancy Act makes the procedure for the trial of suits laid down in the Code of Civil Procedure applicable to proceedings under section 105 of the Act, and not to applications initiating the proceedings. The section has not the effect of making the provisions contained in the Civil Procedure Code relating to the signing and verification of plaints applicable to an application made under section 105 of the Bengal Tenancy Act. [p. 7, col. 1]

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he himself signs and verifies the plaint.

Mohini Mohun Das v. *Bungsi Buddon Saha Das*, 5 Sar. P. C. J. 498 ; 8 Ind. Dec. (N. S.) 926 ; 17 Cal. 580, followed. [p. 7, col. 1.]

Where an application under section 105 of the Bengal Tenancy Act is filed on behalf of all the landlords, the subsequent conduct of some of them in repudiating the authority of the others to sign the application on their behalf and retiring from the case will not attract the provisions of section 188 of the Act so as to defeat the application, if the other joint landlords choose to proceed with it. [p. 7, col. 2.]

Messrs. *B. N. Mitter* and *Subal Chandra Muzumdar*, for the Appellants.

Mr. *S. N. Rai*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This appeal arises out of an application for settlement of fair rent under section 105 of the Bengal Tenancy Act in respect of the holdings of certain tenants having occupancy rights and paying money rents to the proprietors. The application purported to be made by the entire body of landlords holding 16-annas proprietary interest in *mouza* Rampur, bearing *Touzi* No. 841, and the application was really for enhancement of rent under section 30 (*b*) of the Bengal Tenancy Act on the ground of rise in the average local price of staple food crops during the currency of the rent. The tenant-defendants filed written statements taking various objections to the enhancement of the rent.

One of the objections related to the maintainability of the application on the ground that all the proprietors had not joined in making the application nor had it been filed with the consent of all of them, and, therefore, it was not maintainable under section 188 of the Bengal Tenancy Act.

The learned Revenue Officer held that all the co-sharer landlords jointly interested in

Touzi No. 841 had joined in the application and that it was filed with their express or implied consent and the application was, therefore, maintainable. Upon the merits he enhanced the rent to the extent of 1/6th in the rupee and settled the rent so enhanced to be the fair rent of the holdings in dispute.

Against the decision of the Revenue Officer the tenants went in appeal before the Special Judge, and the only ground taken by them in appeal was that the application under section 105 could not succeed because all the landlords had not joined as plaintiffs, and that, therefore, the provisions of section 188 of the Bengal Tenancy Act had been contravened.

The application under section 105 contains the names of all the recorded proprietors of the *Touzi* but the verification of the application was not signed by all of them individually, some of the applicants having signed the same for themselves as well as for some of the other applicants. Sheonandan Singh signed it for himself and for his brother Ram Parsan Singh ; Panchoo Singh Singed it for himself, and for Sabha Singh and Surajnath Singh ; Singhasan Singh signed it for himself and for Bishundeo Singh, Sheodhari Singh and Tej Bahadur Singh and Ramchandra Singh. On the 8th and 17th September 1920 Sheonandan Singh, Ramparsan Singh, Sabha Singh, Surajnath Singh and Ramchandra Singh filed two applicasions before the Revenue Officer to the effect that the application had been filed without their knowledge and permission and that they were not parties to it. The learned Revenue Officer held that the original application under section 105 had, as a matter of fact, had been filed with the express or implied consent of these co-sharers, and that the applications of the 8th and 17th September were subsequently filed by them, because they had been pressed by the tenant defendants, who were their co-villagers and the majority of whom were their castemen, to retire from the case. He referred to the fact that on a previous date all the applicant landlords, including those who had filed the petitions on the 8th and 17th of September 1920, had appeared before him and the case was proceeded with in their presence and no objection was then raised by them that the application had not been filed with their knowledge and under their authority.

On appeal, the learned Special Judge agreed with the Revenue Officer that, so far as the applicants other than Sabha Singh and Surajnath Singh were concerned, they had authorized the filing of the application and the verification thereof by the other applicants named above ; but as regards Sabha Singh and Surajnath Singh he held that Panchoo Singh who had signed the application for them, had no authority to do so. He held that an application for settlement of rent under section 105 was a suit, and that, according to section 141 of the Code of Civil Procedure, the procedure provided in the Code applied to proceedings under section 105 of the Bengal Tenancy Act and that, therefore, the provisions of O. VI, r. 14 of the Code relating to the signing of pleadings by parties must be observed in filing an application, and a person signing the application for another must be duly authorised by him to sign it. He referred to a statement made on behalf of the applicants under section 105 to the effect that Sukhram Singh, father of Sabha Singh and Surajnath Singh, authorised Panchoo Singh to sign the application on their behalf ; and he held that if Sukhram Singh was the managing member of the joint family consisting of Panchoo Singh, Sabha Singh and Surajnath Singh, and as such managing member gave authority to Panchoo, then Sukhram himself was a co-sharer landlord and should have been one of the applicants, and as, in any event, noauthority had been obtained by Panchoo Singh from Sabha Singh and Surajnath Singh to institute the proceedings in their behalf the provisions of section 188 of the Bengal Tenancy Act had been contravened and the application was not maintainable.

In the first place, it is doubtful whether a proceeding under section 105 of the Bengal Tenancy Act is a suit. In *Chiodich* v. *Tulsi Singh* (1), it was held by a Division Bench of the Calcutta High Court that an application under section 105 of the Bengal Tenancy Act cannot be regarded as a suit. In the second place, section 141 of the Code of Civil Procedure

(1) 18 Ind. Cas. 130 ; 40 C. 428 ; 17 C. W. N. 467.

provides that the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The proceeding in the present case was initiated in a Revenue Court before a Revenue Officer and not in a Court of Civil jurisdiction and, in my opinion, section 141 of the Code has no application to applications under section 105 of the Bengal Tenancy Act. It has, however, been pointed out by the learned Vakil for the respondents that section 107 of the Bengal Tenancy Act provides that, in all proceedings under section 105, 105 (A) and 106, the Revenue Officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits. Now, this section makes the procedure for the trial of suits laid down in the Code of Civil Procedure applicable to proceedings under section 105 of the Bengal Tenancy Act, and not to applications initiating the proceedings. In my opinion it does not make the provisions contained in the Code of Civil Procedure relating to the verification of a plaint applicable to such proceedings. But, even assuming that the provisions contained in O. VI, r. 14 of the Code relating to the signing of the plaint are applicable, I think the provisions have been materially complied with in the present case. There can be no doubt that Sabha Singh and Surajnath Singh did authorize Panchoo Singh to sign the application on their behalf as was found by the learned Revenue Officer. The conduct of those two persons before they filed their applications on the 8th and 17th September 1920 makes this point clear. As has been pointed out by the Revenue Officer, these persons appeared before him on the 26th July 1920 and proceeded with the trial in the usual way without raising any objection. If that is so, then any formal defect in signing or verifying the application will not make the application incompetent. As was pointed out by the Privy Council in the case of *Mohini-mohun Das* v. *Bungsi Baddan Saha Das* (2), there is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. Section 188 of the Bengal Tenancy Act provides that, "where two or more persons are joint landlords, anything which the landlord is, under this Act, required or authorized to do must be done either by both or all those persons acting together, or by an agent authorised to act on behalf of both or either of them." Here all that was necessary was that the application under section 105 should be filed by or on behalf of all the joint landlords, this was the thing which the landlords were authorized by the Act to do. The application appears ta have been filed by all of them, and the subsequent conduct of some of the joint landlords in repudiating the authority of the others to sign the application on their behalf and retiring from the case will not attract the provisions of section 188 so as to defeat the application if the other joint landlords choose to proceed with it.

As regards the observation of the learned Special Judge that if Sukhram Singh is the managing member of the joint family consisting of himself, Panchoo Singh, Sabha Singh and Surajnath Singh, he was a necessary party to the application, it is to be noted that it is admitted by both parties before us that Sukhram Singh is not a recorded proprietor. All the recorded proprietors of the *Touzi* are named as applicants in the application and the absence of the name of Sukhram Singh, even if he be the managing member, will not make the application illegal if the persons who are recorded as proprietors are all joined in the application. I am, therefore, of opinion that the learned Special Judge was wrong in holding that the application under section 105 could not be maintained by reason of the provisions of section 188 of the Bengal Tenancy Act. It appears from his judgment that no ground was taken before him as regards the merits of the case ; the only ground upon which the decision of the Revenue Officer was assailed before him was that the application could not be maintained under the provisions of section 188 of the Bengal Tenancy Act. This ground having failed the decision of the Revenue Officer must be confirmed.

The result is that the appeal succeeds, the decision of the Special Judge is set aside and that of the Revenue Officer is restored. The appellants are entitled to their costs in this

(2) 17 C. 580; 5 Sar. P. C. J. 498; 8 Ind. Dec. (N. S.) 926.

appeal and in the Court of Appeal below. The order for costs made by the Revenue Officer will stand.

Dawson Miller, C. J.—I agree.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2688 OF 1920.

Present :—Mr. Justice Harrison and
Mr. Justice Moti Sagar.

November 14, 1923.

THE MUNICIPAL COMMITTEE OF JHANG—DEFENDANT—APPELLANT

versus

DEVI DIAL—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 175—Order directing removal of encroachment—Court, power of, to interfere.

Where a Municipal Committee directs, under the provisions of section 175 o the Punjab Municipal Act, the removal of a structure as constituting an encroachment on a street and the action of the Committee is found to be *intra vires* and not actuated by dishonesty or malice the Court cannot interfere with it merely because in the opinion of the Court it is unnecessary in the public interest to remove the structure.

Nagar Valab Narsi v. *Municipality of Dhandhuka* 12 B. 490 ; 6 Ind. Dec. (N. S.) 810 ; *Ollivant* v. *Rahimtula Nur Mahomed*, 12 B. 474; 6 Ind. Dec. 799, distinguished.

Second Appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 27th August 1920, modifying that of the Munsif 2nd class, Jhang, dated the 19th March 1920.

Dr. *Gokal Chand Narang*, for the Appellant.

Metha *Amin Chand*, for the Respondent.

JUDGMENT.—The Municipal Committee of Jhang, acting under the provisions of section 175 of the Municipal Act (III of 1911), ordered the plaintiffs-respondents to remove certain structures which encroached upon a street, and, on their failure to comply, the Committee removed them. The plaintiffs instituted two separate suits praying for declarations that the sites under these erections where their exclusive property and that the resolution directing their removal should be cancelled. The suits have been decreed by both the lower Courts and the declarations have been given ; but, as the Committee has never denied the title of the plaintiffs and as the erections have actually been removed, it is impossible to see what satisfaction the plaintiffs can get from the declarations or what possible result they can have. The plaintiffs did not ask for damages and none have been awarded. The Committee has appealed, presumably with the idea that the decisions may form a dangerous precedent.

The finding of the District Judge was that the structures were on the street and that the action of the Committee was *intra vires*. He was not satisfied that it was *bona fide* as it appeared to him to be capricious and arbitrary. He thought that the structures were not obstructions because, in his opinion, they caused practically no inconvenience to anybody. The question before us is, whether, in these circumstances, the action being admittedly *intra vires*, any suit lies and whether the decision of the Committee can be questioned. Various authorities have been quoted. the Committee relying upon *Harji Mal* v, *Municipal Committee Delhi* (1), *Abdul Samad* v. *Municipal Committee of Delhi* (2), and *Municipal Committee Rohtak* v. *Karimuddin* (3), while the respondents rely on *Nagar Valab Narsi* v. *Municipality of Dhandhuka* (4), and *Ollivant* v. *Rahimtula Nur Mahomed* (5). The findings in these Bombay rulings in no way assist the respondents, and, moreover, the point in its extreme form as urged by the respondents does not really arise in this case. The District Judge has used the words "*bona fide*" and has found that the action was not *bona fide*. The body of the judgment, however, shows that he has not used these words in

(1) 29 Ind. Cas. 766 ; 107 P. L. R. 1915 ; 67 P. W. R. 1915.
(2) 35 Ind. Cas. 377 ; 75 P. R. 1916 ; 140 P. L. R. 1916 ; 154 P. W. R. 1916.
(3) 46 Ind. Cas. 571 ; 6 P. R. 1919 ; 135 P. W. R. 1918 ; 11 P. L. R. 1919.
(4) 12 B. 490 ; 6 Ind. Dec. (N.S.) 810.
(5) 12 B. 474; 6 Ind. (Dec. N. S.) 799.

their true sense and what he means is "unnecessary." It was alleged that improper influence had been brought to bear on the Committee, but he has not found that this was so. He has merely substituted his opinion as to the advisability and necessity of removing the structures for that of the Committee. In doing so he has acted wholly *ultra vires* and has arrogated to himself powers which he had not got. We, therefore, hold, accepting the finding of fact of the learned District Judge, that the action of the Committee being shown to be *intra vires* and there being no finding that it was in any way dishonest or malicious, the question of whether it was necessary in the public interest to remove the structures did not arise any more than did the question of title.

We accept the appeals and dismiss the suits of both the plaintiffs.

The costs of the defendant Committee will be borne throughout by the plaintiffs in both cases.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 68 OF 1919.

November 14, 1922.

Present :—Mr. Justice Das and
Mr. Justice Adami.

Babu KANHAI LAL KHEMKA
AND OTHERS—APPELLANTS
versus
Babu THAKUR THAKUR PRASAD
SINGH AND OTHERS—RESPONDENTS.

Hindu Law—Minor—Guardian—Mortgage of minor's property by guardian—Necessity—Benefit to minor—Inquiry by mortgagee—Minor, whether can approbate part of transaction and repudiate rest.

A minor cannot be allowed to approbate a transaction in so far as it has given an estate to him and to repudiate the liability that arises from the transaction.

In dealing with the guardian of a minor, a person who lends money to the minor on the security of his property, is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting in the particular instance for the benefit of the minor. But he is under no duty to enquire into the necessity for an altogether different transaction which has made the proposed transaction inevitable. Provided the necessity for the loan has not arisen from any misconduct to which the lender is or has been a party, he is not affected by the precedent mismanagement of the estate by the guardian. [p. 13, col. 1.]

What has to be considered in such a case is the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance. [p. 13, col. 1.]

Messrs. *Hasan Imam, Sultan Ahmad, P. Dayal, Sambhu Saran* and *Jadubans Sahay*, for the Appellants.

Messrs. *P. K. Sen, S. M. Mullick, A. B. Mukherji, N. C. Sinha, Rai T. N. Sahay* and *Bhagwan Prosad*, for the Respondents.

JUDGMENT.

Das, J.—This was a suit by the appellants to enforce a mortgage-bond as against the respondents. The mortgage-bond was executed on the 30th October 1916 by defendant No. 1 who was and still is a minor, through his father and natural guardian, defendant No. 7, as principal and by defendants 2 to 6 (of whom defendants Nos. 4, 5, and 6 are minors) as sureties to secure an advance of Rs. 34,000 made by the plaintiffs to defendant No. 1 to enable him to pay the balance of the consideration money due in respect of a property purchased by defendant No. 1 from the defendants Nos. 2 to 6. The learned Subordinate Judge has given the plaintiffs a personal decree as against defendants Nos. 2 and 3 and has dismissed the suit as against the defendants other than defendants Nos. 2 and 3.

The facts are these. On the 11th September 1916 certain porperties belonging to the defendants second party (defendants Nos. 2 to 6) were sold at a sale held in pursuance of a mortgage-decree that had been obtained by Tilakdhari Lal and another against the defendants second party. The mortgage-claim was for Rs. 1,02,330 and the properties were sold to the decree-holders for Rs. 73,200. It was open to the defendants second party to apply under

O. XXI, r. 89, to have the sale set aside on depositing in Court a sum equal to five per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, but it was necessary for them to make the application on or before the 30th October, after which date no application for setting aside the sale could be entertained by the Court. The defendants second party set about to obtain a loan of Rs. 1,06,011-8-9, the amount which it was necessary for them to deposit in Court under O. XXI, r. 89 of the Code. It so happened that the Rani of Jheria, the aunt of defendant No. 1, had made a promise to defendant No. 7, the father of defendant No. 1, to make a gift of money to enable defendant No. 1 to purchase immoveable properties. Defendant No. 7 entered into negotiation with the defendants second party for the purchase of the properties which had already been sold to Tilakdhari Lal, and the defendants second party agreed to sell those properties to defendant No. 1 for Rs. 1,06,011-8-9. The Rani of Jheria approved of the transaction, and sent Rs. 79,000 to defendent No. 7, Rs. 75,000 for the purchase of the properties in question and Rs. 4,000, for the expenses of the family. It is the case of defendant No. 1 that the Rani never agreed to pay anything more than Rs. 75,000 for the purchase of the properties, but the learned Subordinate Judge has found, and I think rightly, that defendant No. 7 expected to procure the balance of the consideration money from the Rani. The sale-deed was executed by the defendants second party in favour of defendant No. 1 on the 24th October 1916, but the consideration money was not paid that day, as the full consideration money had not been received by defendant No. 7. The parties, however, had complete faith in the promise of the Rani and they believed that Rs. 32,000, the balance of the consideration money, would be sent by the Rani in time to enable defendant No. 7 on behalf of defendant No. 1 to pay off the defendants second party, and the defendants second party to make the deposit on the 30th October. They waited till the 27th October and then, realizing that it was dangerous to wait any longer, since the sale in favour of the decree-holders would stand confirmed if the deposit was not made on or before the 30th October approached the plaintiffs, who happened to have been the bankers of the defendants second party, for a loan for Rs. 32,000 for the short period of three months. The suggestion was made that the plaintiffs should advance Rs. 32,000 to defendant No. 1 on the security of the properties purchased by him from the defendants second party, but the plaintiffs, who knew the defendants second party and did not know the defendant No. 1, agreed to advance the money provided the defendants second party joined in the transaction and mortgaged some of their exclusive properties to answer for the claim of the plaintiffs in case the securities offered by defendant No. 1 proved insufficient. The defendants second party readily agreed and on the 30th October 1916 the plaintiffs advanced Rs. 32,000 to defendant No. 1 on the mortgage executed by defendant No. 1 and by the defendants' second party. It was to enforce this mortgage that the suit, out of which this appeal arises, was brought by plaintiffs in the Court of the Subordinate Judge of Bhagalpore on the 21st December 1917.

The learned Subordinate Judge came to the conclusion that there was no legal necessity which justified the adult defendants to enter into the transaction of the 30th October 1916, and as he thought that the transaction did not benefit the minor defendants, he declined to give the plaintiffs a mortgage-decree on the foot of the mortgage of the 30th October. He thought, however, that the adult defendants Nos. 2 and 3 were clearly bound by their promise, and he has given the plaintiffs a personal decree for Rs. 32,000 with interest as against the defendants Nos. 2 and 3.

It will be convenient, first, to consider the liability of defendant No. 1. In starting the enquiry, the learned Subordinate Judge asked himself the question whether the plaintiffs enquried into the necessities for the loan and satisfied themselves, to the best of their ability, in relation to the person with whom they were dealing, that the guardian (it will be convenient to refer to the defendant No. 7 throughout as the guardian and to defendant No. 1 as the minor) was acting in the particular instance for the benefit of the minors. He thought that no enquiry was, or could be, made by the plaintiffs. He thought also that, had the plaintiffs made any enquiry they

would have seen that the transaction was not for the benefit of the minor as the income from the properties purchased by him, did not exceed Rs. 3,500 per year, whereas the interest payable on the loan (at Rs. 1-4-0 per cent. per month) was Rs. 4,800 per year. The conclusion at which the learned Subordinate Judge arrived may be stated in his own words: "The minor would not at all have been prejudiced had the proposal of the sale fallen through, for he would have at least got back to him the sum of Rs. 74,000 odd belonging to him and the circumstance that the purchase was made for him by his guardian on payment of an improper price cannot deprive the minor of the benefit of his own money and also legalise an improvident act of the manager."

Speaking with all respect, I think there is a confusion in the train of reasoning employed by the learned Subordinate Judge. The transaction before him was the transaction of the 30th October, or rather the transaction of the 30th October read with the transaction of the 24th October, but he was throughout dealing with the transaction of the 24th October. There was no question of the "proposal of sale", "failing through" either on the 28th October, when the proposal was first made to the plaintiffs for the loan, or on the 29th October, when the negotiation for the loan was concluded, or on the 30th October, when the loan was made and the mortgage executed. The sale was concluded on the 24th October 1916, and the position on the 24th October was this: the title in the properties conveyed had passed to the minor subject to the minor paying into Court the sum of Rs. 1,06,011-8-9 on or before the 30th October. This was the legal position on the 24th October, and what the plaintiffs had to consider when the proposal for the mortgage was made to them on the 28th October, was not the propriety of the sale, for the sale had been concluded on the 24th October, but the propriety of advancing Rs. 32,000 to the minor on the security of the properties purchased by him.

Now, in dealing with this question, it is necessary, first, to see what part the Rani of Jheria has played in the matter. It is the case of the minor that he purchased the properties in question from the defendants second party for Rs. 75,000 and not for Rs. 1,06,011-8-9 that the Rani of Jheria having paid Rs. 75,000 to him had done all that she had undertaken to do, that the recital in the conveyance to the effect that he had purchased the properties for Rs. 1,06,011-8-9 was an untrue recital and that not requiring any money he declined to execute the mortgage-bond which was presented to him for his signature and was ultimately coerced into executing it. The learned Subordinate Judge has found that the story told by the guardian on behalf of the minor is an untrue one and that he bought the properties for Rs. 1,06,011-8-9 and not for Rs. 75,000, and that his execution of the mortgage-bond was a voluntary one.

It now becomes material to consider what exactly the Rani of Jheria had undertaken to do for the minor. The guardian describes himself in his evidence in Court as dependent on his sister-in-law, by which he means the Rani of Jheria and on other relations. The Rani of Jheria, is the sister of the wife of the guardian and undoubtedly maintained the family of the guardian. It is easy to see that either the guardian or his wife must have pressed the Rani to make a permanent provision for their infant son. The evidence both of the guardian and of Rajani Kanta makes it perfectly clear that the Rani promised to supply the funds for the purchase of a property for the minor. If the story of the guardian that the defendants second party agreed to sell the property for Rs. 75,000 is, as it has been, disbelieved then it must follow that the Rani was perfectly willing to find the entire capital for the transaction. The evidence shows that the guardian duly informed the Rani of what he had done in the matter, and the Rani sent Rs. 79,000 to defendant No. 7. The evidence of Narendra Narain, one of the plaintiffs, shows that the guardian "expected almost every day that the balance of the purchase-money would reach from Jheria," (page 157 paper book,) and that it was on the 29th (I think the 29th is a mistake for the 28th) that the parties approached the plaintiffs for a short-time loan.

Now, in order to determine whether the security is enforceable as against the minor, it is necessary to see what were the representations made to the plaintiffs and whether the plaintiffs could safely have acted on these

representations. These representations were, first, that the Rani of Jheria, who was the mother's sister of the minor, had agreed to purchase the properties in question for the minor for Rs. 1,06,011-8-9 ; secondly, that she had already sent him Rs. 75,000 and had promised to send the balance soon ; thirdly that the properties which the minor had purchased from the defendants second party had already passed to Tilakdhari Lal at the sale held in pursuance of Tilakdhari's mortgage-decree, and, fourthly, that unless the purchase-money was deposited in Court on or before the 30th October the sale in favour of Tilakdhari would be confirmed and Tilakdhari Lal would still have a claim against the defendants second party for a large sum of money. Now, there is no doubt that each of these representations was true, and the question which we have to determine is, whether any question of legal necessity arises, and, if it does arise, whether it has been made out.

Now, we may look at the conveyance of the 24th October and the mortgage of the 30th October either as one transaction or as two different transactions. If we look at them as one transaction then, in my opinion, no question of legal necessity arises. As I understand the doctrine, it has application only when the minor has an estate or a fund which it is the duty of the Court of Equity to protect as against the improvident act of the guardian. Now what was the estate of which the minor was in possession ? Clearly none, unless it was the estate which his father purchased for him. But then that estate came to him by the very transaction which he is now seeking to challenge, and the question is, whether he can be allowed to approbate the transaction in so far as it has given an estate to him and to repudiate the liability that arises from the transaction. Now, in my opinion, we cannot deny validity to the mortgage unless we are able to set aside the transaction as a whole and restore the parties to the position which they respectively occupied prior to the conveyance of the 24th October. But that is manifestly impossible, for Tilekdhari Lal is not a party to the present suit. In my opinion, once it is realized that the minor was not in possession of any estate independently of the tranaction which he is now seeking to challenge, it becomes manifest that the Court cannot extend its protection to the minor by denying validity to the transaction which has brought the estate into existence.

But it was urged that the infant was in possession of a fund, Rs. 75,000 in all, which it is the duty of this Court to protect as against the improvident act of the guardian. The argument assumes that the infant was in possession of the fund independently of the transaction which he is now seeking to challenge. But, in truth, there is no substance for the assumption. The Rani did not make a gift of any money to the infant. What she did was to make a gift of this identical estate to him. It is only necessary to carefully read the evidence of the guardian to see what the position really was. The family was in a destitute condition and had entirely to depend on the bounty of the Rani. The Rani had agreed in *Chait* 1323 to provide funds for the purchase of a property for the infant and had asked the guardian to see if there were any properties available for sale. Subsequently, the guardian met defendant No.2 (one of the defendants second party) and ascertained from him that he had some properties to sell. He thereupon went to Jheria and told the Rani all that he had ascertained and gave her all the details. The Rani asked him to conclude the transaction and promised to send the necessary fund. He concluded the transaction with the defendants second party and sent a message to the Rani to say that he had done so. Thereupon the Rani sent him Rs. 75,000. The evidence of the guardian establishes beyond doubt that the Rani sent Rs. 75,000 to the guardian in order to enable him to buy for the minor the properties which he had agreed to buy from the defendants second party. It follows, therefore, that the minor became possessed of the fund, not independently of the transaction, which he is now seeking to repudiate, but as a necessary part of it. In my opinion, no question of legal necessity arises in this case.

But, then, it may be contended, that the conveyance of the 24th October was one transaction and the mortgage of the 30th October was another, and that there is no foundation for the argument that the two ought to be considered as one transaction only. The contention, in my opinion, does not improve the position of the minor. If we look

upon the transaction of the 30th October as distinct and apart from the transaction of the 24th October, then it must follow that the sale was concluded on the 24th October and that there is no warrant for the view of the learned Subordinate Judge that, "the minor would not at all have been prejudiced had the proposal of the sale fallen through." There was no question on the 30th October of "the proposal of the sale" falling through. The sale was an accomplished fact and the problem which the plaintiffs had to solve on the 30th October was, not whether the transaction of the 24th October was for the benefit of the minor, but whether the transaction of the 30th October would be for the benefit of the minor. I know of authorities which lay down that, in dealing with a guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting, in the particular instance, for the benefit of the ward. But I know of no authority which imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or has been a party, he is not affected by the precedent mismanagement of the estate. As the Judicial Committee has said: "the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." In my opinion, if we look at the transaction of the 30th October as distinct and separate from the transaction of the 24th October, the question of the propriety of the transaction of the 24th October was not one which the plaintiffs had to consider in entering into the transaction of the 30th October. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, was the thing to be regarded.

Now, when the facts are properly appreciated there can be no doubt that the actual pressure on the estate on the 30th October was undoubted, the danger imminent. The failure to find Rs. 32,000 by the 30th October would have involved, not the "the proposal of the sale" falling through as the learned Subordinate Judge has supposed, but the coming into existence of a large claim against the minor. For what are the facts? The execution-sale which had given the properties to Tilakdhari Lal, had not wiped out the debt of the defendants second party. The total debt, for the recovery of which the properties were sold, was Rs. 1,02,330, and the properties were actually knocked down at the auction for Rs. 73,200. The position then was this, that unless the defendants second party could deposit in Court by the 30th October the sum of Rs. 1,06,011-8-9, which included for the payment to the purchaser, a sum equal to five per cent. of the purchase-money, not only would the sale be confirmed, but the defendants second party would still be liable to pay to Tilakdhari Lal the sum of Rs. 29,130. At this stage the minor came into the scene through his guardian. He agreed to buy the properties for Rs. 1,06,011-8-9, and actually took a conveyance of the properties on the 24th October. The position on the 24th October was this, that the properties had passed to the minor, subject to his paying to the defendants second party on or before the 30th October the sum of Rs. 1,06,011-8-9. But the minor had only something like Rs. 74,000 in his hand on the 24th October. In order not only to save the properties, but to avoid a claim being made against him by the defendants second party, it was essentially necessary for him to find on or before the 30th October the sum of Rs. 32,000. There was, therefore, not only an actual pressure on the estate but an imminent danger, and, in my opinion, the plaintiffs were justified in lending the money to him without enquiring into the question whether the transaction of the 24th October was, or was not beneficial to him.

In the view which I take of the case, it is unnecessary to enter into the question of the value of the properties purchased by defendant No. 1, but I shall deal with it, as the conclusion of the learned Subordinate Judge is largely based on it. The learned Subordinate Judge was greatly impressed by the fact that the properties were knocked

down at the auction-sale for Rs. 73,200. But it is notorious that the price fetched at a forced sale is not a true criterion for determining the real value of the properties sold and that it forms a most fallacious basis for assured conclusions. It is more to the point, as Narendra Narain says, that the Rajah of Nawaggar offered to purchase the properties for Rs. 1,10,000. Narendra Narain explains in his evidence that, as the officer of the Rajah wanted a commission of Rs. 10,000 he declined to sell the properties to the Rajah of Nawaggar. There is no reason to disbelieve his evidence, for it seems that he filed the actual letter received by him from the Private Secretary of the Rajah in Tilakdhari Lal's execution case.

Now, as to the income. The evidence of Narendra Narain is that the income from the properties at the time of the sale was about Rs. 6,000 per year. The learned Subordinate Judge thinks that the nett income could not have exceeded Rs. 3,550. The learned Subordinate Judge concedes that the best evidence on this part of the case would be the collection papers and especially the *jinsi* papers of the estate, but he is under the impression that it was the duty of the plaintiffs to call upon the defendants second party to produce the *jinsi* papers. But Narindra Narain says definitely that he made over the *jinsi* papers to defendant No. 7. This evidence is inherently probable, for it is usual to make over all papers and documents connected with an estate at the time of the sale thereof. In my opinion, since the question of the income of the estate was an important question for the consideration of the learned Subordinate Judge, according to the case of the minor as it was presented on his behalf to the Court, it was the duty of the guardian who was in possession of the materials necessary to enable the Court to come to a conclusion on this point, to have produced those materials before the Court, and his failure to do so, should have induced the Court to accept the evidence of Narendra Narain.

We are, in the absence of those materials, unable to say definitely what the income of the estate was at the time of the transaction of the 24th October. But there are materials in the record which establish conclusively that the calculation made by the learned Subordinate Judge is untrustworthy and ought not to be accepted.

The learned Subordinate Judge divided the lands conveyed into two groups: (1) the lands producing cash rents, and (2) the Kamat lands. As regards the cash rent, there was no difficulty whatever and the conclusion of the learned Subordinate Judge that it was Rs. 2,545 per year must be accepted as correct. As regards the Kamat lands, the learned Subordinate Judge thought that 121 acres, equivalent to 214 *bighas*, had passed by the conveyance 80·76 acres, equivalent to 143 *bighas*, being *Keari* or *paddi* lands, 40·24, acres equivalent to 71 *bighas* being *Bari* or *bhit* lands. He allowed 3½ mds. of nett produce from every *bigha* of the *Keari* lands and 20 seers of nett produce from every *bigha* of the *Bari* lands. He calculated the price at Rs. 3 per maund and came to the conclusion that Rs. 1,606 was the probable income from the Kamat lands. He also allowed Rs. 25 as the income from the *mela* that was held every year in the estate. The gross income, according to him, was Rs. 4,176 per year. Deducting from the *nagdi* income, Rs. 75 for Government revenue Rs. 413 for cesses and Rs. 254 for collection charges, he arrived at the conclusion that the nett income was approximately Rs. 3,555 per year.

Now, there are some obvious mistakes in the calculations made by the learned Subordinate Judge. He conceded that the *kamarbandi* standard of measurement must be taken as the basis of his calculation, but according to that standard of measurement, 121 acres would be equivalent to 239 *bighas* 4 D and not to 214 *bighas*, one acre being equivalant to 1 *bigha* 19 *kathas* and 10 *dhurs*. See Nilmoney's Survey Settlement Guide, page 129. Now the income from these 25 *bighas* of land 16½ *bighas keari* and 8½ *bighas Bari*, accepting the produce per *bigha* and the price at Rs. 3 per maund as found by the learned Subordinate Judge, comes up to Rs. 186 per year. Now, it is true that Rs. 186 per year is a small item when we are considering whether the income is Rs. 6,000 per year, as the plaintiffs assert, or whether it is Rs. 3,555 per year, as the learned Subordinate Judge has found, but it is, in my opinion, necessary to see whether the investigation of the learned

Subordinate Judge, on the question of income was a careful one, and whether his conclusion can be accepted as approximately correct. If, as I shall present show, there are various items of income which the learned Subordinate Judge never took into consideration, it will be impossible to accept his conclusion on the question of income.

I now come to the question whether the learned Subordinate Judge omitted to take into consideration certain classes of lands which have a definite value capable of being capitalized. The plaintiffs assert that he failed to take into consideration the following classes of lands all of which fall within the properties sold, (1) 75 *bighas* of *kamat* lands in Kita Tilaru, (2) 77 *bighas* of *kamat* lands in Patalia, (3) 32 acres of *jote* land, (4) 318'82 acres equivalent to 630 *bighas* of *khas Ghair Mazrua* lands (5) 52'93 acres of *Jagir Chakrana* lands, and (6) 49'83 acres equivalent to 98 B. 8 C. 17 Dh. of *bhawli* lands, 38'85 acres equivalent to 76 B. 15 K. 2 Dh. being *Keari* or Dhanhar lands, and 10'98 acres equivalent to 21. B. 13 K. and 15 Dh. being *Bari* or wheat producing land.

I will take these items one by one. There is no doubt whatever that the learned Subordinate Judge entirely ignored the 75 *bighas* of *Kamat* lands in Kita Tilaru. The saledeed of the 24th October is conclusive on the point. In order to understand the point, it is necessary to state that the conveyance was by Parmeshwar Narain Singh by his three sons, Narendra Narain, Gagendra Narain and Rajendra Narain, and by Randhir Prosad, the son of Narendra Narain. The conveyance recites that Parmeshwar Narain had no further interest in the joint family properties having relinquished his title thereto in favour of his sons, and that he had kept for his maintenance 100 *bighas* of *Kamat* lands in *Mouza* Kasba Mander (one of the *mouzas* sold) known as Kita Tilaru and Kita Tulshichowra. There can be no doubt whatever that there existed in *Mouza* Kasba Mander 100 *bighas* of *Kamat* land in two lots, one lot being known as Kita Tilaru, the other lot being known as Kita Tulshichowra. The fourth paragraph recites the contract of sale in respect of *Mouza* Kasba Mandar, *Mouza* Matakundi and Kita Patalia, "*mal* with *Kamat* and *Bakasht* lands in the aforesaid *mouzas* known as Kita Bhalgada, Kita Hathia and Kita Tilaru." It will be noticed that Kita Tulshichowra was not intended to pass, but that Kita Tilaru was clearly intended to pass. In order to avoid confusion, it ought to be stated here that the Kamat lands known as Kita Bhalgoda and Kita Hathia have an area of 121 acres and the income arising therefrom has been considered by the learned Subordinate Judge. The fifth paragraph conveys to the minor, the *mauzas* Kasba Mander Mahakundi, and Kita Patalia with *Kamat* and *bakasht* lands, whereof details are given in schedule No. 1 of this deed." The 20th paragraph recites that Kita Tilaru measuring 75 *bighas*, belonging to Parmeshwar Narain has been sold along with the properties belonging to the other executants. The schedule describes Kita Tilaru as follows:— "Kita Tilaru measuring about 75 *bighas* or so much land that may be found under Survey Settlement *khatian* and *khasra*," and then the boundaries are given.

What possible reason is there for doubting that 75 *bighas* of land known to the executants as Kita Tilaru and belonging exclusively to Parmeshwar Narain was intended to be and was in fact, conveyed to the minor. Parmeshwar Narain had no interest in the properties conveyed if we exclude the Kita Tilaru from our consideration. Why then was it necessary for him to join in the conveyance. It is argued on behalf of the defendant that what was conveyed was Kita Tilaru as so described in the Survey Settlement *Khatian*, and as Kita Tilaru is not to be found in the Settlement records, either these lands never existed at all, or they did not pass by the conveyance. It is quite true that the Record of Rights does not show that there is any block of land known as Kita Tilaru but I do not agree that what was intended to be conveyed was Kita Tilaru as so described in the Record of Rights. The reference to the Survey Settlement *Khatian* was necessary as the area given in the conveyance was only approximately correct. The boundaries of the block are accurately given in the schedule, and there is no difficulty in identifying the land sold.

But, still, it is a matter for our consideration why no block of land known as Kita Tilaru is shown in the Record of Rights. I think there is an explanation and it is this, these lands are shown in the Record of

Rights as *bhawli* lands and not as *Kamat* lands. The boundaries of Kita Tilaru are given in the *kabala* and it is possible to locate the block known as Kita Tilaru in the Record of Rights. On such an investigation, it would appear that Kita Tilaru is identical with 76 B. 15 K. 2Dh. of Dhanhar or Keari *bhawli* lands shown in the Record of Rights. This, in my opinion, is the solution of the problem raised on behalf of the defendant.

There is no difficulty in calculating the income derivable from these 76 *bighas* of *bhawli* land. Taking the produce at five maunds per *bigha*, and giving the landlord a half share in the produce and calculating the the price at Rs. 3 per maund, we find that Rs. 570 per year is the income derivable from these lands. This, as I have said before, the learned Subordinate Judge did not take into consideration.

I take the next item, 77 *bighas* of *Kamat* lands in Patulia. In my opinion, the plaintiffs have not established the existence of these lands. Neither the conveyance nor the Record of Rights supports the case of the plaintiffs and it is impossible to hold on the evidence that there are any *Kamat* lands in Patalia. We have in the record of the case the clear admission of Narendra Narain that there were no *bhawli* or *Kamat* lands in Patalia. I hold that the plaintiffs have not established the existence of these lands.

But they have, in my opinion, establised the existence of 32 *bighas* of *jote* lands which is the next item which I have to consider. Now, these *jote* lands are lands which were the occupancy holdings of the *raiyats*, but which, either by conveyance or at auction-sales, passed to the landlords. The sale-deed, Ex. 15, clearly mentions these lands and conveys them to the minor. The passage dealing with this point will be found in the 13th paragraph and runs as follows:—"All those *jote* lands also which we the executants purchased at an auction-sale held by a Court or by means of a *kabala* executed in name or *benami* form, are in possession of us, the executants. All these land too are sold under the *kabala*." But it was urged that the conveyance can not decide the point, for it may well be that the vendors never acquired any of these lands or if they did acquire them, they were again settled with tenants. But the evidence is conclusive on this point. The first witness examined on behalf of defendant No. 1 is the *muharir* of defendant No. 1 who on his own evidence, was in charge of the collections. He admits in his cross-examination that the minor acquired 32 or 36 acres of *jote* lands from the defendants second party. There is also an admission of the guardian on this point. He says that there were 77 or 76 *bighas* of *jote* lands in the name of Narendra Narain and that the *kabalas* and the sale certificates were made over to him by Narendra Narain. Now 77 or 78 *bighas* are equivalent to 40 acres, but it will be safe to proceed on the admission of the *muharrir* and to hold that 32 acres equivalent to 63 *bighas* 4 K. 4 Dh. of *jote* lands passed by the conveyance. It was pointed out by the learned Counsel for the defendant that these *jote* lands are not shown in the Record of Rights, but the explanation is that they may have been reduced into possession after the publication of the Record of Rights. In my opinion it is impossible to ignore the recital in the sale-deed and the admissions made on behalf of the minor. The income derivable from these 32 acres of *jote* land, according to the method of calculation adopted by the learned Subordinate Judge, is Rs. 661·8. In my opinion, the learned Subordinate Judge should have taken this figure into his consideration.

I now come to the next item, 318·82 acres equivalent to 630 *bighas* of *khas ghairmazrua* lands. The existence of these lands is established by the Record of Rights and is, recognised by the learned Subordinate Judge. But the learned Subordinate Judge has declined to take these lands into his consideration, for he does not think that "any income used to be had from these lands at the time of the sale." The problem, whether "any income used to be had from these lands at the time of sale" could only be solved by the production of the books of account which were made over by the defendants second party to defendant No. 1 and which have not been produced in the case. The evidence of Narendra Narain on this point is that, since the Bansi Railway line was opened, the value of lands in the locality rose very high, as many persons acquired lands for

building purpose. He says that such lands are let out at a premium of Rs. 100 to Rs. 300 per *bigha* and at the rent of 8 as. to Rs. 4. According to him, the annual income from Bhatdiha is about Rs. 700, and that from Patalia is about Rs. 300. His evidence receives strong corroboration from the evidence of Purnath Singh, witness No. 4 for the plaintiffs. The comment of the learned Subordinate Judge is that the argument no longer applies "as the railway line has been discontinued." There is, however, no evidence in the record that "the line has been discontinued." In my opinion, it is impossible to ignore these lands which, as the evidence shows, are very valuable for building purposes. Narandra Narain is probably exaggerating the income derivable from these lands, and it is impossible to say with any confidence, what that income was. But these lands have clearly a value of their own and their acquisition cannot, by any stretch of imagination be regarded as a speculation, as the learned Subordinate Judge supposed.

Then, there are 52'93 acres of *Jagir Chakrana* lands. These lands are held in service tenure and produce no cash income. But the landlord is entitled to service and to resume the lands on the failure on the part of the tenants to render service. They have, therefore, a value of their own which cannot be ignored. I ought to add that the existence of these lands is established by the Record of Rights.

I now come to the *bhawli* lands having an area of 49'83 acres. The learned Vakil for the respondent admits that the learned Subordinate Judge left them out, but he maintains that their value is so small that they may well be ignored. The Record of Rights shows that there are 38'85 acres equivalent to 76 *bighas* 15 C. 2 Dh. of *Keari* lands and 10'98 acres equivalent to 21 B. 13 K. 15 Dh. of *Bari* land. My own view is, as I have already expressed, that the *Keari* lands measuring 76 *bighas* 15 C. 2 Dh. are identical with 75 *bighas* of *Kamat* lands comprising Kita Tilaru. I have already considered the question of income derivable from Kita Tilaru. There then remains 21 B. 12 K. 15 Dh. of *Bari* land. The incomes from these lands would be Rs. 48-12-0 according to the method of calculation employed by the learned Subordinate Judge.

It is possible now to see how careless the investigation of the learned Subordinate Judge has been on the question of income. He has omitted to take into consideration various items of properties having an income of Rs. 1,466-4-0, on his own method of calculation, and also failed to attach any importance to the *khas Ghairmazrua* lands and the *Jagir chakrana* lands, which as I have said have a value of their own. Apart from these, there are, according to the Record of Rights, 993 palm trees, 110 date trees, 33 mahua trees, 67 sakhua trees, 60 sisum trees, 48 mango trees, and 49 bamboo clumps, the income from which is not wholly negligible. And, lastly, there is the income from Jalkar (*khasra* No. 84) and from Banker (*khasra* No. 116 and 119). In my opinion, the income from the different classes of land conveyed does not fall far short of Rs. 6,000 per year which, according to the evidence of Narendra Narain, is the income of the estate. It is impossible to say that an investment of Rs. 1,06,011-8-9, which brought an income of Rs. 6,000 per year, was an improvident investment. I hold that the mortgage-bond is binding on the minor and is enforceable as against him.

I now come to the question of the liability of the defendants second party. There is, in my opinion, no escape from the conclusion that the transaction of the 30th October was for the benefit of the entire joint family and that the mortgage-bond is enforceable against them. It will be remembered that, at the auction-sale, held in execution of Tilakdhari Lal's decree, the properties which were the subject-matter of that mortgage and which are substantially the same as those sold to defendant No. 1 were knocked down for Rs. 73,200. The sale did not wipe out the liability of the defendants second party and there was every prospect of what other properties they had passing into the hands of Tilakdhari Lal. It was, therefore, urgently necessary for them to pay the decretal amount into Court on or before the 30th October not only to rescue the properties which had already passed into the hands of Tilakdhari Lal, but to save what other properties they had. It is quite

true that the effect of the transactions of the 24th October and 30th October was to rescue these properties from the hands of Tilakdhari Lal and to vest them in defendant No. 1. But it was important for them to save the remaining properties which they had and this they did by entering into the transaction of the 30th October.

The argument of the learned Subordinate Judge is this: "The family properties were not all saved, but the upshot was in effect that the properties which would have gone into the hands of the auction-purchasers passed into those of a private purchaser and that the liability under the decree came to an end only to emerge in another form to fasten the family estate with the liability of Rs. 32,000 at an exorbitant rate of interest by virtue of the bond in suit." And then he comes to this conclusion, "the benefits, if any, which accrued to them," that is to say, to the minor defendants Nos. 4, 5 and 6, "by the acts of the defendants Nos. 2 and 3 followed not from the contracting of the loan under the bond, but from the sale in favour of defendant No. 1."

With all respect, I am wholly unable to appreciate the argument. The sale in favour of defendant No. 1 would have availed them nothing, if the decretal amount could not be brought into Court on or before the 30th October. The defendant No. 1 could not pay the purchase-money, and the decretal amount could not be deposited in Court on or before the 30th October. It may be that the defendants second party could proceed against defendant No. 1, but meanwhile the auction-sale would be confirmed, and their remaining properties would be proceeded against. I think the mistake is in insisting on looking at the sale of the 24th October and the mortgage of the 30th October as separate transactions, whereas in substance they constitute one transaction. The problem which the managing members of the joint family had to solve on the 30th October was this:—which course was more beneficial to the interest of the joint family, to refuse to join in the mortgage of the 30th October and to submit to the auction-sale being confirmed and their remaining properties being immediately sold to answer for Tilakdhari's claim against them, or to join in the mortgage and immediately save the properties and take upon themselves a contingent liability which might never arise? I have no doubt whatever that they acted prudently in entering into the transaction of the 30th October.

"But then," says the Subordinate Judge, "what have you gained? Your liability under the decree is gone, but your liablility under the mortgage has emerged." If the argument of the learned Subordinate Judge were at all admissible, the managing member of a joint family would be legally incompetent to borrow money to discharge a prior obligation. The immediate necessity was to save the properties, the properties which were not the subject-matter of the conveyance. The necessity was urgent, and the danger to these properties imminent. Can it be argued for a single moment that the liability which they took upon themselves under the mortgage was merely a substitute for the liability which they had under the mortgage-decree? In the first place, they had no reason to doubt that the Rani of Jheria would send the balance of the consideration money to defendant No. 1. They were told so by defendant No. 7, and they believed it, and they had good reason to believe it, since the Rani had already given the defendant No. 1 no less than Rs. 79,000. In the second place, under the mortgage-bond, their liability would only arise on a certain event, that is to say, in the event of the security offered by defendant No. 1 being insufficient to discharge the mortgage-debt. Their liability under Tialkdhari's decree was certain, their liability under the mortgage is a contingent one. Their liability under the decree was for the sum of Rs. 29,130, their liability under the mortgage, if it arises at all, will only be for a very small sum of money, for it is inconceivable that the properties which have been mortgaged by defendant No. 1, which have an annual income of Rs. 6,000 and which were knocked down for Rs. 73,200 at Tilakdhari Lal's auction-sale, can possibly sell for much below the price necessary to satisfy the plaintiffs' claim in the auction. I am of opinion that the mortgage-bond is enforceable against the defendants second party.

I would allow the appeal, set aside the judgment and decree passed by the Court below, and give the plaintiffs a decree in terms of the

reliefs claimed by them. The plaintiffs are entitled to interest at the bond-rate up to the date of the decree and also to interest at 6 per cent. on the decree. The defendants will have six months for redemption from the date of this judgment.

The plaintiffs are entitled to their costs throughout.

Adami, J.—I agree.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 253-B AND 298-B OF 1923.

February 26, 1924.

Present :—Mr. Baker, J. C.

JANARDHAN *versus* WASUDEO.

WASUDEO *versus* JANARDHAN.

Hindu Law—Joint family—Partition—Joint and self-acquired property—Burden of proof—Manager, whether bound to keep accounts—Registration Act (XVI of 1908), s. 49—Unregistered instrument, admissibility of, in evidence—Collateral purpose, what is.

Where there is a nucleus of joint family property yielding an income, the burden of proving that items of property claimed as self-acquired were not purchased out of joint funds lies on the person asserting it. Property purchased out of the savings of the income of joint family property or by raising loans on the security of joint family property would also be joint.

The manager of a joint Hindu family is not obliged to keep accounts while the family remains joint. When a partition is asked for, it takes place of the property as it exists in the hands of the manager. Although there is a severance of interest from the date of the suit, the property remains joint till it is actually divided. It is considered as one entity until the moment comes for division and each party gets his actual share. Any expenses which should properly be debited to the joint family purse are taken out of the joint family property and cannot be debited to any particular co-parcener.

Ramnath v. *Goturam*, 54 Ind. Cas. 115 ; 21 Bom. L. R. 1179, 44 B. 179, relied on.

While an instrument which is compulsorily registrable but is not registered, may be used in evidence to prove a collateral fact, to be collateral the fact must be independent of or divisible from the purpose to effect which the law requires registration.

Kalicharan v. *Lal Indar Shah*, 48 Ind. Cas. 923 ; 15 N. L. R. 31, followed.

Appeal against the decree of the Additional District Judge, Amraoti, dated the 6th June 1923, in Civil Appeal No. 40 of 1921.

Mr. *M. B. Niyogi*, for the Appellants.

Messrs. *M. Gupta* and *K. V. Deosker*, for the Respondents.

JUDGMENT.—These are cross-appeals against the same decree and may be disposed of together. The suit was for partition and came before this Court before in Second Appeal No. 302-B of 1921. This Court held that the family was joint at the date of the suit, and remanded the appeal to the lower Appellate Court for a fresh finding as to the property in lists F and H.

The only question in this appeal is as to whether defendants prove that the property comprised in these lists is their self-acquired property. The lower Appellate Court holds that it is not. It has been held that the family was joint up to the date of suit. Defendant No. 1 was the manager. It is also admitted that there was a nucleus of joint family property and it is not disputed that the income of this property was Rs. 800 a year. The onus is, therefore, on the defendants to show that the property which they claim as self-acquired is not purchased out of the joint funds. If purchased out of savings of the income, it will be joint family property. If by raising loans, it will also be joint unless the manager proves that it was borrowed on his own personal responsibility.

It has been contended that the property was acquired out of the income which defendant No. 1 got as Patwari, but no evidence has been adduced as to what this income was. The family being joint and the family property being under the management of defendant No. 1, the inference would be that the Patwari income was thrown into the common purse.

There is no evidence that any debts were incurred by defendants on their individual responsibility. The mortgage-deed referred to

in connection with Survey 46 has not been produced. The fact that money was borrowed to purchase property which was then mortgaged to the person from whom the money was borrowed, is not inconsistent with the property being joint. With regard to the Farkhat, which is inadmissible for want of registration, the reference to self-acquired property remaining with the respective owner, has been held by the learned Additional District Judge to be an interpolation, and it certainly appears to be so. Apart from this, it has been held in *Kalicharan* v. *Lal Indar Shah* (1) that, while an instrument which is compulsorily registerable under the Registration Act, may be used in evidence to prove a collateral fact, to be collateral the fact must be independent of or divisible from the purpose to effect which the law requires registration.

It appears to me that if the collateral fact to be proved is that some members of the family owned self-acquired property which was not affected by the partition, that is really a clause of the *Farkhat* excluding certain property from partition and as such not independent of or divisible from the purpose to effect which the law requires registration. Hence it is not a collateral fact as defined in the above quoted ruling, and the *Farkhat* cannot be used for the purpose of proving it.

In these circumstances, I hold that the defendants have failed to prove that the property in question is their property self-acquired without the assistance of the joint family funds and the defendants' Appeal No. 253-B of 1923 must be dismissed with costs.

The plaintiffs' cross-appeal No. 298-B of 1923 deals with two points. First, they claim profits from the date of suit and, secondly, they state there is an error with regard to costs.

As regards profits the appellants rely on *Ramaswami Aiyar* v. *Subramania Aiyar* (2). The latest authority on the point is *Ramnath* v. *Goturam* (3) in which it was held that the manager of a joint family is not obliged to keep accounts while the family remains joint and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager. Although there is a severance of interest from the date of the suit, it does not follow that the family property does not remain joint till it is actually divided.

The joint family property is considered as one entity until the moment comes for division and each party gets his actual share. Any expenses which should properly be debited to the joint family purse are taken out of the joint family property and cannot be debited to any particular co-parcener. The present case is not one in which the plaintiffs have been excluded. They are themselves in possession of a part of the joint family property and on the plaintiffs' contention the defendants would be entitled to ask for profits of that share. This would give rise to the difficulty referred to in *Ramnath* v. *Goturam* (3) (above quoted) *viz.*, that immediately after the suit was filed the person in charge of the family property would have to pen a separate ledger account for each co-parcener.

The view of the Bombay High Court in *Ramnath* v. *Goturam* (3) obviates these difficulties and, on the authority of that decision, I hold that the plaintiffs are not entitled to claim profits from the date of suit.

As regards costs, the lower Appellate Court has given reasons for its decision and I am not prepared to interfere with its discretion.

The cross-appeal is consequently dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 48 Ind. Cas. 923 ; 15 N. L. R. 31.
(2) 74 Ind. Cas. 804; 43 M. L. J. 406 at pp. 409, 410; 16 L. W. 297 ; (1923) A. I. R. (M.) 147 ; 46 M. 47.
(3) 54 Ind. Cas. 115; 44 B. 179; 21 Bom. L. R. 1179.

GOKARAN SINGH *v.* JOKHU SINGH

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 306 OF 1923.
January 17, 1924.

Present :—Mr. Wazir Hasan, A. J. C. and Mr. Neave, A. J. C.

GOKARAN SINGH—PLAINTIFF—APPELLANT
versus
JOKHU SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debt incurred by father—Decree—Execution of decree—Family property, whether liable to be sold.

Where the managing member of a joint Hindu family is the father, and the other members are his sons, he may, by incurring a debt, so long as it is not for an immoral purpose, lay the joint family property open to be taken in execution proceedings upon a decree for payment of that debt.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126 ; 21 C. W. N. 698 ; 1 P. L. W. 557 ; 15 A. L. J. 437; 19 Bom. L. R. 498 ; 26 C. L. J. 1 ; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22 ; 6 L W. 213; 39 A. 437 (P. C.); *Brij Narain Rai* v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 28 C. W. N. 253; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; 1924 A. I. R. (P. C.) 50; 33 M. L. T. 457 (P. C.), followed.

Appeal against the decree of the Additional District Judge, Gonda, dated 12th July 1923, upholding decree of the Munsif, Tarabganj, dated 6th September 1922.

Mr. *H. D. Chandra*, for the Appellant.

Mr. *S. N. Roy*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Additional District Judge of Gonda, dated the 12th July 1923, confirming the decree of the Munsif of Tarabganj in the suit brought by the plaintiff-appellant for a declaration that certain property was liable to attachment and sale, in execution of a simple money-decree, which he holds against Anrudh Singh, defendant No. 2. The plaintiff's suit, as stated above, has been dismissed by both the Courts below.

On the 2nd August 1920 the plaintiff obtained a simple money-decree against the defendant No. 2 from the Court of the Munsif of Tarabganj in the District of Gonda. In execution of that decree he attached a 2-annas 8-pies share in village Peoli, *pargana* Gwarich, District Gonda. Objection was taken to this attachment under the Code of Civil Procedure by Jokhu Singh, minor son of Anrudh Singh, under the guardianship of his mother. The Execution Court upheld the objection and withdrew the attachment. The suit out of which this appeal arises, was subsequently brought by the decree-holder, Gokaran Singh, for a declaration that the property, which he had originally attached, was liable to be attached and sold in execution of his decree. The defence to the suit is that the property attached is the property of the joint family consisting of the judgment-debtor, Anrudh Singh, and his minor son, Jokhu Singh, the two defendants in the present suit. It was admitted in the Court below that the debt in respect of which the plaintiff had obtained the simple money-decree, was incurred neither for legal necessity nor in satisfaction of any antecedent debt. On these premises the Court below has come to the conclusion, on the authority of the decision of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1), that the family property is not liable to be seized in execution of the decree obtained in respect of a debt which was incurred neither for legal necessity nor in satisfaction of an antecedent debt. At this hour of the day it is not necessary to discuss whether the view taken by the lower Appellate Court was justified or not on the interpretation which we may place on the decision of their Lordships in the case just now mentioned. We are not free to interpret that decision according to our own lights. Their Lordships have more recently interpreted it and we are bound by that interpretation. This has been done in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (2). At the end of their judgment their Lordships have stated five propositions of law in a categorical form. The present case falls under proposition No. 2 which is as follows :—" If he (the managing

(1) 39 Ind. Cas. 280 ; 44 I. A. 126 ; 21 C. W. N. 698 ; 1. P. L. W 557 ; 15 A. L. J. 437 ; 19 Bom. L. R. 498 ; 26 C. L. J. 1 ; 33 M. L. J. 14 ; (1917) M. W. N. 439 ; 22 M. L. T. 22 ; 6 L. W. 213 ; 39 A. 437 (P. C.).

(2) 77 Ind. Cas 689 ; 28 C. W. N. 253 ; 21 A. L. J. 934; 46 M. L. J. 23 ; 5 P. L. T. 1; (1924) M. W. N. 68 ; 19 L.W. 72 ; 3 P.L.R. 41 ; 10 O. & A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 33 M. L. T. 457 (P. C.).

member of a joint undivided estate) is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." It is not shown in this case, indeed it is not pleaded, that the debt incurred was of an immoral nature. It has been argued that it was of an illegal character and the ground of the argument is that the bonds, on the basis of which the simple money-decree was obtained, were not executed by Anrudh Singh for consideration paid in cash but the creditor had undertaken to discharge certain liabilities against Anrudh Singh in respect of previous debts and that the creditor has not shown to have satisfied those liabilities. We cannot permit this argument to be raised at this stage of the litigation. This defence was not taken in the written statement and there is no trace of it in the judgments of the Courts below. We must, therefore, hold that it has not been proved that the debt, for which the simple money-decree was obtained, was either for immoral or illegal purpose. It follows that the appellant is entitled to proceed against the property which he had originally attached for the purpose of satisfying the decree which he holds against defendant No. 2.

The appeal is, therefore, allowed, the decrees of the Courts below are set aside and the plaintiff's suit is decreed with costs throughout.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 201 OF 1923.

February 28, 1924.

Present :—Mr. Baker, J. C.

JAGESHWAR RAO AND ANOTHER—DEFENDANTS—APPLICANTS

versus

GUJAB RAO—NON-APPLICANT—PLAINTIFF.

Civil Procedure Code (*Act V of* 1908) *s.* 11—Res judicata *between co-defendants, requisites of—Hindu Law—Minor—Guardian, power of, to bind minor's estate—Money borrowed to pay land revenue—Estate, whether liable.*

If the relief given to a plaintiff in a suit does not require or involve a decision of any case between co-defendants, the latter will not be bound as between each other by any proceeding which may be necessary only to the decree which the plaintiff obtains.

Cottingham v. *Earl of Shrewsbury*, (1843) 3 Hare, 627 at p. 638; 66 E. R. 530, relied on.

A guardian cannot bind his ward's estate except by a document purporting to bind it.

Jhitibai v. *Tejmal*, 41 Ind. Cas. 35; 13 N. L. R. 109, followed.

On a contract entered into on behalf of a minor by his guardian under which the guardian borrows money but no charge is created on the minor's estate, no decree can be passed against the minor on his attaining majority or against his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal Law to which he is subject

Patchu Ramajagayya v. *Vajjulu Jagannadhan*, 49 Ind Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M L. J 29; (1919) M. W. N. 148 (F. B.), relied on.

The estate of a minor is liable for money borrowed by the guardian for payment of land revenue.

Revision against the decree of the Judge, Small Cause Court, Betul, in Civil Suit No. 661 of 1922, dated the 28th June 1923.

Mr. *A. C. Roy*, for the Applicants.

Mr. *J. Sen*, for the non-Applicant.

Order.—The facts of this case are peculiar, and raise several points of law. The plaintiff Gujab Rao sued the defendants in the Small Cause Court at Betul, alleging that defendant No. 3, as guardian of the minor defendants Nos. 1 and 2, had executed a bond in favour of one Lakhmichand for payment of land revenue and that the plaintiff stood surety and was compelled to pay the amount to Lakhmichand, and he, therefore, sued to recover it from the defendants. The Small Cause Court Judge passed a decree against them.

The defendants seek revision on the ground that in a previous suit between Lakhmichand, themselves and the present plaintiff, based on this very bond, it was held that their mother had not executed this bond, and the suit was dismissed. Hence the present suit cannot lie.

JAGESHWAR RAO *v.* GUJAB RAO

It is a fact that in suit No. 233 of 1918 of the Court of Small Cause Judge at Betul, Lakhmichand sued the present applicants, who are minors, through their mother their guardian, on a bond and the present plaintiff was added as a surety. He admitted his liability as surety, but the suit against the minors was dismissed on the ground that there was no evidence to prove the execution of the bond in suit, and that, even if the bond was proved, no decree could be passed against them in view of the ruling in *Tukaram Manaji Dhangar* v. *Ramchandra Hari Peshkar* (1). A decree for Rs. 199-1-0 was passed against the present plaintiff on his own confession.

This fact does not seem to have been brought to the notice of the Small Cause Court when it passed the present decree. The fact of the bond having been passed in Lakhmichand's favour was mentioned in the plaint, and the defendants stated in their written statement that the suit against them based on it had been dismissed, but the point was not referred to in the judgment and the decree in that suit was not placed on the record.

The case presents some difficulty. I have no doubt that the decision in the former suit is not *res judicata* as the present plaintiff and the defendants were co-defendants in that suit, and the question of the execution of the bond was not in issue as between them. Although the present plaintiff admitted the bond, there was no matter directly and substantially in issue between the defendants, and no adjudication as between thetm was necessary for the determination of he suit. If the relief given to the plaintiff does not require or involve a decision oi any case between the co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree which the plaintiff obtains : cf. *Cottingham* v. *Earl of Shrewsbury* (2).

The former suit was between Lakhmichand, the present defendants and the present plaintiff. Lakhmichand was a party to the suit, and the present plaintiff does not claim under Lakhmichand. The decision in that suit was one between Lakhmichand and defendants Nos. 1-3 and not between them and the present plaintiff. I am of opinion, therefore, that the suit is not barred by *res judicata*, and, this being so, it was open to the plaintiff to prove the bond. This he bas succeeded in doing.

As to the liability of the defendants to pay the amount which the plaintiff had to pay to Lakhmichand, the bond does not purport to bind the defendants' estate. The decree has not been made to bind them personally, but it is also established law that a guardian cannot bind his ward's estate except by a document purporting to bind it : cf. *Jhitibai* v. *Tejmal* (3). On the other hand, it has been found that the debt was contracted to pay land revenue and it is contended that the case just quoted is authority for the proposition that the estate will be bound.

In *Patchu Ramajogayya* v. *Vajjula Jagannadhan* (4), it was held by the majority in a Full Bench that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree can be passed against the minor on his attaining his majority or his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. In Mayne's Hindu Law, paragraph 218, 9th edition, it is stated that the minor will be bound by the act of his guardian, if the act is such as the infant might reasonably and prudently have done for himself, if he had been of full age.

The money was borrowed for the payment of assessment, which is a necessary charge on the estate, and in my opinion the estate is liable.

The application is consequently dismissed with costs.

Z. K. *Application dismissed.*

(1) 2 N. L. R. 25.
(2) (1843) 3 Hare 627 at p 638 ; 67 E. R. 530.

(3) 41 Ind. Cas. 35 ; 13 N. L. R. 100.
(4) 49 Ind. Cas. 872 ; 42 M. 185 ; 25 M. L. T. 23 ; 9 L. W. 229 ; 36 M. L. J. 29 ; (1919) M. W. N. 148 (F.B.).

RAMJI LAL *v.* MUNSHI LAL

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 248 OF 1921.
March 31, 1924.

Present :—Mr. Justice Harrison and
Mr. Justice Raoof.

RAMJI LAL AND OTHERS—DEFENDANTS —APPELLANTS

versus

MUNSHI LAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Construction of document—Mortgage-deed—Interest, whether charge on land—Mortgagee, remedy of.

In a mortgage-deed the payment of interest was recited as an obligation to be met by the mortgagors yearly. It was further stated that in case of default the mortgagee could bring the property to sale at any time in order to recover the principal and interest and that at any time the mortgagors could redeem by paying the principal mortgage-money ;

Held, (1) that the interest was not a charge on the mortgaged property and the mortgagors were entitled to redeem the property on payment of the principal amount only ;

(2) that the remedy of the mortgagee was to recover the interest due by means of a separate suit for sale.

Appeal from the decision of the District Judge, Karnal, dated the 1st November 1920.

Messrs. *Sheo Narain, R. B.*, and *Shamair Chand*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The only point in this second appeal is whether the defendants-mortgagees are entitled to recieve the interest, calculated from the date of the execution of the deed to the date of payment, before the plaintiff-mortgagor can redeem the property. It has been held by the learned District Judge that the terms of the mortgage entitled the mortgagors to redeem on payment of the principal only. It is not necessary for us to recapitulate those terms in this judgment and it will be sufficient to say that the payment of interest is recited as an obligation to be met by the mortgagors yearly. It is further stated that, in case of default, they can bring the property to sale at any time in order to recover their principal and interest and the final and all-important clause is that, at any time, the mortgagors may redeem by paying the mortgage-money and this is stated to be the definite sum of Rs. 2,600. There is no escape from this final clause, if strictly interpreted, and the net result would be, if we dismiss this appeal, that the mortgagors will be entitled to redeem on payment of Rs. 2,600 in accordance with the strict letter of the deed and when they have done so, it will be open to the mortgagees to bring a suit for sale and to recover by sale the amount due to them. This amount will be twelve years' interest and no more, for when they become plaintiffs they will be debarred by the Law of Limitation from claiming any interest beyond twelve years. But, it is contended they are now defendants and under *Motan Mal* v. *Muhammad Bakhsh* (1) the Law of Limitation does not apply to them. Under the terms of the deed they can attach no interest to the amount to be paid by the mortgagors before redemption. The interest, therefore, is a charge only in the sense that it can be recovered by a suit for sale. They are, therefore, not in the position of the defendants in *Motan Mal* v. *Muhammad Bakhsh* (1) and cannot, as a right, claim interest at all in the present suit. It is, however, desirable to put an end to this litigation, and in order to avoid the delay which will be caused by the mortgagees being forced to bring a second suit, we think it right to exercise our powers in equity and find that the plaintiffs will be entitled to redeem on payment of the principal and interest for 12 years. We now accept the appeal, in so far as to give a preliminary decree to this effect, considering all the facts of the case we direct the parties to bear their own costs.

We, therefore, combine the results of the two suits and declare that the amount due is the total of Rs. 1,872 plus Rs. 2,600, the principal, or Rs. 4,472, and that if this sum be paid within six months from to-day the defendants shall deliver up the property to the plaintiff.

The decree will be as prescribed in O. XXXIV, r. 7 of the Civil Procedure Code.

Z. K. *Appeal accepted.*

(1) 66 Ind. Cas. 771 ; 3 L. 200 ; 4 U. P. L. R. (L.) 55 ; (1922) A. I. R. (L.) 254 ; 42 P. L. R. 1922.

SARTAJI *v.* RAMJAS

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 78 OF 1922.
July 19, 1923.

Present :—Mr. Justice Banerji, Acting Chief Justice, and Mr. Justice Ryves.

Musammat SARTAJI—DEFENDANT—APPELLANT

versus

RAMJAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Surrender—Transfer in favour of daughter on occasion of marriage, effect of.

Where a Hindu widow divests herself entirely of her estate and transfers the entire estate to the next reversioner, the effect of which is an entire effacement of herself, it amounts to a vesting of the estate in the reversioner immediately upon the making of the transfer, whether it is called a surrender or an acceleration. It is not the form in which the transfer is made that is to be looked at, but the effect which it would have on the estate itself. The mere fact that the transfer is made in favour of the daughter who is the next reversioner on the occasion of her marriage and is described as her dowry will make no difference to the nature and effect of the transfer.

Rangasami Goundan v. *Naciappa Goundan*, 50 Ind. Cas. 498 ; 42 M. 523; 36 M. L. J. 493 ; 17 A. L. J. 536 ; 29 C. L. J. 539; 21 Bom. L. R. 640 ; 23 C. W. N. 777 ; (1919) M. W. N. 262 ; 26 M. L. T. 5 ; 10 L. W. 105 ; 46 I. A. 72 (P. C.) ; *Bhagwat Koer* v. *Dhanukdhari Prasad Singh*, 53 Ind. Cas. 347 ; 47 C. 466 ; 37 M. L. J. 513 ; 17 A. L. J. 1036 ; (1919) M. W. N. 850 ; 1 P. L. T. 1 ; 2U. P. L. R. (P. C.) 27 ; 46 I. A. 259 ; 22 Bom. L. R. 477 ; 24 C. W. N. 274; 12 L. W. 105 (P.C.), relied on.

Appeal under section 10 of the Letters Patent, from a judgment of the Hon'ble Mr. Justice Gokul Prasad, dated the 27th April 1922.

Mr. *S. P. Sinha*, for the Appellant.

Mr. *N. Upadhiya*, for the Respondents.

JUDGMENT.—The property to which this litigation relates originally belonged to one Guptar, who died leaving his widow *Musammat* Raj Rani and his daughter *Musammat* Jaipali. Raj Rani inherited the property as next heir to her husband. On the occasion of the marriage of Jaipali she executed a document by which she transferred her rights in the husband's property, which consisted of a share of *zemindari* and a house, to her daughter *Musammat* Jaipali. This she did in the year 1881. Jaipali was in possession for some years when she died. Raj Rani survived her. Jaipali left a daughter Sartaji, who is the defendant in this case. Sartaji has been found to have obtained possession upon the death of Jaipali and to have remained in possession for more than 12 years.

The plaintiff Ramjas is the son of Balraj, who was the nephew of Guptar, and is the next reversioner to the estate of Guptar. *Musammat* Raj Rani died in 1918 and upon her death the present suit was brought by Balraj for recovery of the property from Sartaji.

The Court of first instance decreed the claim but the lower Appellate Court dismissed it. That Court was of opinion that there was a surrender by Raj Rani of her rights as a Hindu widow, and this amounted to an acceleration of the reversionery rights of Jaipali. Upon Jaipali's death the only person who could claim the property was Balraj and Balraj not having brought any claim in respect of this preperty and Sartaji having been allowed to remain in possession for more than twelve years, she had acquired an absolute right to the property, and the plaintiff could not recover it.

This decision of the lower Appellate Court has been reversed by a learned Judge of this Court solely on the ground that the transfer to Jaipali was made at the time of her marriage and as a marriage gift. No doubt, in the document which Raj Rani executed in 1881 in favour of Jaipali she says that she was making this transfer to her daughter as dowry on the occasion of her marriage. We think, however, that the fact that the transfer was made to her on the occasion of her marriage makes no difference so far as the rights acquired by Jaipali were concerned. Jaipali was the next reversioner to the estate after her mother. Her mother divested herself of the whole estate and transferred it to her daughter. This amounted to an acceleration of the right of her daughter to succeed to the estate of her father. It was held in the cases of

JANKI KUER *v.* BIRJ BHIKHAN OJHA

Rangasami Goundan v. *Naciappa Goundan* (1) and *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (2), by their Lordships of the Privy Council that where the widow divests herself entirely of her estate and makes a transfer, the effect of which is an entire effacement of herself, it amounts to a vesting of the estate in the reversioner immediately upon the making of the transfer, whether this is called a surrender or an acceleration. It is not the form in which the transfer is made that is to be looked at but the effect which it would have on the estate itself. It cannot be held that what was transferred by *Musammat* Raj Rani to Jaipali was the life-estate of Raj Rani by way of gift as such life-estate. She completely effaced her own life-estate, and thereupon the right, which Jaipali would have succeeded to on her death, became vested in her at once. In this view it was a case of surrender of the estate, and the fact of the surrender having been made on the occasion of the marriage of *Musammat* Jaipali in the shape of a gift, makes no difference. Upon the death of Jaipali the right to the property vested in the next reversioner to her father and not in her mother. Therefore, the fact of her mother being alive for a number of years after the death of Jaipali does not affect the question of the plaintiff's right of succession. The plaintiff's right to succeed accrued upon the death of Jaipali and that event having taken place more than twelve years prior to the institution of the suit, and Sartaji having been in possession for more than twelve years without having any right, her possession thus amounted to adverse possession and the plaintiff's claim was beyond time and was rightly dismissed by the lower Appellate Court. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower Appellate Court with costs of both hearings in this Court, including fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

(1) 50 Ind. Cas. 498 ; 42 M. 523 ; 36 M. L. J. 493 ; 17 A. L. J. 536 ; 20 C. L. J. 539 ; 21 Bom. L. R. 640 ; 23 C. W. N 777 ; (1919) M. W. N. 262 ; 26 M. L. T. 5 ; 10 L. W. 105 ; 46 I. A. 72 (P. C.).

(2) 53 Ind. Cas. 347 ; 47 C. 466 ; 37 M. L. J. 513 ; 17 A. L. J. 1036 ; (1919) M. W. N. 860 ; 1 P. L. J. 1 ; 2 U. P. L. R. (P. C.) 27 ; 46 I. A. 259 ; 22 Bom. L. R. 477 ; 24 C. W. N. 274 ; 12 L. W. 105 (P. C.).

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 54 OF 1923.
January 4, 1924.

Present :—Sir Dawson Miller, Kt., K. C., Chief Justice, and Justice Sir B. K. Mullick.

Maharani JANKI KUER—PLAINTIFF—APPELLANT

versus

BIRJ BHIKHAN OJHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (*IV of* 1882), *ss.* 107, 117—*Registration Act* (*XVI of* 1908), *ss.* 17, 49—*Evidence Act* (*I of* 1872), *s.* 91—*Agricultural lease—Registration, whether necessary—Unregistered lease, whether admissible in evidence—Part performance, doctrine of, applicability of.*

By virtue of the provision contained in section 117 of the Transfer of Property Act, it is not necessary under that Act that a lease for agricultural purposes should be made by a written instrument. It may be effected by oral agreement, and when so effected no registration is required, but if it is reduced to writing, then, in the case of a lease from year to year or for any term exceeding a year, or reserving a yearly rent, registration would be required under section 17 of the Registration Act, and, if unregistered, the lease will be inadmissible in evidence under section 49 of the Act, and other evidence of its terms would be precluded by section 91 of the Evidence Act. [p. 28, cols. 1 and 2.]

Jagdish Chandra Sanyal v. *Lal Mohan Paddar*, 7 Ind. Cas. 864; 13 C. L. J. 318, distinguished.

If, however, the subsequent acts of the parties themselves disclose a state of affairs consistent only with the existence of an agreement mutually recognised and acted upon as if the instrument were binding upon the parties, then, although the written document may be defective as a valid and finally concluded agreement, such defects may be supplied by the subsequent actings and conduct of the parties. [p. 29, col. 1.]

Maddison v. *Alderson*, (1883) 8 A. C 467 ; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R 820; 47 J. P. 821; *Muhammad Musa* v. *Aghore Kumar*, 28 Ind. Cas. 930; 42 C. 801 at p. 818; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.), relied on.

A document which is inadmissible in evidence for the purposes mentioned in section 49 of the Registration Act, may nevertheless be admitted for a collateral purpose, as, for example, to explain why a transferee under a deed imperfect through lack of registration was in possession, or to prove the nature of that possession. [p. 29, col. 2.]

JANKI KUER *v.* BIRJ BHIKHAN OJHA

Jagannath Marwari v. *Chandni Bibi*, 67 Ind. Cas. 31; 26 C. W. N. 65; 34 C. L. J. 432; *Thakore Fatesingji Dipsangji* v. *Bamanji Ardeshir Dalal*, 27 B. 215; 5 Bom L. R. 274; *Jhamplu* v. *Kutramani*, 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761; *Varada Pillai* v. *Jeevaratnammal*, 53 Ind Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U P. L. R. (P. C.) 64; 22 Bom L. R. 444; 46 I. A. 285 (P. C.), relied on.

Letters Patent Appeal against the decision of Mr. Justice Ross.

Mr. *L. N. Singh*, for the Appellant.

Mr. *S. Saran*, for the Respondents.

JUDGMENT.

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted by the appellant under section 106 of the Bengal Tenancy Act against the respondents, her tenants, claiming a declaration that the status of the respondents is that of occupancy *raiyats* and not *raiyats* holding at a fixed rate as recorded in the recent Revisional Survey and Settlement.

The Assistant Settlement Officer found in favour of the respondents and dismissed the suit.

An application in revision under section 108 of the Act was preferred before the Settlement Officer who affirmed the decision of his subordinate and dismissed the application.

An appeal was then preferred to the Special Judge who reversed the decision of the lower Courts on the ground that the entry in the Record of Rights declaring that the respondents were tenants at a fixed rate was based upon a *sanad* dated 1289 F. (1882 A. D.) granted by the predecessor of the appellant to the predecessor of the respondents but as the document was a lease requiring registration under section 17 of the Registration Act it was not admissible in evidence under section 49 of the Act as it had not been registered.

As there was, in his opinion, apart from the document and the Record of Rights which was based on it, no other evidence by which it could be shown that the respondents were tenants holding at a fixed rate he allowed the appeal and ordered the entry to be amended by recording them as occupancy tenants instead, holding at the fixed rate.

From this decision the respondents appealed to the High Court. The appeal was heard by Ross, J., who considered that, apart from the *sanad*, there was other evidence from which the respondents' status as tenants at a fixed rate might be proved, and on this ground alone he would have remanded the case for further consideration by the Special Judge, but he was further of opinion that the *sanad* being an agricultural lease did not require registration, being exempt under section 117 of the Transfer of Property Act. He accordingly allowed the appeal, set aside the decision of the Special Judge, and restored that of the Assistant Settlement Officer. The learned Judge did not consider the effect of the Registration Act or of section 91 of the Evidence Act in relation to leases affected by a written document.

The present appeal is preferred under the Letters Patent from the decision of Ross, J.

It should be stated here that the *sanad* has been found by all the Courts to be a genuine document. It grants a *mukararri* interest of the land in suit measuring 7 *bighas* to Bisweswar Ojha, the predecessor of the respondents, for an indefinite period at a fixed rent of Re. 1 per *bigha*. If it is admissible in evidence it is conclusive in favour of the respondents. In the Cadastral Survey and Record of Rights, prepared some years before the recent Revisional Survey, the recorded *raiyat* was one Mahadeo Darzi, a servant of the respondents' father, who was stated to be an occupancy *raiyat* holding under the proprietor and not under the respondents' father and the rent recorded was Rs. 6. This was relied on by the appellant as showing that the rent was subject to variation and not fixed. The respondents' explanation was that at that time their father had a temporary tenure of the whole village and, fearing that the *raiyati* interest might become merged in his tenure, he had the holding entered in the *farzi* name of his servant, but that the rent was in fact paid by him and was always Rs. 7. The rent receipts showed that the rent paid was Rs. 7 and not Rs. 6 all along. There was also an entry in the Cadastral Survey record showing some trees in the holding to be in possession of the *mukararridar*, and it was not suggested that there was any other *mukararridar* than the respondents' father or his predecessor. There appears to have been some evidence, therefore, apart from the *sanad* from

which an inference might possibly be drawn as to the status of the respondents although the learned Special Judge had stated that there was no such evidence.

The main question for determination is whether the *sanad* is admissible in evidence as held by Mr. Justice Ross. By section 107 of the Transfer of Property Act (Act IV of 1882) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. The present lease comes within that description. By section 117 of the Act none of the provisions of Chapter X (which includes section 107) apply to leases for agricultural purposes. It is, therefore, not necessary under the Transfer of Property Act that a lease for agricultural purposes, which the present lease is, should be made by a written instrument. It may be effected by oral agreement and when so effected no registration is required, but if it is reduced, to writing then, under the Registration Act, certain consequences follow. Section 17 of the Registration Act of 1908 provides that certain documents, including leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, any of the previous Registration Acts from 1864 up to 1908 applies. The Indian Registration Act III of 1877 was in force on the date when the *sanad* was executed and applied to the district in which the property was situate. The lease, therefore, being in the form of a document, and not merely oral, required registration under the section last named and by section 49 of the same Act no document required by section 17 to be registered shall (*a*) affect any immoveable property comprised therein, or (*c*) be received as evidence of any transaction affecting such property unless it has been registered. It seems to follow, therefore, that the *sanad* relied upon being a document requiring registration under section 17 cannot under section 49 be received as evidence of the lease. If the document itself is not admissible, no other evidence of its terms can be given because section 91 of the Evidence Act provides: "When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself or secondary evidence of its contents, in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The result of these enactments appears to be that a lease of immoveable property such as that under discussion need not be in writing. It may be effected by oral agreement in which case no question of registration arises and the lease may be proved in the same way as any other verbal agreement, and even documentary evidence may be admissible in support of the oral agreement; but if the lease or grant is in the form of a document then the only evidence admissible in proof of the terms of the document is the document itself and unless it is registered even the document itself cannot be admitted in evidence as proof of any transaction affecting the property.

In *Jagdish Chandra Sanyal* v. *Lal Mohan Paddar* (1), relied on by the respondents and by Mr. Justice Ross, the question did not really arise and the case is no authority for the proposition that a written document granting a lease for agricultural purposes does not require registration. In that case it was found that no formal lease was executed but an *amalnama* was relied on by the defendants containing a reference to the terms of the lease. This document, however, was not produced as it could not be found and nothing seems to have turned upon it. The case must be regarded as one in which the lease was not contained in a written document and to which the Registration Act and section 91 of the Evidence Act had no application and in fact neither of these Statutes is referred to in the judgment. I consider, therefore, for the reasons already given, that the judgment appealed from cannot be supported upon the grounds given in the judgment.

It has been argued that this result creates an anomalous state of affairs involving great hardship upon the lessee who takes a written

(1) 7 Ind. Cas. 861; 13 C. L. J. 318.

lease but omits to register it, as in such a case he is precluded from proving the terms of his grant, whereas had he been content with a title created in a less formal manner by word of mouth he would have been under no such disability. Whatever may be the force of this criticism it is not in all cases necessary for the lessee to rely upon the terms of the written lease as proof of his interest. If the subsequent acts of the parties themselves disclose a state of affairs consistent only with the existence of an agreement mutually recognised and acted upon as if the instrument were binding then, although the written document may be defective as a valid and finally concluded agreement, such defects may be supplied by the subsequent actings and conduct of the parties. As pointed out by Lord Selbourne in *Maddison* v. *Alderson* (2), "The defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract and not within the meaning of the Statute of Frauds upon the contract itself." In *Mahomed Musa* v. *Aghore Kumar* (3), where the equitable doctrine laid down in *Maddison* v. *Alderson* (2) and other authorities was quoted and applied, Lord Shaw, in delivering the judgment of the Judicial Committee, said: "Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary, it follows them."

It seems to me that the question for consideration in this appeal is, whether the defendants and their predecessors have been in possession since 1882 exercising the rights conferred by the *sanad* with the consent and acquiescence of the landlord. Although, apart from the *sanad* itself, it might be difficult in the present instance to arrive at a satisfactory conclusion as to the terms upon which the defendants were exercising their right of possession, nevertheless, if the *sanad* is admissible in evidence to prove the nature of their possession then no difficulty arises. It must be conceded that section 49 of the Registration Act precludes the use of the document for the purpose of proving a binding contract between the parties creating an interest in the property, nor can it be received as evidence of any transaction affecting the property. But, as already pointed out, it is not necessary to rely upon such a transaction if the acts of the parties themselves are consistent only with the recognition, on the one hand, and the exercise, on the other, of those rights which the document, although not finally binding as a contract, purported to confer. That the defendants and their predecessors have been in possession since 1882 as tenants is proved and that the same rent has all along been paid is found by all the Courts. There is also some evidence apart from the *sanad* which, when examined, might possibly lead to the conclusion that their possession was that of tenants at fixed rates. But if the *sanad* is admissible, not for the purpose of proving a concluded transaction transferring an interest, which it is clearly not, but for the collateral purpose of proving the nature of the defendants' possession then there can be no doubt that the plaintiff's claim must fail, the document having been accepted as genuine. There is ample authority for the proposition that a document inadmissible for the purposes mentioned in section 49 of the Registration Act may, nevertheless, be admitted for a collateral purpose, as, for example, to explain why a donee under a deed imperfect through lack of registration was in possession, *Jagannath Marwari* v. *Chandni Bibi* (4), or to prove the nature of that possession, see *Thakore Fatesingji Dipsangji* v. *Bamanji Ardeshir Dalal* (5) *Jhamplu* v. *Kutramani* (6), *Varada Pillai* v. *Jeevarathnammal* (7). In the last named case it was held by the Judicial Committee that, although certain unregistered documents were not admissible to prove a gift, they could be referred to as explaining

(2) (1883) 8 A. C. 467; 52 L. J. B. 737; 49 L. T. 3203; 31 W. R. 820; 47 J. P. 821.

(3) 28 Ind. Cas. 930; 12 C.801; at p. 818, 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N 250; 18 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(4) 67 Ind. Cas. 31; 26 C. W. N. 65; 34 C. L. J. 432.

(5) 27 B 515; 5 Bom. L. R. 274.

(6) 42 Ind. Cas 713; 39 A, 696; 15 A. L. J. 761.

(7) 53 Ind. Cas. 901; 43 M. 241 (1919) M. W. N. 721; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P.C.) 61; 22 Bom. L. R. 111; 46 I. A. 285 (P. C.).

the nature and character of the possession subsequently held by the donee and as she had been in possession for upwards of twelve years she had acquired an indefeasible title. Applying the same rule in the present case, I consider that the *sanad* may be referred to as explaining the nature and character of the defendant's possession and as they and their predecessors have been in possession, ostensibly in virtue of the *sanad*, as tenants at fixed rates for a period of over 30 years before the institution of the suit I am of opinion that the plaintiff's claim fails and the appeal should be dismissed with costs.

Mullick, J.:—I agree.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISC. CIVIL APPEAL NO. 33 OF 1922.
December 4, 1923.

Present :—Mr. Kincaid, J. C. and
Mr. Aston, A. J. C.

KOOVERBHAN SUKHANAND—
APPLICANTS

versus

Messrs. LOUIS DREYFUS & COY.—
OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 20—Contract for sale of goods deliverable at Karachi—Breach of contract—Suit for damages—Cause of action—Jurisdiction.

A contract for sale of wheat, to be delivered at a future day, was made at Lyallpur and, *inter alia*, provided that the sellers were to despatch the same to Keamari, (Karachi) at their own risk and cost, after the buyers' agents at Lyallpur had passed it, to receive 90 per cent. of their value on delivery of the Railway Receipts to the buyer's Agents at Lyallpur and the balance after the goods had been finally tested and approved by the buyers at Karachi, the buyers having the right of accepting or rejecting it at Karachi. The contract further provided that the sellers had an option to send the goods direct to Karachi, where they were to be tested and approved by the buyers and provided for reference to arbitration in case of dispute :

Held : that as the contract had to be completed at Karachi, a part of the cause of action arose at Karachi and the Karachi Court had jurisdiction to entertain a suit for damages for failure to make delivery. [p. 31, col. 2.]

Mayamal v. *Sanday Patrick & Coy.*, 5 S. L. R. 97, followed.

Louis Dreyfus & Coy. v. *Miran Bux*, 2 S.L.R. 37, distinguished.

Per **Aston, A J. C.**:—"Cause of action" consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendants would have the right to traverse. [p. 32, col. 2.]

Wilson v. *Volkart Brothers*, 27 Ind. Cas. 129; 8 S. L. R. 107; *Venkata* v. *Krishnaswami*, 6 M. 344 ; 7 Ind. Jur. 358; 2 Ind. Dec. (N.S.) 520; *Ramappa* v. *Ganpat*, 35 B. 81 ; 7 Bom. L. R. 289, relied upon.

In a suit for damages for breach of contract it (*i.e.*, cause of action) consists of the making of the contract and of its breach in the place where it ought to be performed. [p. 32, col. 2.]

Dhanjishah v. *Fforde*, 11 B. 649 ; 6 Ind. Dec. (N.S) 427 ; *Ramparlab* v. *Pransukh*, 15 B. 93 ; 8 Ind. Dec. (N.S.) 63 ; *Dobson* v. *Bengal Spinning and Weaving Coy.*, 21 B. 126 ; 11 Ind. Dec. (N. S.) 86 ; *Seshagiri Rao* v *Nawab Askerjung*, 27 M 494, relied upon.

Appeal from the judgment of Mr. E. Raymond, A. J. C., dated 17th July 1922.

Mr. *Kimatrai Bhojraj*, for the Applicants.

Mr. *N. P. Chandnani*, for the Opponents.

JUDGMENT.

Kincaid, J.C.—The facts of this case are quite simple, but involve an interesting point of law. They are somewhat as follows :—

The applicants, Messrs. Kooverbhan Sukanand of Lyallpur, entered into two contracts for the supply of wheat to Messrs. Louis Dreyfus and Co. Part of the wheat was delivered and part was not delivered. Louis Dreyfus and Co. claimed damages. The matter went to arbitration and the arbitrator awarded Messrs Louis Dreyfus and Co. damages. The latter then sought to file the award under the Civil Procedure Code. The applicants objected. Dreyfus and Co. withdrew their application under the Civil Procedure Code and applied to file the award under the Indian Arbitration Act. The applicants again objected. On the 17th July 1922 Mr. Raymond, A. J. C., in an exhaustive judgment overruled their objections and ordered the award to stand filed.

The applicants have now asked the High Court to revise Mr. Raymond's order.

Mr. *Kimatrai*, appeared in support of the application.

Mr. *Chandanani*, appeared on behalf of Messrs. Louis Dreyfus and Co.

Mr. Kimatrai has relied on only one point, namely, the alleged absence of jurisdiction in the lower Court. Such an absence of jurisdiction would, undoubtedly, be fatal to the respondents' case. The Court must, therefore, examine the plea closely.

The contracts between the parties were drawn upon a printed form of which we have been supplied with a copy. By clause 5 the applicants were bound to deliver wheat at Lyallpur. The respondents by clause 6 were entitled to examine the wheat at Lyallpur and "to reject same or to accept same at an allowance to be paid by buyers themselves or to cancel the contract or to re-purchase in the open Lyallpur market or elsewhere at the market rate of the day on which the tendered goods are rejected, holding the seller responsible for any loss which buyers may sustain thereby."

If the buyers' agents passed the wheat or any part of it at Lyallpur the sellers had to send it by Railway to Keamari at their own cost and risk. Clause 6 continued,—

"If upon arrival of the goods at Keamari they are found to be damaged or to contain a distinctly higher refraction or to be of a different quality from the goods passed by the agency the seller shall be wholly responsible for any excess claims made by Karachi over and above the claims already deducted in the agency bill and shall immediately pay up this difference when called upon to do so. Karachi outturn figure shown in buyer's books to be binding and final."

The view of the learned Judge of the lower Court was that these clauses conferred on the respondents the right of accepting or rejecting the wheat at Karachi. Mr. Kimatrai, however, pressed on this Court the same argument, which he had submitted to Raymond, A. J. C., namely, that if the goods were "delivered" at Lyallpur, Louis Dreyfus and Co. had no right to reject them at Karachi but only to insist on compensation in terms of the second clause of clause 6. As Raymond, A. J. C., has observed, the contracts between the parties are not happily worded. Nevertheless, I agree with the learned Judge that the contract between the parties really gave the respondents the right to reject the wheat at Karachi. The wheat was sent at the sellers' risk. If it was entirely ruined, stolen or destroyed by fire, it is certain that the buyers' acceptance at Lyallpur would not have bound them in the least. They would have been entitled to recover the whole sum advanced by their agents at Lyallpur. In the same way, if the sellers had, after the inspection at Lyallpur, put on the Railway wagon sacks of straw instead of sacks of wheat, the buyers would have been entitled to recover all their money. In other words, the buyers were entitled to reject the wheat wholly or in part at Keamari and to recover a proportionate amount of the money advanced by them. Such a right is equivalent to a right to accept or reject the wheat wholly or in part in Karachi. Now, if such a right existed, the present case is on all fours with the case of *Mayamal* v. *Sanday Patrick and Co.*, (1) wherein Fawcett, A J. C., observed

"The cause of action is the sellers' breach to deliver in the terms of the contract and this (as shown above) covers the required completion of the contract for sale at Karachi, towards which the non-delivery at Amritsar was only one step."

Here the contract was not completed until the wheat had been finally tested and approved at Karachi.

There is also another aspect of the case. The sellers had the option to send the wheat to Keamari direct. In that case the buyers had admittedly the right to reject it wholly or in part at Keamari. A part of the cause of action, therefore, arose in Karachi and the case comes under section 20 (*c*) of the Civil Procedure Code.

In this connection Mr. Kimatrai relied on the authority of *Louis Dreyfus and Co.* v. *Miran Bux* (2). But that case should be carefully distinguished. The learned Trial Judge there found that in the contract between the parties the sellers had no option. The pertinent passage runs as follows:—

"Then follow several clauses having

(1) 12 Ind. Cas. 662 ; 5 S. L. R. 97.
(2) 2 S. L. R. 37.

unmistakeable reference to a contract which was to be completed in Karachi. Clauses 13, 15 and 16 contain blanks to be filled in with the amount to be advanced for Railway Receipt, the place where these advances were to be made, and the balance paid, etc., important details without which the contract contemplated by these clauses could not be complete. It is evident, from the fact that these blanks were not filled in, that it was not anticipated that the sellers would exercise their option of despatching goods to Karachi and as there is no allegation that the option was exercised, I must take it that the contract made by the parties was that embodied in the first eleven clauses and any other clauses in the document that clearly apply."

Now, if the sellers had no option to deliver in Karachi no part of the cause of action arose there. But here the blanks were filled in and Mr. Kimatrai has himself stated that the option to deliver in Karachi existed.

For the above reasons, I think that the application for revision made to us should be dismissed with costs.

Aston, A. J. C.—The only question which arises in this appeal is whether the lower Court had jurisdiction to order the award to stand filed under section 2 of the Indian Arbitration Act IX of 1899 which is as follows :—

"Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town.

"Provided that the Local Government with the previous sanction of the Governor-General in Council, may, by notification in the local official gazette, declare this Act applicable in any other local area as if it were a Presidency-town."

The Indian Arbitration Act has admittedly been declared applicable to Karachi. The question for determination is, therefore, whether if the subject-matter submitted to arbitration were the subject of a suit the suit could with leave or otherwise have been instituted in Karachi. Section 20 of the Civil Procedure Code (Act V of 1908) provides as follows :—

"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction

(*a*) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, or

(*b*) any of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not riside or carry on business or personally work for gain as aforesaid acquiesce in such institution, or

(*c*) the cause of action wholly or in part, arise."

It appears from the evidence that the second respondents at the time of the reference and award had a branch office at Karachi where the first respondent also had an office, but it is clear that the head office of the second respondents was at Multan and they are referred to in the application for filing the award as carrying on business at Multan.

The only clause, therefore, which could give jurisdiction to a Court in Karachi would be clause (c) of section 20. It is necessary, therefore, to determine whether the cause of action arose wholly or in part in Karachi.

In this connection it has been held that the cause of action consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendants would have the right to traverse: see *Wilson* v. *Valkart Brothers* (3), *Venkata* v. *Krishnaswami* (4), *Ramappa* v. *Ganpat* (5). In a suit for damages for breach of contract it consists of the making of the contract and of its breach in the place where it ought to be performed : *Dhunjisha* v. *Forde* (6), *Rampartab* v. *Premsukh* (7), *Dobson* v. *Bengal Spinning and Weaving*

(3) 27 Ind. Cas. 129; 8 S. L. R. 107.
(4) 6 M. 344; 7 Ind. Jur 358 ; 2 Ind. Dec. (N. S.) 520.
(5) 30 B. 81; 7 Bom. L. R. 289.
(6) 11 B. 649; 6 Ind. Dec. (N. S.) 427.
(7) 15 B. 93; 8 Ind. Dec. (N. S.) 63.

Co. (8), and *Seshagiri* v. *Nawab Askurjung* (9). See also explanation III to the corresponding section of the old Code of 1882 which laid down that the cause of action arises in the place where the contract was made, the place where it was to be performed or performance completed and the place where, in the performance of the contract, any money to which the suit related was expressly or impliedly payable. Explanation III has been rendered unnecessary owing to the amendment of the Code but it is still a correct statement of the law : see *Salig Ram* v. *Chaka Mal* (10).

In applying the principles above mentioned to the facts of the present case the material clauses in the contract between the parties seem to me to be clauses 6, 7, 9, 16 to 23 which are as follows:—

"6. Should the proportions and admixtures exceed those stated above, or should the quality be in any way inferior the buyer reserves the right to reject same or to accept same at an allowance to be fixed by the buyers themselves, or to cancel the contract or to re-purchase in the open Lyallpur market or elsewhere at the market rate of the day on which the tendered goods are rejected holding the seller responsible for any loss which buyers may sustain thereby.

If upon arrival of the goods at Keamari they are found to be damaged or to contain a distinctly higher refraction or to be of a different quality from the goods passed by the agency the seller shall be wholly responsible for any excess claims made by Karachi over and above the claims already deducted in the agency bill and shall immediately pay up this difference when called upon to do so. Karachi outturn figure shown in buyers' books to be binding and final.

"7. Delivery to be made at Lyallpur Railway Station and clean Railway Receipt or Receipts to be delivered by seller to buyers' Lyallpur Agencyon or before 3 P. M. of 31st May 1921.

"9. Payment to be made by buyers at their Lyallpur Agency against clean Rail Receipts as they come in but should seller deliver goods at any Railway Station outside the limit stated above the same to be sent to Keamari on Karachi Pass Terms and payment to be made at the rate of (90 per cent.) say, ninety per cent. of value, the balance to be paid after advice from Louis Dreyfus and Co., Karachi, *whose report of analysis and outturn to be accepted as final*, of correct delivery at Keamari of weight, quality, condition and etc., according to the terms of the contact.

"16. Sellers have the option of despatching all or part of the goods under this contract to Messrs. Louis Dreyfus and Co., Karachi, instead of delivering as per clauses 5, 6, 7, 8, in which case the following special clauses 17 to 23 will also apply to goods so despatched.

"17. The goods shall be despatched during the period fixed by clause 7 at sellers' expense and risk by Rail from any station in consignments of not less than one wagon load consigned in the name of Messrs. Louis Dreyfus and Co. to Messrs. Louis Dreyfus and Co., Karachi. Clean Railway Receipts to be delivered by sellers to buyers.

"18. Terms of Payment.

(*a*) Buyers to advance to sellers 90 per cent. of the contract price of the goods in exchange of Railway Receipts.

(*b*) Buyers to pay the balance of the contract price after analysing the goods and taking the delivery as provided for in clause 19 of the contract.

"19. Contract price is understood for absolutely dry stuff and sellers shall without question or dispute accept final and conclusive the first report of the buyers made after arrival and examination of the goods at Karachi or Keamari as to quality, quantity, weight, refraction and allowance for dryage and, etc., if any, to be made to buyers in respect thereof, sellers to have the option to attend by their Agents or in person at Karachi or Keamari at the process of ascertaining refraction and weighment provided they are present at Karachi or Keamari without special notice while unloading and analysing.

"20. Should any portion of the goods to be delivered under this contract arrive at Karachi for Keamari, in any respect unfit for shipment buyers shall have the option of rejecting the goods which shall so arrive or of taking the

(8) 21 B. 126; 11 Ind. Dec. (N. S.) 86.
(9) 27 M. 494.
(10) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

same with an allowance, the amount whereof shall be determined by the Louis Dreyfus and Co., Karachi.

"21. In the event of non-delivery or short delivery or rejection of any goods in exercise of any right or option arising under or conferred by this contract sellers shall forthwith on demand, refund to buyers the amount which shall have been advanced by buyers pursuant to clause 13 hereof on account of the contract price of such goods.

"22. In the event of rejection of any goods by buyers in exercise of any right or option arising under or conferred by this contract, buyers shall notwithstanding such rejection and without prejudice thereof and their right therein be entitled to retain the goods so rejected until the refund by sellers of the amount advanced by buyers pursuant to clause 13 hereof on account of the contract price of such goods. Buyers shall give sellers notice of such retention and if within 10 days from the delivery of such notice at the last known place of business or abode of sellers or either of them, sellers shall not refund the amount advanced by the buyers on account of contract price of the goods, buyers shall be entitled without further notice to sellers, to sell the goods so retained and to receive the sale proceeds thereof and apply the same to the repayment of the amount of their advance.

"23. In the event of buyers becoming entitled by virtue of this contract or by the exercise of any option hereby given to any allowance or allowances in respect of any goods the amount whereof shall exceed the balance of the contract price of such goods which shall have been retained pending the receipt of the report of the said buyers, referred to in clause 14 thereof, sellers shall forthwith on demand pay to buyers the amount of such excess."

The contract appears to me to provide that delivery was to be either at Lyallpur (see clause 7) or at Karachi (and in that term I of course include Keamari) at the option of the sellers (see clauses 9, 16 to 23). If the delivery was made at Karachi the terms of the contract were "Karachi Pass Terms;" the vendor was entitled to be paid 90 per cent. on consignment and the balance on advice from Louis Dreyfus and Co., Karachi, of correct delivery (see clause 9). If delivery was made at Lyallpur the vendor was entitled to be paid the entire amount subject, however, to a responsibility to compensate the buyer if upon arrival of the goods in Karachi they are found to be damaged or of a different quality from the goods passed by the agency at Lyallpur (see clause 6). The fact that delivery was to be either at Lyallpur or Karachi, is, I think, further borne out by clause 13 (*c*) which, in the event of failure to deliver, short delivery, or rejection of goods, gave the buyers the option to buy at Lyallpur or Karachi the quantity of goods which had not been delivered or rejected.

It follows from the agreement between the parties that it would not be sufficient for the plaintiff, in the event of a failure to deliver, as in this case, to establish that no delivery had been made at Lyallpur to entitle him to succeed. It would also be necessary for him to prove that the defendant had not exercised his option of delivery in Karachi. Karachi was one of the places where the contract was to be performed at the sellers' option and a part of the cause of action, it seems to me, clearly arose within the jurisdiction of this Court. I think it also follows that in a case where the seller delivered goods at Lyallpur and the buyers subsequently claimed compensation under clause 6 because the goods were damaged in transit to Karachi or were different in quality from the goods passed by the agency, the Karachi Court would have jurisdiction because the fact that the goods were found damaged on arrival in Karachi and different in quality from goods passed by the agency would be a fact which the plaintiff would have to prove to entitle him to success: See *Read* v. *Brown* (11). The mere fact, however, that there was a clause giving plaintiff a right to claim compensation in certain circumstances arising at Karachi would not, in my opinion, of itself give jurisdiction to the Karachi Court in every case arising under the contract, whether clause 6 was concerned or not, for the plaintiff would not necessarily, in such cases, have to prove the existence of facts within the jurisdiction of the Court to entitle him to succeed In other

(11) (1889) 22 B. 128 ; 58 L. J. A. B. 120 ; 60 L. T. 250 ; 37 W. R. 131.

words, a part of the cause of action would not necessarily arise within the jurisdiction of the Karachi Court.

The remarks of Fawcett, A. J. C., in *Mayamal* v. *Sanday Patrick and Co.*, it seems to me, related to a contract on what are known as " Karachi Pass Terms " in which the delivery under the contract was specifically stated to be at Karachi : See the words " correct delivery at Kemari " in clause 9 of the contract in that suit at p. 99. The rights and obligations of the parties under that contract were similar to the rights and obligations in present contract in these cases. where the buyer exercised the option of delivery at Karachi : See clause 9 of the contract in this suit.

For the reasons above mentioned, I concur in the order dismissing this revision application with costs.

P. B. A. *Revision dismissed.*

K. S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 9 OF 1923.

January 24, 1924.

Present :—Mr. Wazir Hasan, A. J. C.

MUNNU LAL AND ANOTHER —DEFENDANTS —APPELLANTS

versus

BISHAMBHAR NATH —PLAINTIFF — RESPONDENT.

Hindu Law—Joint family—Alienation by manager—Antecedent debt—Consideration for usufructuary mortgage—Necessity—Rate of interest and other terms—Suit by one member to challenge alienation—Alienation, entire, whether can be set aside.

The consideration for a purely usufructuary mortgage constitutes an antecedent debt which can support a subsequent alienation. [p. 37, col. 1.]

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689, 28 C. W. N. 253 ; 21 A. L. J. 931; 46 M. L. J. 23; 5 P. L. T. 1 ; (1924) M. W. N. 63 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. & D. L. R. 82 ; (1924) A. J. R. (P. C.) 50 ; 33 M. L. T. 457 (P. C.). followed.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at the rate and upon the terms mentioned in the deed, and if it is not shown that there was necessity to borrow at that rate and on those terms, that rate and those terms cannot stand. [p. 37, col. 2; p. 38, col. 1.]

Nawab Nazir Begam v. *Rao Raghunath Singh*, 46 I. A. 145 (P. C.) ; 50 Ind. Cas. 434 ; 36 M. L. J. 521 ; 17 A. L. J. 591 ; 23 C. W. N. 700 ; 21 Bom. L. R. 484 ; 26 M. L. T. 40 ; 30 C. L. J, 86 ; (1919) M. W. N. 468; 1. U. P. L. R. (P. C.) 49 ; 41 A. 571 ; 11 L. W. 188 (P. C.) ; *Ram Bujhawan Prosad Singh* v. *Nathu Ram*, 71 Ind. Cas. 933 ; 50 I. A. 14; 4 P. L. T. 29 ; (1923) A. I. R. (P. C.) 37 ; 32 M. L. T. 129 ; 44 M. L. J. 615 ; 25 Bom. L. R. 568 ; (1923) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25 ; 18 L. W. 767 ; 1 P. L. R. 145 ; 28 C. W. N. 146 (P. C.), followed.

Under the Mitakshara Law a single member of a joint Hindu family, whose rights have been infringed by a sale of the joint family property, can have the entire sale set aside [p. 38, col. 1.]

Narain Prasad v. *Sarman Singh*, 40 Ind. Cas. 284; 44 I. A. 163 ; 15 A. L. J. 584 ; 2 P. L. W. 29 ; 21 C. W. N. 990 ; 33 M. L. J. 39 ; 19 Bom. L. R. 616 ; 26 C. L. J. 97 ; (1917) M. W. N. 516 ; 6 L. W. 334 ; 39 A. 500 (P. C.), *Manna Lal*, v. *Karu Singh*, 56 Ind. Cas. 766 ; 1 P. L. T. 6 ; 13 L. W. 652 (P. C.), followed.

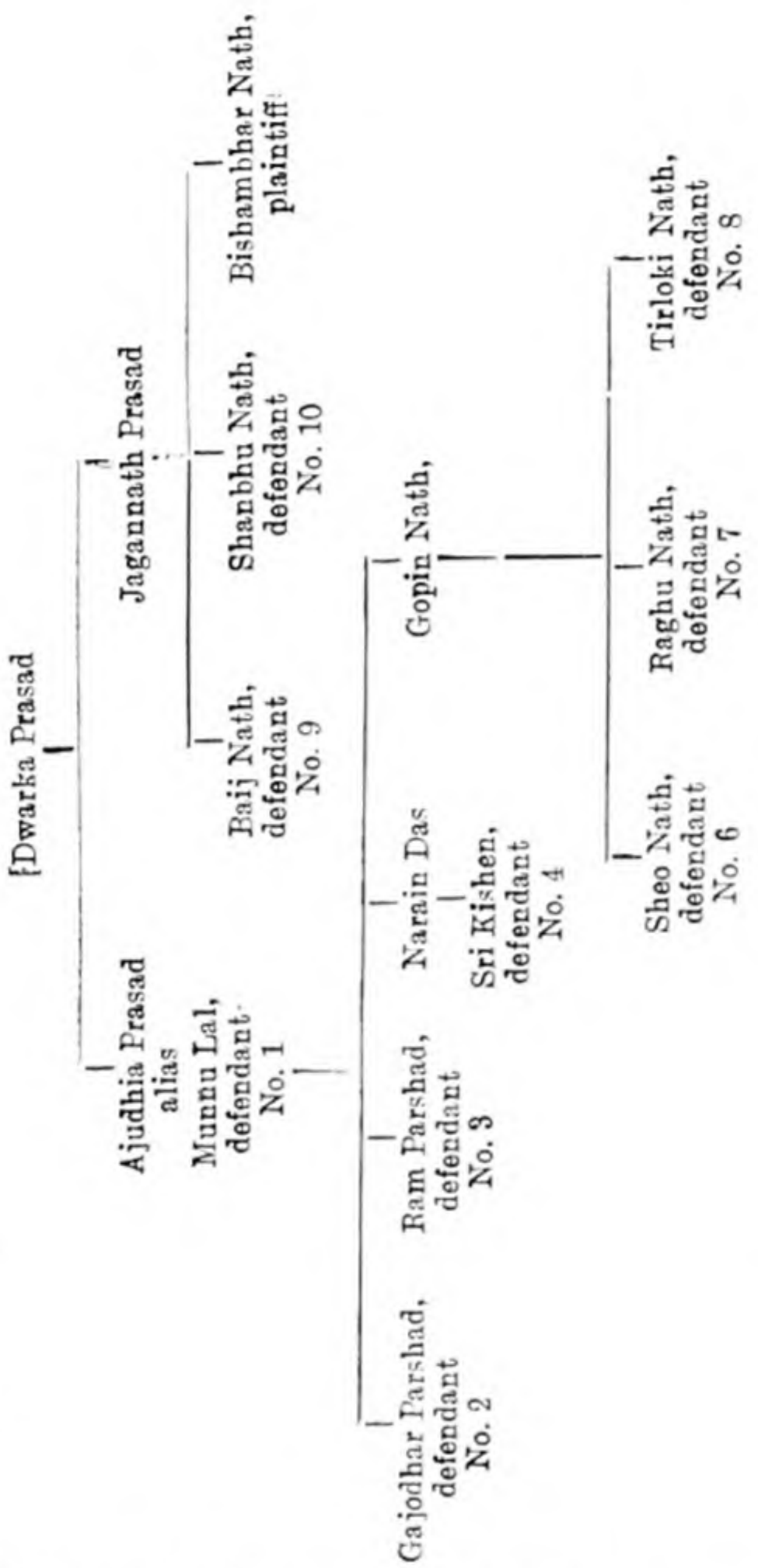
Appeal against the decree of the First Subordinate Judge, Sitapur, dated the 12th December 1922.

Mr. *H. K. Ghose*, holding the brief of Mr. *A. P. Sen*, and Mr. *Bisheshar Nath Srivastava*, for the Appellant.

Messrs. *M. Wasim* and *Ali Zaheer*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants from the decree of the First Subordinate Judge of Sitapur dated the 12th December 1922. A short pedigree may be given at the outset of this judgment.

MUNNU LAL *v.* BISHAMBHAR NATH



The appellants are defendants Nos. 1 and 2. The suit out of which this appeal arises was for the recovery of possession of 3-annas 2-pies out of a 5-*biswas* share of village Gangupur with its hamlets Ramnagar and Ganeshpur, *Pargana* Gondlamau, District Sitapur and of a *chabutra* No. 786-2-494, situate at Thomsonganj in the town of Sitapur. The plaintiff offered to pay any sum of money which might be found due from him before the relief as to possession could be granted in his favour. The lower Court has granted a decree for possession of a 2-annas 4-pies share and dismissed the rest of the claim. It has further directed the payment of the sum of Rs. 494-2-2 by the plaintiff to the defendants Nos. 1 and 2. The appeal is against that portion of the decree which is in favour of the plaintiff and the plaintiff has filed cross-objections against the portion which is against him.

The facts are that the plaintiff's father, Jagannath Prasad, held a power-of-attorney from his father, Dwarka Prasad, authorizing him to make alienations of the properties of Dwarka Prasad. On the 18th April 1905, Jagannath Prasad executed a deed of possessory mortgage in respect of the property in suit in his capacity of a general agent of Dwarka Prasad in favour of Debi Din, the predecessor-in-interest of defendants Nos. 1 and 2. Two days previous to the deed of mortgage, that is, on the 16th April 1905, Dwarka Prasad had died. The deed of mortgage is assailed by the plaintiff on several grounds and so many of them as still survive will appear as this judgment proceeds. It is now common ground that the fact that Dwarka Prasad had died two days before the execution of the deed in question makes no difference in the authority of Jagannath Prasad to act as an agent of his father. In favour of third parties the mortgage is not invalid on the ground of want of authority in Jagannath Prasad. The deed, therefore, must be taken to be the deed of Dwarka Prasad.

The plaintiff's case is that the property in suit is the joint ancestral property of the family consisting of Dwarka Prasad and his descendants; that the mortgage in dispute was executed without any legal necessity and is not binding on the family estate; that the term of thirty years fixed in the deed of mortgage on the expiry of which the redemption is permitted was not justified by any legal necessity, and that the plaintiff is, at all events, entitled to redeem the mortgage in question on payment of such amount as the Court may deem fit.

Exhibit A 1 is the mortgage in question. It is for a sum of Rs. 2,000 half of which was to carry interest and in lieu of the other half the mortgagee was put in possession with power to appropriate the profits in satisfaction of the interest. At the date of the mortgage the two hamlets were in the possession of

prior mortgagees. On that date, therefore, the present mortgagee could obtain possession of Gangupur alone.

The sum of Rs. 2,000 mentioned above is made up of the following items :—

	Rs.
(1) Left for payment to Ajudhia Prasad under the deed dated the 13th November 1904 ...	1,100
(2) Left for payment to Shiam Lal under the deed dated the 21st January 1905 ...	275
(3) Set off on account of Dwarka Prasad's pro-note dated the 12th February 1905 ...	100
(4) Received in cash ...	525
Total ...	Rs. 2,000.

The Court below has found that no legal necessity for any of the sums mentioned above has been proved.

As to item No. 1, the Court below has found that the present mortgagee paid Rs. 1,200 to Ajudhia Prasad towards the satisfaction of the mortgage in his favour but it has held that the loan incurred under the deed in favour of Ajudhia Prasad (Ex. A4) was not antecedent debt inasmuch as its re-payment was secured by a usufructuary mortgage. This veiw is in consonance with the opinion held so far in this Court that the consideration for a purely usufructuary mortgage does not constitute antecedent debt which could support a subsequent alienation. It is agreed that that opinion cannot be sustained now in view of the recent pronouncement of their Lordships of the Privy Council in the case of *Brij Narain Rai* v. *Mangla Prasad* (1). This item is, therefore, a valid part of the consideration of the mortgage in dispute.

As regards item No. 2, the deed of mortgage in favour of Shiam Lal has not been proved. The Court below says that from the evidence produced it appears that the deed was executed not by Dwarka Prasad but by Jagannath Prasad. On this ground it has held that this item is not binding on the plaintiff. It may be that it is not binding for the reason that it did not constitute antecedent debt but it is clear from exhibits A8 to A11 and A36 that Shiam Lal had brought a suit on his mortgage and had obtained a decree for sale therein in respect of part of the property now in dispute. It is further proved by the same documents that the present mortgagee had to pay Rs. 374-10-0 to Shiam Lal in satisfaction of his decree for sale. This being so, I am clearly of opinion that the amount last mentioned is binding on the family estate for the reason that its payment averted the sale of that estate and was consequently for legal necessity.

Item No. 3. As regards this sum of money, it is admitted that it was lent to Dwarka Prasad in anticipation of the mortgage in suit on the understanding that it will be set off against the consideration for the mortgage. This debt, therefore, has been rightly held by the Court below as not disassociated in fact with the transaction in dispute. This item, therefore, must be rejected.

As regards item No. 4. The finding of the Court below is that it is not binding on the plaintiff. This finding is challenged before me. I, however, agree with the opinion of the Court below. The appellants' case is that one Jai Narain held a decree against Jagannath personally and this amount of money was paid to Jai Narain by Jagannath in part satisfaction of that decree. Exhibit A38 certainly proves that Jai Narain held a decree against Jagannath. It further proves that Jagannath was under arrest in execution of that decree, but there is no evidence to connect this money with the payment that Jagannath might have made in part satisfaction of that decree. This item must, therefore, be rejected.

The result is that out of the total consldera-tion of Rs. 2,000 the two !tems of Rs. 1,200 and Rs. 374-10-0 paid to Ajudhia Prasad and Shiam Lal, respectively, are vaild and binding on the plaintiff. The consequence is that the bulk of the mortgage-money is found to be valid consideratinn binding on the estate froming the subject-matter of the mortgage, The mortgage, therefore, holds good.

The second question involved in the appeal is of the plaintiff's right to redeem the mortgage within the period of thirty years for which it was to subsist. I am of opinion that the plaintiff is not bound by the term of thirty years. It is a well established principle that, "it is incumbent on those who support a mortgage made by the manager of a joint

(1) 77 Ind. Cas. 689 ; 28 C. W. N. 253 ; 21 A. L. J. 934 ; 46 M. L. J. 23 ; 5 P. L. T. 1 ; (1924) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. & A. L. R. 82 (1924) A. I. R. (P. C.) 50 ; 33 M. L. T. 457 (P. C.).

Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand." Per Lord Phillemore in the case of *Nazir Begam* v. *Rao Raghunath Singh* (2). The sameprinciple was re-affirmed by their Lordships of the Privy Council in the case of *Ram Bujhawan Prosad Singh* v. *Nathu Ram* (3). The learned Subordinate Judge has given cogent reasons for the conclusion that the term of thirty years fixed is onerous in the circumstances of the case and I am not prepared to disagree with him.

I now come to the cross-objections. The Court below has granted a decree to the plaintiff in respect of 2-annas 4-pies only as representing his share. The ground for limiting the decree to the extent of that share is, that the plaintiff is not a manager of the joint family and it is only a manager who can recover the whole of the family estate. In support of this opinion reference in made to a decision of this Court in the case of *Mahesh Dat* v. *Ram Asre* (4) That decision was considered by a single Judge of this Court in *Jang Bahadur Singh* v. *Ranjit Singh* (5). In *Dwarka Prasad* v. *Mt. Ram Dei* (6) a Bench of two Judges of this Court held that, " under the Mitakshara law a single member of a joint Hindu family, whose rights have been infringed by a sale of the joint family property, can have the entire sale set aside." In accordance with the opinion expressed in the last mentioned case the plaintiff would seem to be entitled to recover the whole of the joint family estate which was alienated under the deed of mortgage in question. To me it appears that the point under consideration is concluded by two recent pronouncements of their Lordships of the Privy Council in cases arising out of the law of the *Mitakshara*—*Narain: Prasad* v. *Sarnam Singh* (7) and *Manna Lal* v. *Karu Singh* (8).

The learned Advocate for the appellants has urged in reply to the point taken under cross-objections that the family has ceased to be joint and the plaintiff holds a specific share in what was formerly the joint family property. This is a contention which does not seem to have been pressed before the Court below. Reliance is placed on the *khewat* (Ex. A34), the register of *nazul* (Ex. A3) and the statement of the plaintiff's witnesses Nos. 1 and 3. An entry in the *khewat* or in the register of *nazul* is not, in my opinion, sufficient evidence to prove disruption of a joint Hindu family. There is no evidence to show that these entries were made at the desire of any member of the family. The statement of the two witnesses mentioned above is too vague to establish a case of separation. It is not an uncommon feature of a joint Hindu family that its adult members carry on a business or a profession in their own names. It would stand on the same footing as a deed in the name of one member of the family alone.

The result is that both the appeal and the cross-objections are allowed, the decree of the Court below is set aside and the plaintiff is given a decree for redemption of the entire property in suit on payment of Rs. 1,574-10-0 plus interest on Rs. 574-10 0 at the rate mentioned in the deed of mortgage from the date of the deed till the date fixed for payment in the decree with future interest at the rate of 6 per cent. per annum till the date of actual payment within six months from this date. In the event of default in payment, the property with regard to which redemption is allowed will be sold. The parties will bear their own costs throughout. The usual decree for redemption, in terms of O. XXXIV, r. 7, of the Code of Civil Procedure, will be prepared in lieu of the decree of the Court below.

Z. K. *Appeal allowed.*

(2) 50 Ind. Cas. 434 ; 46 I. A. 145 (P. C.) ; 36 M. L. J. 521 ; 17 A. L. J. 591 ; 23 C. W. N. 700 ; 21 Bom. L. R. 484 ; 26 M. L. T. 40 ; 30 C. L. J. 86 ; (1919) M. W. N. 498 ; 1 U. P. L. R. (P. C.) 49 ; 41 A. 571 ; 11 L. W. 188 (P. C.).

(3) 71 Ind. Cas. 983 ; 50 I. A. 14 ; 4 P. L. T. 29 ; (1923) A. I. R. (P. C.) 37 ; 32 M. L. T. 129 ; 14 M. L. J. 615 ; 25 Bom. L. R. 568 ; (1922) M. W. N. 382 ; 2 Pat. 285 ; 38 C. L. J. 25 ; 18 L. W. 767 ; 1 P. L. R. 445 ; 28 C. W. N. 416 (P. C.).

(4) 67 Ind. Cas. 814 ; 90. L. J. 138 ; 4 U. P. L. R. (O.) 38 ; (1922) A. I. R. (O.) 114.

(5) 77 Ind. Cas. 853 ; 10 O. L. J. 353 ; 10 O. & A. L. R. 189.

(6) 77 Ind. Cas. 829 ; 10 O. L. J. 360 ; 10 O. & A. L. R. 194.

(7) 40 Ind. Cas. 284 ; 44 I. A. 163; 15 A. L. J. 584 ; 2 P. L. W. 29 ; 21 C. W. N. 990 ; 33 M. L. J. 39 ; 19 Bom. L. R. 646 ; 26 C. L. J. 97 ; (1917) M. W. N. 516 ; 6 L. W. 334; 39 A. 500 (P. C.).

(8) 56 Ind. Cas. 766; 1 P. L. T. 6; 13 L. W. 652 (P. C.).

MUNNA LAL *v.* HAMID ALI

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 158 OF 1923.

March 31, 1924.

Present :—Sir Shadi Lal, Chief Justice, and Mr. Justice Le Rossignol.

MUNNA LAL—APPELLANT

versus

HAMID ALI AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908) Sch. I, Arts. 142, 148—Dispossession, what amounts to—Mortgage—Adverse possession by mortgagee—Limitation.

Mere paper dispossession does not amount to dispossession within the meaning of Article 142 of Schedule I to the Limitation Act, and the *terminus a quo* under that Article is actual physical dispossession.

The period of sixty years prescribed in Article 148 of Schedule I to the Limitation Act for suits for redemption can only be availed of where the defendant has no better title than that of a mortgagee.

Where a mortgage confers no right of possession on the mortgagee and the latter obtains possession of the mortgaged property in assertion of a proprietary title his possession will be adverse to that of the mortgagor.

Letters Patent Appeal from an order of remand passed by the Hon'ble Mr. Justice Moti Sagar, dated the 27th March 1923, in Civil Appeal No. 2199 of 1922.

Lala *Shamair Chand*, for the Appellant.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of the following circumstances.

The land in suit belonged as to 3|4ths share to one Mahbub Ali, the remaning 1/4th belonged to his wife Mahfuz-Un-Nissa in her own right.

In 1895 Mahbub Ali mortgaged his 3|4ths without possession to Sheo Bakhsh and thereafter transferred his rights in his share to his wife.

In March 1904 the mortgagee was decreed possession as owner under the conditional sale clause of the mortgage and on 24th May 1904 obtained joint formal possession of the 3/4ths share ; and in July 1904 mutation of the share was sanctioned.

In 1907 the *quandam* mortgagee applied for partiton ; in August the fields were allotted and in December 1907 the separate holding of the *quandam* co-sharers was recorded in a mutation. On January 27, 1920 the present plaintiff, the son of Mahbub Ali, sued to redeem, alleging that the transfer by his father to his mother was fictitious and the decree of 1904 was a nullity as the foreclosure proceedings were defective.

The learned District Judge dismissed the suit on the ground that the plaintiff was dispossessed more than 12 years before suit, but the learned Judge in Chambers has held the suit to be within time on the ground that the defendant, even if he took possession in August 1907 of the fields allotted to him in partition, his possession of that plot up to *Kharif* 1908 was the possession of only a co-sharer.

The crucial question in the case appears to be, when was the plaintiff dispossessed, *i. e.*, deprived of physical possession of the land ?

Mere paper dispossession does not amount to dispossession and whether Article. 142 or Article 144 of the Limitation Act be applicable, the *terminus a quo* is the actual physical dispossession.

The Trial Judge found that defendants' actual possession came into existence only when Ghani, tenant, attorned to him, *viz.*, after 3rd February 1908. The learned District Judge does not decide the date of defendant's acquisition of actual possession and holds that his possession must be referred to the date of his formal or symbolical possession.

The learned Judge in Chambers held that as the partition came into operation only in *Kharif* 1908 that must be taken as the date of defendants' actual possession.

In our judgment, the defendant could have had and did have actual possession from *Kharif* 1907 and it is a matter of no importance that his possession was that of a co-sharer. The significant point is that his possession ousted the plaintiff from possession. The appellant-defendant obtained mutation in December 1907 and the possession of the tenant became his possession ; that possession he vindicated by a successful suit for rent and ejectment.

Now the mortgage as such conferred upon the defendant no right of possession over the mortgaged land, and his possession ever since its inception has been that of a full proprietor. Consequently, the plaintiff can avail himself of the longer period of limitation provided for suits for redemption only if the defendant has no better title than that of mortgagee.

We have found, however, that he has been in physical possession through a tenant since *Kharif* 1907, *i.e.*, October-November 1907. In the absence of evidence that Ghani paid rent to Mahfuz-un-Nissa for *Kharif* 1907, it is clear that she was ousted in *Kharif* 1907.

Further, unless it be established (and this is not the case) that the possession of Mahfuz-un-Nissa was the possession of the plaintiff, the plaintiff has been out of possession since 1904, the date of his father's death, but, as shown above, the critical date is the date of defendant's actual possession.

For the foregoing reasons, we hold that the suit instituted in January 1920, is barred under Article 144, Limitation Act, and, accepting this appeal, we dismiss the suit with costs throughout.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND APPEALS NO. 1396 AND 1397 OF 1921.

November 13, 1922.

Present :—Mr. Justice Phillips and Mr. Justice Devadoss.

NAGATHAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

V. ARUMUGAM PILLAI AND OTHERS—PLAINTIFF AND (DEFENDANTS NOS. 1 AND 2)—RESPONDENTS.

Transfer of Property Act (IV of 1882) ss. 83, 84—Mortgage—Redemption—Deposit in Court—Interest, cessation of—Mesne profits, right as to.

A mortgagor deposited the mortgage-money in Court to the credit of the mortgagee's heirs under section 83 of the Transfer of Property Act and allowed it to remain in Court till his redemption suit was decreed. The money was not drawn by the mortgagee's heirs owing to quarrels among themselves :

Held, that the mortgagor had done all he could to enable the mortgagee's heirs to draw out the money, and interest had, therefore, ceased to run on the mortgage-money from the date of the deposit and the mortgagor was entitled to mesne profits.

Thevaraya Reddy v. *Venkatachalam Pandither*, 37 I. C. 444 ; 40 M. 804 ; 4 L. W. 433 ; 31 M. L. J. 548 ; (1916) 2 M. W. N. 321 ; 20 M. L. T. 403, followed.

Second appeals against the decrees of the Court of the Subordinate Judge, Dindigul, in A. S. Nos. 42 and 43 of 1921, preferred against the decrees of the Court of the District Munsif, Palni, in O. S. Nos. 118 and 119 of 1920.

Messrs. *K. S. Ganapathy Aiyar* and *M. S. Venkatarama Aiyar*, for the Appellants.

Mr. *K. S. Jayarama Aiyar*, for the Respondents.

JUDGMENT.—In this case the mortgage-money was deposited by plaintiff in Court under section 83, Transfer of Property Act, to the credit of the mortgagee's heirs. Owing to quarrels among the heirs, the amount was not drawn, but the amount was allowed by plaintiff to remain in deposit until his suit for redemption was decreed. He had thus done all he could to enable the mortgagee to draw the amount, as the money was not withdrawn by him before the heirs could settle their disputes, as was the case in *Thevaraya Reddi* v. *Venkatachalam Pandither* (1). In this case, therefore, interest ceased to run from the date of the deposit and the Subordinate Judge was right in allowing mesne profits to plaintiff. This being so, his order as to costs must also stand.

Second Appeal No. 1396 of 1921 is dismissed with costs of the plaintiff.

Second Appeal No. 1397 of 1921 is dismissed for the same reasons but without costs.

Z. K. *Appeals dismissed.*

(1) 37 Ind. Cas. 444 ; 40 M. 804 ; 4 L. W. 433 ; 31 M. L. J. 548 ; (1916) 2 M. W. N. 321 ; 20 M. L. T. 403.

SHER MUHAMMAD KHAN *v.* PARBHU LAL

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 44 OF 1921.

July 18, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaya Lal.

SHER MUHAMMAD KHAN—DEFENDANT—APPELLANT

versus

PARBHU LAL AND OTHERS—PLAINTIFFS.
BABU CHOTAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom — Pre-emption—Wajib-ul-arz, *entry in, value of—Rebuttal.*

An entry in a *wajib-ul-arz* is by itself good *prima facie* evidence of the custon of pre-emption, and it is not necessary to corroborate a *wajib-ul-arz* by proof of instances in which pre-emption has been allowed. On the other hand, the evidence afforded by the *wajib-ul-arz* may be rebutted by convincing evidence which satisfies the Court that in fact the *wajib-ul-arz* cannot reasonably be treated as a record of custom. Such evidence may be found in the language of the document itself or there may be external evidence.

Digambar Singh v. *Ahmed Sayeed Khan*, 28 Ind. Cas. 34 ; 37 A. 129 ; 13 A. L. J. 236 ; 19 C. W. N. 393; 17 M. L. T. 193 ; 2 L. W. 303 ; 21 C. L. J. 237 ; 28 M. L. J. 556 ; 17 Bom. L. R. 393 ; (1915) M. W. N. 581 ; 42 I. A. 10 (P. C.), followed.

First appeal from the decree of the Subordinate Judge of Saharanpur, dated the 13th of September 1920.

Dr. *S. N. Sen*, for the Appellant.

Mr. *Nihal Chand*, for the Respondents.

JUDGMENT.—The sole question for decision in this appeal is, whether the existence of the custom of pre-emption which was pleaded by the plaintiffs in the Court below was established on the evidence submitted to the Subordinate Judge.

The property sought to be pre-empted is situated in a village in the Saharanpur district known as Lakhnoti Kalan.

The evidence in support of the custom consisted of a *wajib-ul-arz* prepared at the Settlement of 1867 A. D. Another *wajib-ul-arz* was prepared in 1296F, corresponding with 1889. In addition to these two *wajib-ul-arzes* the plaintiffs produced a decree showing that a claim for pre-emption had been decreed in the Court of the Munsif of Saharanpur in the year 1907. The judgment of the Munsif was based upon the provision of the *wajib-ul-arz* of 1867 which is in evidence in this case.

There was no rebutting evidence put forward on the part of the defendants.

The full text of the *wajib-ul-arz* of 1867 is before us and it has been argued at great length that, having regard to the language of the document and to certain of its provisions, it ought to be held in this particular case that the *wajib-ul-arz* is not a record of custom.

In support of his argument the learned Advocate for the appellants has referred us to some of the earlier decisions of this Court in pre-emption cases. He has cited before us the cases of *Dhian Kuar* v. *Diwan Singh* (1), *Budh Singh* v. *Gopal Rai* (2), and *Tota* v. *Sheo Narain* (3).

While it might be conceded in favour of the appellants that on the earlier decisions of this Court it would be possible to construe the *wajib-ul-arz* before us in the present case as a record of contract rather than of custom we are decidedly of opinion that it is not possible for us to follow the reasoning of these earlier cases in view of the pronouncement of their Lordships of the Privy Council in the case of *Digambar Singh* v. *Ahmed Sayed Khan* (4). Since that the judgment has been published it has naturally been followed in this Court and it must be taken that any principles which are laid down in it must be accepted in preference to any statement of law contained in previous decisions of the Court. It was clearly laid down in this case that a *wajib-ul-arz* by itself is good *prima facie* evidence of custom and that it is not necessary to corroborate a *wajib-ul-arz* by proof of instances in which pre-emption has been allowed. At the same time, it was laid down that the evidence afforded by the *wajib-ul-arz* may be rebutted by other evidence.

Since that case was decided the Pre-emption Bench of this Court has taken up the position

(1) 10 Ind. Cas. 558 ; 8 A. L. J. 786.
(2) 5 A. L. J. 539 ; A. W. N. (1908) 246 ; 30 A. 544.
(3) 3 Ind. Cas. 534 ; 6 A. L. J. 715.
(4) 28 Ind Cas. 34 ; 37 A. 129 ; 13 A. L. J. 236 ; 19 C. W. N. 393 ; 17 M. L. T. 193 ; 2 L. W. 303 ; 21 C. L. J. 237 ; 28 M. L. J. 556 ; 17 Bom. L. R. 393 ; (1915) M. W. N. 581 ; 42 I. A 10 (P. C.)

that the *wajib-ul-arz* is strong *prima facie* evidence of custom and that in order to over-turn the presumption in its favour there must be convincing evidence to satisfy the Court that in fact the *wajib-ul-arz* could not reasonably be treated as a record of custom.

The evidence which would rebut the presumption may of course be found in the language of the document itself or there may be external evidence. It has been laid down by the Pre-emption Bench in the case reported in *Fazal Husain* v. *Muhammad Sheriff* (5) that in certain cases the language of the *wajib-ul-arz* will of itself afford sufficient evidence to over-turn the presumption that it contains a record of custom. In that case certain observations were made with reference to the previous decision of this Court in *Dhian Kuar* v. *Diwan Singh and others* (1). It was pointed out that in that case the *wajib-ul-arz* was peculiar and that in the clause relating to pre-emption there were to be found "a number of other matters" which could not possibly have been matters of custom." It was held accordingly that in such a case it might reasonably be held that the record in the *wajib-ul-arz* was not really a record of custom but a record of contract.

We have in recent cases endeavoured as far as possible to follow this principle laid down in the case just cited and we may also refer in this connection to the case reported in *Surajbali Singh* v. *Muhammad Nasir* (6).

We have in the present case, as has been stated, the *wajib-ul-arz* prepared in the year 1867 and a subsequent *wajib-ul-arz* prepared in or about the year 1889. This latter *wajib-ul-arz* merely incorporates the provisions of the earlier document and so it is only necessary to consider the language of the *wajib-ul-arz* of 1867.

The document begins with a recital that it is the *wajib-ul-arz* or *dasturdehi* of *mauza* Lakhnoti Kalan. Then there follows the declaration of the share-holders who attested the *wajib-ul-arz* and following on this we have a number of provisions contained in 20 paragraphs setting out all the usages and arrangements prevailing in the village.

The particular paragraph with which we are concerned, that is to say, the paragraph which relates to pre-emption is paragraph No. 6 and that undoubtedly lays down in the clearest possible terms that there is a right of pre-emption in the village. In addition to the provisions relating to pre-emption the paragraph refers to a number of other matters concerning the devolution of property. Certain rules are laid down such, for example, as the exclusion of a daughter's son or a sister's son. Another rule which is laid down in the same paragraph relates to the custom which is known as *istribant* or *chundabant*. Obviously, therefore, the paragraph does refer to matters other than pre-emption. At the same time, we think it is proper to observe that these other matters so referred to are matters which are capable of being the subject of a custom.

In this connection, however, the learned Advocate for the appellants lays particular stress upon two rules which are laid down in the paragraph in question. One of these is that in cases of dispute about the price of the property offered for sale the question is to be settled by the appointment of arbitrators or by a reference to the Court. It is argued that this provision relates to a matter which cannot properly be said to be the subject of a custom. We do not, however, understand this provision in the sense contended for. It appears to us that the custom of pre-emption being recognised, all that the rule in qusetion lays down is that a certain procedure is to be observed in cases where there is a dispute between the parties, regarding the price of the property sold. We have to notice in this connection that in the *wajib-ul-arzes* which were before their Lordships of the Privy Council in *Digambar Singh's case* (4) there were similar provisions recorded and it is quite clear that the presence of those provisions in the *wajib-ul-arzes* in question did not prevent their Lordships of the Privy Council from holding that the *wajib-ul-arzes* in those cases were to be treated as records of custom.

The only other argument we have to notice in this connection is one which is based upon the language of the concluding sentence of the paragraph in question which lays down that if there be no male issue or no relatives descended from a common ancestor the share-holders of the *patti* will become the owners of the property in proportion to their shares. Dr-Sen has argued very earnestly that this pro-

(5) 24 Ind. Cas. 464 ; 36 A. 471 ; 12 A. L. J. 800.
(6) 48 Ind. Cas. 220 ; 16 A. L. J. 879.

vision contained in paragraph 6 cannot properly be treated as relating to any custom. He says that it is an endeavour on the part of the co-sharers of this village to prevent the application of the principle of escheat to the Crown in cases where a proprietor dies without leaving any heir. We do not say that this is an impossible construction of the words in question but we are very doubtful whether that is the significance of them. It may be that they merely provide a rule or custom whereby other heirs who would take in preference to the Crown are excluded. It is well-known that after the list of all relatives has been exhausted succession to the property of a deceased Hindu may go to his spiritual preceptor or disciple or even to a Brahman before the Crown can come and claim escheat. We have given this matter our best consideration and we think we ought to hold in the present case that there is no provision in paragraph 6 upon which, acting in accordance with principles laid down, we ought to come to the conclusion that the paragraph does not contain a record of custom. On the contrary, we are of opinion that it does contain such a record.

Something was said in the course of argument regarding the provisions in other paragraphs of the *wajib-ul-arz* and it is pointed out that many of these provisions relates obviously to matters of contract. That, however, is not a matter of any importance because every *wajib-ul-arz* must of necessity contain matters which constitute arrangements between the co-sharers. The fact that such matters are to be found in a *wajib-ul-arz* does not prevent the *wajib-ul-arz* being treated also as a record of custom wherever a clear pronouncement regarding a custom is set out in the document itself.

We have further to notice that the case of the plaintiff is supported by an actual instance in which pre-emption was decreed in the year 1907. To that fact due weight must be given and we hold accordingly that the *wajib-ul-arz* supported by the judgment in question which was passed in the year 1907 affords sufficient evidence upon which it was competent to the Court below to find that the custom alleged in the plaint does exist. We have not in any way been convinced that the judgment of the first Court is erroneous.

We notice that in the Court below another plea by way of defence was that the plaintiffs could not maintain this suit as they had consented to the sale and had themselves refused to take the property offered to them. The learned Judge of the Court below was of opinion that the evidence which was offered in support of this plea was not reliable and although the point is taken in the memorandum of appeal to this Court it was not seriously argued here. We have no reason to differ from the learned Judge of the Court below in his estimate of the evidence in question.

The result, therefore, is the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1625 OF 1923.

April 17, 1924.

Present:—Mr. Justice Le Rossignol.

AMAR CHAND—PLAINTIFF—APPELLANT
versus
SATYA PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913) s. 15 (fourthly)—Co-sharer on date of sale, whether entitled to pre-empt—Decree for pre emption against pre-emptor, effect of.

In determining the question whether a pre-emptor's right to pre-empt is superior to that of the vendee, the situation existing at the time of sale alone is to be regarded. The mere fact that the pre-emptor subsequently loses the property by virtue of which he claimed a superior right of pre-emption is immaterial

Second appeal from the decree of the District Judge, Jullundur, dated the 14th April 1923, reversing that of the Munsif, 1st Class, Jullundur, dated the 18th August 1923, dismissing the claim.

Mr. *Sagar Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—Plaintiff who, on 16th July 1921, had purchased a share in an undivided holding sued to pre-empt a share sold on 17th July 1921 to defendant-vendee.

The vendee's defence was that he had a suit pending to enforce pre-emption of the plaintiff's sale of 16th July 1921.

The first Court decreed the plaintiff's suit on the ground that on 17th July 1921 he was a co-sharer in the holding, whilst vendee was not. In appeal, the District Judge, accepting a statement that the vendee's suit to pre-empt plaintiff's purchase on 16th July 1921 had been decreed, dismissed this suit.

The point has been the subject of conflicting rulings, but the trend of later cases is in favour of the view that only the situation at the time of the sale is to be regarded. Further, it is asserted by the plaintiff and not denied by the respondent, that the latter's suit to pre-empt the plaintiffs' purchase on 16th July 1921 has been dismissed.

My view is that the plaintiff's right should be determined by the situation existing at the time of the sale, this may lead to strange results, but the whole law of pre-emption is an anachronism.

I accept the appeal and restore the first Court's decree with costs throughout to plaintiff.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 376 OF 1922.

January 18, 1924.

Present :—Mr. Justice Odgers and
Mr. Justice Wallace.

RALLABANDY VENKATARATNAM
AND OTHERS—APPELLANTS
versus
YANAMANDRA SATYAVATI
AND OTHERS—RESPONDENTS.

Probate and Administration Act (*V of* 1881) *s.* 50—*Letters of Administration, binding nature of—Application for revocation—Just cause—Judgment of Probate Court, when* res judicata

Letters of Administration with the Will annexed were granted to the widow of a testator. The appellant, an undivided brother of the testator, was a party to the proceedings. On account of some differences arising on account of the widow refusing to adopt his son, the appellant applied for revocation of Letters of Administration granted to the widow but the application was dismissed. Later on, the petition of two other brothers of the appellant, the Letters were recalled and the matter becoming contentious took the form of a suit and ultimately the Will was upheld and Letters ordered to be re-issued. The appellant then filed a fresh application for revocation of the original grant of Letters :

Held, that inasmuch as the appellant was aware of the probate proceedings and had an opportunity to contest them he was barred by the application of the principle of *res judicata* from reopening the matter any more.

Per *Odgers, J.*:—So long as the judgment of a Court of Probate is in force it is conclusive not only upon all parties who may be before the Court but also upon all other persons whatsower in all proceedings arising out of the Will or claims under or connected therewith.

Saroda Kanto Das v. *Gobend Mohan Das*, 6 Ind. Cas. 912 ; 12 C. L. J. 91 at p. 97, followed.

Per *Wallace, J.*—Any order passed after contention in a probate proceeding is *resjudicata* in any subsequent proceeding of any sort against the caveators who contested it.

When a party has an opportunity to put forward a particular just cause and has not chosen to put it forward he cannot be heard to agitate the same cause later.

The grant of probate by a competent Court is binding on all persons who had an opportunity of putting forward their objection before it was passed unless they can make out a good case under section 50 of the Probate and Administration Act for setting it aside.

Appeal against the order of the District Court, Godavari, at Rajahmundry, dated the 11th September 1922 in O. P. No. 151 of 1921.

Messrs. *C. S. Venkatachariar* and *A. Venkatachalam*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.

Odgers, J. :—This is an appeal against the order of the District Judge, Godavari, whereby he dismissed the appellant's petition to revoke a Probate under section 52, Probate and Administration Act. The previous history of the case is set out in the learned District Judge's order. The only facts we need con-

sider are the following: an application was made by the widow of one Appa Row, deceased, in 1908 for Letters of Administration to his estate with the Will annexed. The Will is printed at page 17 of the documents in A. A. O. No. 275 of 1920 and it is to be noted that the only property of the testator on which it could take effect was a sum of insurance money Rs. 1,000. The father of the testator entered a caveat to the proceedings of 1908 but withdrew it apparently in consequence of an agreement (printed at page 5 of the documents in Appeal No. 110 of 15) to which this (1st) appellant *inter alia* was a party. The agreement shortly provided that the widow should take the Rs. 1,000, should adopt the son of the 1st appellant, (authority to her to adopt was given in the will) and withdraw her application for Letters of Administration. The 1st appellant was a respondent to the application for Letters of Administration though he was not cited. The agreement fell through, the father of testator did not appear in the proceedings and the widow obtained Letters of Administration. It appears that she subsequently adopted another boy. The present 1st appellant thereupon petitioned for a revocation of the Letters of Administration granted to the widow. This was dismissed both by the District Judge and by the High Court (Ayling and Napier, JJ.,) in A. A. O. No. 132 of 1911 the learned Judges held that no just cause was shown for revoking the Letters of Administration. Several years afterwards, two brothers of the 1st appellant in 1916 filed revocation proceedings. Their petition was allowed and the Letters of Administration to the widow were re-called, the 1st appellant was along with the widow a respondent to these proceedings. The matter being contentious took the form of a suit (No. 55 of 17). The 1st appellant was not a party in his own right and applied to be brought on in I. A. No. 609 of 1919. This was dismissed by the District Judge as he had not objected to the grant originally and his subsequent petition for revocation had been dismissed. He was held not to be a proper or necessary party as he had no power in himself to ask for revocation. In the result, the Will was upheld and Letters of Administration were ordered to be re-issued to the widow. As a matter of fact, this was never done as there was nothing left for the Letters of Administration to operate upon. Further, the 1st appellant, as representing the widow, would be the person or one of the persons to whom the Letters of Administration would be issued. The question is, can the 1st appellant be now heard to reagitate the whole matter for his own purposes ? It has first to be premised that the 1st appellant is clearly not interested in upsetting the Will *qua* Will. His grievance has nothing to do with the disposal of the Rs. 1,000 but with the power of adoption given by the Will. He wants to use this means to upset the adoption made by the widow and which was not in accordance with the agreement above referred to. It is perfectly clear that the authority to adopt could have been given to the widow otherwise than by the testator's Will. The present application is based on section 50, Probate and Administration Act, and the particular just cause relied on is the 2nd—the fraud alleged being the concealment of the agreement. I am by no means convinced that it was a duty incumbent on any of the parties to bring this agreement to the notice of the Court in 1908—nor am I convinced on the evidence that is before us that the testator's father failed to appear in the proceedings of 1908 because the agreement was then subsisting. The judgment in No. 132 of 11 (page 7) shows to my mind that 1st appellant was aware of the proceedings and also that the agreement had by that time fallen through. The learned Judge there found as follows :—

> "The respondent's 4th witness's deposition clearly shows that the petitioner was aware of the proceedings during their pendency and such evidence receives support from the unimpeachable evidence of the other witnesses though the latter cannot fix the dates accurately ; the compromise attempted and referred to by these witnesses clearly shows that the petitioner was aware of the proceedings while they were pending."

In *Nistariny Dabya* v. *Sarasaty Dabya* (1) it was held that the mere absence of a special citation in proceedings in which Probate of a Will is granted is not where the person to whom a citation has not been issued is otherwise aware of the

(1) 18 C. 45 ; 9 Ind. Dec. (N, S.) 31.

proceedings, a 'just cause' for revocation. I, therefore, hold that the 1st appellant was a party to the proceedings in 1908 and is bound by the decision of the Court. The learned Judge has held that the 1st appellant is debarred from re-agitating the matter ou account of *res judicata*. It is contended that it has been so held solely on the ground that 1st appellant was aware of the proceedings which were not strictly a suit. Further, it will be noticed that the validity of the Will has been upheld by this Court, in A. A. O. No. 275 of 1920 (Phillips, J., and myself). There this 1st appellant put in a memo. of objections wherein he repeated his allegation that, in view of the agreement, the Court ought to have made him a necessary party and enabled him to call evidence. He also adopted all the grounds of appeal against the validity of the Will filed by the then petitioners (his brothers). It is not disputed that these form his grounds in the present appeals. This memo of objections was not pressed and was dismissed by us. In my opinion the 1st appellant is barred by the application of the principle of *res judicata* though the words of section 11 may not be strictly applicable. The matter has previously been in issue between the same parties and the validity of the Will has been fully and finally established and in my opinion it would only be encouraging this protracted litigation to proceed to further lengths to hold the opposite. It is contended that the 1st appellant has up to now not had a chance to present his case. I am unable to agree. He had every chance to attend at the original hearing in 1908. He was heard in 1910 when his application to revoke was dismissed. He did not take steps to displace the order refusing to make him a party to suit No. 55 of 1917; but he filed, as stated, a memo. of objections to the appeal. The Privy Council has held in *Hook* v. *Administrator-General of Bengal* (2) that the plea of *res judicata* still remains apart from the limited provisions of the Code and in *Sheopavsan Singh* v. *Ramnandan Prashad Singh* (3), their Lordships held that the application of the rules by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. The learned District Judge has further dismissed the appellants' petition on the ground that the judgment of the Court of Probate substantiating the Will is a judgment *in rem* So long as this is in force, it is conclusive not only upon all the parties who may be before the Court but also upon all other persons whatsoever in all proceedings arising out of the Will or claims under or connected therewith: *Sarodakanto Das* v. *Gobind Mohan Das* (4). It is contended by Mr. Venkatachariar that its conclusive character cannot apply to an attempt to set it aside. He further contended that the argument has no force as the Letters of Administration having been re-called and not re-issued there is in fact no such judgment in existence. In my view this is a fallacy; the Letters were re-called, but the validity of the Will was finally established in suit No. 55/17 and Letters of Administration were ordered to be re-issued. The Will must, therefore, be treated as having been valid all through and it is this judgment in No. 55/17 which has the force of a judgment *in rem*. It may be that a judgment *in rem* proved to have been obtained by fraud can be set aside. In my opinion there is no such evidence here. The vilidity of the Will has been considered over and over again and has been finally established and the appellant is, under the circumstances of this case, bound by that decision. The appeal fails and must be dismissed with costs throughout.

Wallace, J. :—The original petition is in substance, though not in terms, an application to revoke the grant of a Probate. The first appellant contends that the order granting Probate on 13th March 1909 is not *res judicata* against him because, first, it was not passed after contention and, therefore, the proceedings are not of the nature of a suit and, therefore, section 11 of the Civil Procedure Code does not apply, and, secondly, that, in any case, that grant was set aside by an order of the Court on the petition of his minor brothers, and that thereby the order of the Court was revoked. As to the first point it is clear law that any order passed after contention in a

(2) 16 Ind. Cas. 631 ; 48 C. 499 ; 19 A. L. J. 366 ; 40 M. L. J. 423 ; 29 M. L. J. 336 ; 1921 M. W. N. 313 ; 33 C. L. J. 405 ; 3 U. P. L. R. (P. C.) 17 ; 23 Bom. L. R. 648; C. W. N. 915 ; 14 L. W. 221; 48 I. A. 187. (P.C.)

(3) 33 Ind. Cas. 914 ; 43 C. 694 ; 15 A. L. J. 466 ; 20 C. W. N. 738 ; 18 Bom. L. R. 397 ; 23 C. L. J. 621 ; (1916) 1 M. W. N. 419 ; 20 M. L. T. 1 ; 3 L. W. 544 ; 31 M. L. J. 77 (P. C.)

(4) 6 Ind. Cas. 912 ; 12 C. L. J. 91 at p. 97.

probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it, see *Nuzhatud Dowla Abbas Hassain* v. *Mirza Kurratulain* (5), *Sheoparasan Singh* v. *Ramanandam Prasad Singh* (3), and *Hook* v. *The Administrator-General of Bengal* (2), and it would come within the purview of section 11 of the Civil Procedure Code. Now, the appellant was aware of the probate proceedings, had an opportunity to contest but did not choose to contest them : so that, it was owing to his own neglect that the proceeding did not become contentious. It appears to me that he is barred from re-opening the matter any more and this conclusion is based not so much on section 11 of the Civil Procedure Code itself but on the general principle of the Probate and Administration Act that the grant of Probate by a competent Court is binding on all persons who had an opportunity of putting forward their objection before it was passed unless they can make out a good case under section 50 for setting it aside. Section 50 lays down that for "just cause" the grant of Probate or Letters of Administration may be revoked or annulled. There is no period of limitation for putting forward such a cause, since, obviously, the cause may only appear long after the grant ; but it is an elementary principle that, where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would, in my opinion, allow a "just cause" already agitated and decided upon before the grant of Probate to be again made the subject of an application to revoke that grant, and I see no difference in principle between disallowing such an application on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. So that the question before us, as I view it, is whether the 1st appellant had an opportunity before the grant was made of urging the very grounds he now puts forward, or whether he urges any new grounds that have arisen since he had that opportunity which he refused to utilise.

I find that he urges nothing new. His petition does not arrange clearly his points of attack or state under which clause of section 50 he appeals ; but although he does not ask for the revocation of the order of 13th March 1909, his main points of attack seem to me to be (*a*) that the Will was forged ; (*b*) that there was fraudulent conduct of the widow in reference to an agreement ; (*c*) his ignorance of the probate proceedings ; (*d*) the non-service of summons or citation on him ; (*e*) attacks on the conduct of O. S. No 55 of 1917 into which the petition of his minor brothers was converted after their I. A. No. 383 of 1916 was allowed, and (f) the plea that the High Court by re-calling the grant in C. M. A. No. 305 of 1917 vacated the original order, so that the whole proceedings are open in this Court. The first four points should have been made grounds of attack before the first grant of Probate, for, though no citation was served on him, he was aware of the proceedings. The citation was properly issued and the first appellant had sufficient knowledge of the proceedings, *vide* High Court's finding in A. A. O. 132 of 1911 and in Appeal No. 110 of 1915, and such knowledge was enough to render it incumbent upon him to put forward then any case he had. As to the attack on the conduct of O. S. No. 55 of 1917, it is an irrelevant matter in this petition, as such conduct would have no retrospective effect on the probate proceedings which the 1st appellant now seeks to reprobate.

As to the last point, some discussion is necessary. The 1st appellant contends that the fact that the grant of Probate to the widow under O. P. No. 534 of 1908 was revoked by the District Court in I. A. No. 383 of 1916 on the petition of his brothers enables him to plead that that grant is not *res judicata* against him, and that, therefore, the civil suit O. S. No. 79 of 1909 filed by him to set aside the adoption and the suit for partition by the adopted son of the widow, O. S. No. 6 of 1914, should also be allowed to be re-opened since he was not allowed in those suits to challenge the genuineness of the Will, because of the previous grant of the Letters of Administration.

Now, as has been clearly pointed out in A. A. O. No. 305 of 1917, on the appeal by the widow against the order of revocation, that order was in any case wrong and the proper order was to re-call the

(5) 31 C. 186.

letters, which had the effect of holding the letters in abeyance until the contention between the widow and the petitioners in I. A. No. 383 of 1916 should have been tried in the form of a suit as provided by the Probate and Administration Act. The mere re-call of the letters does not open to the 1st appellant any fresh opportunity to challenge the original grant since it is in no way the result of his attack. Any attack by others will not avail to set his attack on its legs again. Section 50, in certain circumstances, would allow one party after another to attack in turn the grant of probate, but nothing in it supports the contention that each of such attacks in turn reopens all previous attacks and enables parties already defeated to press their attacks anew. There is no substance, therefore, in this last ground of attack under section 50, Probate and Adminstration Act, on the grant of probate on 13th March 1909.

The present 1st appellant applied to be added as a party-defendant in O. S. No. 55 of 1917. That application was refused on the ground that his right to oppose the issue of Letters of Administration had been negatived by the proceedings in 1909 granting Letters of Administration and could not be revived. No Civil Revision Petition was preferred from this order. When the decree in this suit went in favour of the widow and the petitioners in I. P. No. 383 of 1916 appealed to the High Court in A. A. O. No. 275 of 1920, the present 1st appellant did not in the High Court ask to be brought on record so that he might agitate his right to be made a party-defendant to the suit. That he knew of the appeal is not open to question, since he himself was brought on record in it as the legal representative of the widow who died during its pendency. As such legal representative he put in a memorandum of objections in which, incidentally, he alleged that the lower Court ought to have brought him on record in his own right, but that memorandum was not pressed and was dismissed. No doubt it was futile to press such a contention in his capacity as the legal representative of the widow, but that forms no excuse for his not himself applying to the High Court to bring him on record in his own rights so that he might contest the refusal of the District Court to make him a party. This is sufficient to dispose of the vague prayers in this petition to declare that the final order in O. S. No. 55 of 1917 and the connected suits Nos. 79 of 1909 and 6 of 1914 are invalid, since it was rightly held in those suits that the petitioner cannot attack the Probate proceedings declaring the genuineness of the Will or the authority to adopt covered by it. There is no reason for re-opening these suits on the ground that he was wrongly prohibited from agitating these questions; while, as regards the allegation of fraud no decree can be set aside on such a ground by mere petition. I am clear that, so far as the first appellant is concerned, he has for ever lost his opportunity of challenging the grant, unless he discovers in future some fresh ground for challenge which he has not up till now put forward. This disposes of the first appellant's case.

The cases of the other appellants have not been separately pressed. Appellants Nos. 2 and 3 are the sons of the first and appellants Nos. 4 to 6 are the sons of the defendants in O. S. No 55 of 1917 and obviously cannot re-open that decree by means of this petition. The seventh appellant is the mother of the original testator and has no interest in these proceedngs.

I, therefore, agree that the petition should be dismissed with costs throughout.

V. N. V. *Appeal dismissed.*
K. S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 241-B OF 1922.

Present :—Mr. Kinkhed, A. J. C.

HUSSAINBHAI BHORA—
APPELLANT
versus
BANSILAL AND ANOTHER—
RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. III, r. 4, Sch. II, rr. 1, 16 (2)—Arbitration—Award—Appeal, whether lies—Reference, validity of, whether can be questioned—Parties interested, failure of, to join,

HUSSAINBHAI BHORA *v.* BANSILAL

effect of—Pleader, whether can make reference—Power-of-attorney, construction of—Ratification, effect of—Hindu Law—Succession—Re-marriage, whether deprives mother of right of succession to son.

A restrictive provision like the one contained in paragraph 16 (2) of Schedule II to the Civil Procedure Code must be strictly construed. [p. 51, col. 2.]

The Legislature must be taken to have contemplated that the decree in respect of which paragraph 16(2) of the Second Schedule to the Civil Procedure Code provides that there shall be no appeal, must be one which has been passed after a substantial compliance with the preceding provisions of the Schedule. [p. 51, col. 2.]

In a case where the validity of a reference to arbitration is attacked, the Court, in order to determine whether an appeal lies against the decree passed on the award, must decide whether the reference was valid or invalid. If it was valid, the decree will be a decree under the Second Schedule and no appeal will lie therefrom if it is passed in terms of the award. If the reference is not valid, the decree will not be a decree under the Second Schedule and will be open to appeal like any other decree not coming under the Schedule. [p. 51, col. 2.]

Where all the parties interested in a matter do not apply for a reference to arbitration, and an order of reference is made, the order is illegal and if an award is made on such reference, the award will also be illegal. [p. 52, col. 1.]

Joy Prokash Lall v. *Sheo Golam Singh*, 11 C. 37 ; 5 Ind. Dec. (N. S.) 782 ; *Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar*, 26 M. 47 ; 12 M. L. J. 396, relied on.

In order to decide whether a reference to arbitration made by a pleader on behalf of a party was competent or not, the first question which the Court must consider is whether the pleader had authority to make the reference, and this necessitates examination of the terms of the power-of-attorney given to the pleader. [p. 53, col. 1.]

Where a Court has to ascertain whether a particular act of a person holding a power-of-attorney for another is within the scope or in excess of the authority conferred by the power, it is necessary to show that on a fair consideration of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. The decision of this question must depend upon the construction of the instrument in each case and the intention of the parties as evidenced by the circumstances. [p. 53, col. 2.]

Bryant v. *La Bonque du peuple*, (1893) A.C. 170 ; 62 L. J. P. C. 68 ; 1 R. 336 ; 68 L. T. 546; 41 W. R. 600 ; *Roy Radha Kissen* v. *Nauratan Lall*, 6 C. L. J. 490 at p. 500; *Ghasiram* v. *Raja Mohan Bikram Sha*, 6 C. L. J. 639 at p. 647, relied on.

A pleader has no authority to apply for making a reference to arbitration unless his *Vakalatnama* is so worded as to give him that authority specifically. [p. 54, col. 1.]

Sheo Das Misser v. *Birj Nandan Pershad*, 7 C. W. N. 343 ; *Ram Jiwan Ram* v. *Kali Charan Singh*, 29 A. 429 ; 4 A. L. J. 342 ; A. W. N. (1907) 139.

No amount of ratification can raise an act which is void *ab initio* to the level of a valid one. [p. 54, col. 2.]

Husen v. *Rajaram*, 26 Ind. Cas. 813 ; 10 N. L. R. 133 at p. 137, followed.

Notwithstanding re-marriage, a Hindu mother remains competent to succeed as heir to the estate of her son by her first marriage, where succession to such estate opens after her second marriage. [p. 51, col. 1.]

Kashirao v. *Ukarda*, 31 Ind. Cas. 290 ; 11 N. L. R. 116, followed.

Appeal against the decree of the 2nd Addl. District Judge, East Berar, Amraoti, in Civil Appeal No. 143 of 1921, decided on the 9th January 1922.

Messrs. *M. Gupta* and *V. Chitale*, for the Appellant.

Messrs. *G. R. Deo* and *P. C. Dutt*, for the Respondents.

JUDGMENT.—One Hussainbhai, plaintiff-appellant, brought this suit to eject defendant Pannalal, son of Bhairao, from a certain portion marked A. B. C. D. on the map filed with the plaint out of Survey No. 37 of Amraoti and for certain arrears of rent said to be due from him. The plaintiff alleges that he served notice to quit on the defendant on 12th May 1918. The defence was that the defendant was a permanent tenant. Issues were framed on 27th July 1920 and the case was fixed for evidence on 4th October 1920. After the trial of the case had thus begun this suit along with other four suits against other defendants was referred to arbitration. In this suit the agreement of reference was signed by the plaintiff's pleader, Mr. Pangarkar, and by his agent. This application was presented to the Court on 4th October 1920. The Court made a reference in all the five cases to the arbitrators and they were requested to return the award by 15th November 1920. The case was accordingly adjourned to 15th November 1920. The award was not ready by that time and time was extended till 1st December 1920. This reference was superseded and a fresh reference was made to another set of arbitrators by a petition dated 26th November 1920 which was signed on

HUSSAINBHAI BHORA *v.* BANSILAL

behalf of plaintiff by Mr. Pangarkar alone and by Sita Bai on behalf of her minor son defendant Pannalal. 15th December 1920 was fixed as the date for submission of the award and of the arbitrators' record. The award not being ready, extensions were given from time to time and 28th December 1921 was fixed as the last day on which the award was ordered to be filed. On that day the award was filed in Court. Time was given to the parties to file objections against the same till 10th March 1921. The plaintiff filed his objection against the award on that day and on defendant's reply thereto issues were framed and the case was fixed for evidence of parties for the 4th of May 1921. An additional statement was filed by defendant on 22nd March 1921 and again the case was adjourned for framing additional issues to 30th March 1921. Additional issues were framed on that day and the case came on for hearing on 4th May 1921 as already fixed. The objections to the award gave rise to the following issues :—

1. Whether Mr. Pangarkar, pleader, had authority to refer the matter in suit to arbitration ?

2. (*a*) Whether arbitrators based their award on private information ?

   (*b*) If so, are they guilty of legal misconduct ?

3. Is the award indefinite and incapable of execution ?

4. To what relief is plaintiff entitled ?

Additional Issue.

Whether plaintiff is estopped from questioning the award as alleged by the defendant in para 1 of his statement dated 22nd March 1921 ?

The Munsif held that Mr. Pangarkar had authority to refer the matter in suit to arbitration on plaintiff's behalf ; that the award was not based on private information and that the arbitrators were not guilty of legal misconduct; that the award was quite definite and capable of execution and was binding on plaintiff, and that plaintiff was estopped from questioning the award. He accordingly passed a decree in terms of the award that the defendant should pay a rent of Rs. 12 for the years in suit. The plaintiff's claim for higher rent and ejectment was dismissed.

Against this decree, passed on the 30th July 1921, the plaintiff preferred an appeal to the Court of the second Additional District Judge who held that the reference to arbitrators by plaintiff's pleader was not shown by the plaintiff to have been prohibited by the terms of the pleader's *Vakalatnama* and that plaintiff could not, therefore, raise any objection of want of authority in the pleader to make the reference ; that the plaintiff had further acquiesced in the reference. The conduct of plaintiff's agent during the arbitration proceedings raised a presumption of acquiescence, and it was held that want of authority could not, therefore, be pleaded. The finding of the Court of first instance that the reference was valid was thus confirmed. The finding that the award was not invalid on the ground of misconduct was upheld. Similarly, the objection that the award was ambiguous and incapable of execution was overruled. An additional ground which the plaintiff took at the stage of the argument that plaintiff was *Wahiwatdar* of Bohra Jamat to which the land in question belonged was considered as not arising in the case on the findings given by the Court of first instance. The appeal was accordingly dismissed.

Against this dismissal the plaintiff filed this second appeal urging, (1) that the burden of proving want of authority was wrongly laid upon plaintiff and, even if rightly laid, was sufficiently discharged by him as the terms of the power-of-attorney would show; (2) that acquiescence could not be valid substitute without written authority, and (3) that the arbitrators could not legally import their own knowledge without bringing the fact to the notice of the parties and that the award was invalid on account of ambiguity and incapable of being carried out It was also argued that the objection that plaintiff was the *Wahiwatdar* of Bohra Jamat to which the land belonged should have been allowed to be raised.

The respondent Pannalal died about two months before the date of hearing which was fixed for 30th July 1923. The appellant on 27th July 1923, therefore, made an application to place on record, one Bansilal, the brother of

Pannalal, as his legal representative. The application came on for hearing on 30th July 1923. On that day Mr. P. C. Dutt, Barrister-at-law, appeared for plaintiff's mother, Sita Bai, and claimed that his client was the legal representative of the deceased respondent and prayed for being made a party to the appeal. The appellant, however, did not admit that Sita Bai was the legal representative, and so " substitution as prayed for by the appellant " was ordered, and a fresh day was fixed for hearing the appeal. On 6th August 1923 the appellant made a fresh petition requesting that besides Bansilal Mt. Sita Bai may also be brought on record as the legal representative of the deceased, so as to effectually adjudicate all matters in dispute. My predecessor on 8th September 1923 passed the following order : " subject to objection by any of the parties let this be done." The name of Mt. Sita Bai was accordingly added to the memorandum of appeal. On 26th October 1923 the appeal came on for hearing before me. Mr. G. R. Deo, pleader for Bansilal, objected to Mt. Sita Bai being placed on the record as Pannalal's legal representative on the ground that Mt. Sita Bai, by reason of her re-marriage, could not succeed to her son Pannalal. Mr. Dutt urged that Bansilal's name could not stand as, in spite of re-marraige, the mother could under law succeed to her son. It was admitted that re-marriage had taken place long before the succession opened out to the estate of Pannalal. The case, therefore, was governed by the ruling of this Court in *Kashirao* v. *Ukarda* (1), where it was held that, notwithstanding re-marriage, mother remains competent to succeed as heir to the estate of her son by the first marriage where such estate devolves after her second marriage. I, therefore, ordered the name of Bansilal to be struck out from the record and proceeded to hear the appeal with Mt. Sita Bai as the sole respondent in place of the deceased respondent Pannalal.

Mr. Dutt raised a preliminary objection that no appeal lay against a decree passed in terms of an award, and cited several authorities in support of his contention. His argument was that all that the Court had to see was, whether the decree was in terms of the award, or in excess of it, and that the Court will have no jurisdiction to see whether the reference, on which the award was based, was or was not validly made. A similar objection was raised in the second appeals which the present appellant had preferred against the decrees passed in the four other suits against other defendants. These second appeals are Nos. 240-B, 242-B, 243-B and 244-B of 1922. My predecessor disposed of these appeals and remanded those cases for fresh decision after holding that appeal lay. The reasoning adopted by Kotval, A. J. C., in both cases was that a restrictive provision like the one in paragraph 16 (2) of the second Schedule of Civil Procedure Code must be strictly construed. The Legislature must be taken to have contemplated that the decree in respect of which paragraph 16 (2) provides that there should be no appeal, must be one which has been passed after a substantial compliance with the preceding provisions of the Schedule. He also observed that in a case where the validity of reference is attacked, the Court, in order to determine whether an appeal lay against the decree in such a case, must decide whether the reference was valid or invalid, and that if it were valid the decree will be a decree under the second Schedule and no appeal will lie therefrom if it is passed in terms of the award. If the reference is not valid, the decree will not be a decree under the second Schedule and will be open to appeal like any other decree not coming under the Schedule. It was, therefore, held that it was necessary for the Courts to decide the question of the validity of the reference. In those cases the question was whether plaintiff's agent Tahirali had authority to refer the case to arbitration. In the present case the question is whether plaintiff's pleader, Mr. Pangarkar, had authority to refer the case to arbitration. If Pannalal's legal representative had then been brought on record my predecessor would have been in a position to decide this appeal also along with the other appeals.

In the present case I, therefore, hold that if the reference could not be validly made by Mr. Pangarkar the arbitrators would have no jurisdiction to take cognisance of the matters in dispute between the parties, and their award, though made upon a reference through the intervention of the Court, would be null

(1) 31 Ind. Cas. 290 ; 11 N. L. R. 116.

and void on the ground that it was made upon a reference to which all the parties interested did not agree as required by paragraph 1 of the second schedule. It has been held in *Joy Prokash Lall* v. *Sheo Golam Singh* (2) that if all the parties interested do not apply, and an order of reference is made the order is illegal and if an award is made on such reference, the award also will be illegal. The same view was taken in *Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar* (3), where in a suit for partnership accounts by the plaintiff against two persons the plaintiff and one of the defendants alone applied to the Court to refer the matter in dispute to arbitration and an order of reference was made and an award given by the arbitrators. Upon an objection raised by the defendant, who joined in the reference to the validity of the award on the ground that the other defendants had not joined in the application it was held that the order of reference as well as the award made in pursuance thereof were illegal. In the present case the award was filed on 28th February 1921 and on 10th March 1921 plaintiff filed his objection to the validity of the award and urged that the reference to the arbitration was totally *ultra vires* as plaintiff's pleader had no authority to make the reference. In other words, the plaintiff's objection came within paragraph 14, clause (*c*), of the second Schedule and if this objection were upheld the award was liable to be set aside under paragraph 15, clause (*c*), on the ground of the award "being otherwise invalid." The words "being otherwise invalid" inserted in paragraph 15 (*c*) are new.

My attention has been drawn to the two following cases, *Lutawan* v. *Lachiya* (4) and *Batcha Sahib* v. *Abdul Ganny* (5), and it is a argued that if an objection to the validity of an award which might have been raised under paragraph 15 of the second Schedule to the Civil Procedure Code is not raised within the time limit or being raised is rejected and the Court proceeds to pronounce judgment and to frame a decree no appeal will lie except on the ground stated in paragraph 16 of the second Schedule. In the Allahabad case (1) it is observed by Banerji, J., at page 76 that "an additional reason has been added in the present Code for objecting to an award, namely, that it is 'otherwise invalid" if upon such objection being taken the Court judicially considers the objection and decides it in favour of the award, the decree which follows such judgment is, under the present Code, final and no appeal lies from it. It is thus clear that the intention of the Legislature was that only one Court, namely, the Court which referred the case to arbitration, should try the question whether the award is invalid for any reason other than the reasons specifically mentioned in paragraph 16. It seems to me that the Legislature clearly intended to set at rest the conflict of opinion which existed before the enactment of the present Code and to take away the grievance which existed on the ground that the validity of an award could not be contested on any ground other than those specified in section 521 of the old Code." In that case all the parties interested had joined in the reference and the Court made an order of reference. The objections raised related to the conduct of the arbitrator and to his alleged refusal to hear evidence offered and to other matters. No objection was taken that the leave of the Court was not obtained prior to the order of reference. The Munsif who heard the various objections overruled them and made a decree in accordance with the award. It was for the first time in appeal to the District Judge by the defendants that they raised the objection that the leave of the Court had not been obtained prior to the reference, and it was contended that on that account there was no valid reference, and, therefore, no valid award, and that an appeal lay to the District Judge. The District Judge accepted this contention and set aside the decree and the award and remanded the case. In second appeal to the High Court the Judges observed that, in the case before them, the defendants took no objection before the Court of first instance on the ground that the award was invalid because the agreement to refer the dispute to the arbitration had not received sanction of the Court. It is observed that such objection could have been taken before the expiry of the period of limitation allowed for preferring such

(2) 11 C. 37; 5 Ind. Dec. (N. S.) 782.
(3) 26 M. 47 ; 12 M. L. J. 396.
(4) 21 Ind. Cas. 989 36 A. 69 ; 12 A. L. J. 57 (F.B.).
(5) 21 Ind. Cas. 308 ; 38 M. 256 ; 25 M. L. J. 507 ; 14 M. L. T. 314 ; (1914) M. W. N. 142.

objections and not having been taken at that stage it could not, at any subsequent stage, be put forward as a ground for setting aside the award. The objection was, therefore, disallowed on the ground of delay in making it and not on the ground that it was not a valid objection. The necessary consequence was that the appeal to the District Judge was considered incompetent and the order of remand was, therefore, set aside.

In the Madras case (5) the award was submitted on the 29th June 1910 and the application to set aside was made on 18th July 1910 which was beyond the ten days' period of limitation prescribed by Article 158 of Schedule I of the Limitation Act of 1908 There was thus no application within time which could be said to have been refused after hearing objections urged. No doubt, in that case, the fact that the application was itself time-barred was overlooked, and the actual order refusing to set aside the award was passed after the time for making such application had expired. What is, therefore, needed to bar an appeal is a refusal of the objections after judicial determination by the Court. The validity of the reference to the arbitrators was not there challenged as in this case on the ground that all the parties interested had not joined in it or that the person signing on behalf of one of the parties had no authority to sign. In this view of the case, it was necessary for the Court of first instance, as also for the lower Appellate Court, to consider the objection that the award was invalid because it was based upon a reference made by the plaintiff's pleader and not by the plaintiff himself. In order to decide whether the reference by a pleader was competent or not the first question which they had to consider was whether the pleader had authority to make the reference. This necessitates examination of the terms of the power-of-attorney given to a pleader. Under O. III, r. 4, Civil Procedure Code, the appointment of a pleader to make or do any appearance, application or act for any person is required to be in writing and to be signed by such person or by his recognised agent or by some other person duly authorised by power-of-attorney to act in this behalf, and it has to be filed in Court. In this case Mr. Pangarkar's power-of-attorney is signed by Hussainbhai and is dated 12th May 1920. Where a Court has to ascertain whether a particular act of a person holding a power-of-attorney for another is within the scope or in excess of the authority conferred by the power, it is necessary to show that, on a fair consideration of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. The decision of this question must depend upon the construction of the instrument in each case and the intention of the parties as evidenced by the circumstances. Lord Macnaghten in delivering the judgment of their Lordships of the Judicial Committee of the Privy Council in *Bryant* v. *La Banque Du Peuple* (6) held that, "it was well settled law that powers of-attorney are to be construed strictly that is to say, that where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication," quoted in *Roy Radha Kishen* v. *Nauratan* (7) and *Chasiram* v. *Raja Mohan Bikram Singh* (8). Applying this test to the power-of attorney which I have got before me, I am of opinion that it is a power of-attorney drawn up for the express purpose of conducting the suit to its termination in the Court of the Munsif. It does not contain any covenant or stipulations delegating to the pleader an express authority to get matters involved in the suit decided by any tribunal other than the Judge of the Court in which the suit is instituted.

If the Courts below have laid the onus of proving the absence of authority to make a reference to arbitration on the plaintiff, I think they were certainly wrong; particularly in view of the terms of the power-of-attorney of the pleader. There must be express proof of the authority delegated and this must be adduced by the party who alleges such authority. I, therefore, think that the burden was

(6) (1893] A C. 170 ; 62 L. J P. C. 68 ; 1 R. 836 ; 68 L. T. 546 ; 41 W. R. 600.
(7) 6 C. L. J. 490 at p. 500.
(8) 6 C. L. J. 630 at p. 647.

on the defendant to establish that Mr. Pangarkar had such authority. Even if it be considered that it was for the plaintiff to prove want of authority he has discharged the burden by producing the power-of-attorney of Mr. Pangarkar which contains no such express authorisation.

The following cases law down that a pleader has no authority to apply for making a reference to arbitration unless his *vakalatnama* is so worded as to give him that authority specifically: *Sheo Das Misser* v. *Nandun* (9). In this case the objection was specifically taken to the filing of the award on this ground and it was upheld and the award was set aside. In *Ramjiwan Ram* v. *Kali Charan Singh* (10) other objections were raised, but the one based on the want of specific authority of a pleader to make the reference was not amongst the objections and consequently the Court of first instance when it ordered the award to be filed had no opportunity of considering that objection. The High Court declined to entertain that objection in revision and, while rejecting the plea as too late, observed as follows: "*Vakalatnama*" in general terms is wholly insufficient to enable a pleader to apply for an order of reference to arbitration on behalf of his client." These cases no doubt were of applications made by pleaders in connection with a reference under section 506 of the old Civil Procedure Code which authorised applications to be made by "pleaders specially authorised in writing in this behalf." The corresponding new provision of the Civil Procedure Code is contained in para. 1 of Schedule II which runs as follows:—"*Wherein* any suit all the parties *interested agree* that any matter..... *shall* be referred they may.....apply to the Court for an order of reference. The underlived words represent the changes introduced by the new Code. The omission of the words "pleaders specially.....in this behalf" is said to have dispensed with the necessity of a special authority in the case of pleaders to enable them to apply for making the reference because of the provisions in O. III, r. 1, Civil Procedure Code, which empower the pleader to make appearances, applications and acts on behalf of the party whom he represents. This may be so, but the new case requires that before any application could be made to the Court even by a pleader there should be an agreement between the parties that any matter in difference between them shall be referred to arbitration, as the substitution of the word "agree" would clearly show. I have carefully examined the pleadings of the parties and it is not the case of the defendant that the plaintiff made an *agreement* with him that the matter in difference between them *shall* be referred to arbitration and that Mr. Pangarkar merely joined in the application. The defendant's reply, dated 17th March 1921, only says that Hussainbhai and his *Mukhtiyar* Tabirali and their pleaders Messrs. B. K. Pangarkar and D. L. Limaye *were authorised to refer* the matter in dispute to arbitration. It does not say that plaintiff *agreed* with defendant to refer the matter. Even the additional statement filed on 22th March 1921 simply says that plaintiff himself through his *Mukhtiyar* and pleader had actually encouraged and conducted the arbitration and was, therefore, estopped from challenging the validity of the reference and the award. But nowhere do I find words that the parties had *agreed* to make the reference. Under these circumstances, on a mere application of Mr. Pangarkar, pleader, no reference could be made and the award based on such reference is, therefore, void and of no effect. The case of an agent whose powers are much wider than those of a pleader is quite different. Ordinarily, he has got power to initiate or start proceedings or institute suit, while a pleader has no such power or, at any rate, his power is limited to the special purpose or care entrusted to him: *Tenal Ammal* v. *Sokkammal* (11), *Basangowda* v. *Churchigirikar* (12), and *Ramaswami* v. *Badra Nayabad* (13).

In this view of the case, the second question as to how far acquiescence could be a valid substitute for authority does not arise for the simple reason that Mr. Pangarkar's application has not the very legal basis of an agreement between the parties to back it up. No amount of ratification can raise an act which is void *ab initio* to the level of a valid one:

(9) 7 C. W. N. 313.
(10) 29 A. 429; 4 A. L. J. 342; A. W. N. (1907) 139.
(11) 41 Ind. Cas. 429; 41 M. 233; 22 M. L. T. 149.
(12) 5 Ind Cas. 268; 31 B. 408; 12 Bom. L. R. 223.
(13) 55 Ind. Cas. 267; 38 M. L. J. 322; 11 L. W. T. 225; 27 M. L. T. 99.

Husen v. *Rajaram* (14). I, therefore, think that the question is not material so far as this case is concerned.

Even assuming that that question was or is material for the decision of the case, I am not prepared to accept the finding of the Court below on that point as in any way binding as against me. That finding appears to have been arrived at without sufficient material being placed before the Court below and is vitiated by reason of its being based on an erroneous view of the law as to the burden of proof. The defendant has not cared to raise proper pleadings on that point and no proper issues have been framed. Moreover, I have not got before me and I presume the lower Court also had not before it the whole of the proceedings of the arbitrators, to satisfy myself after careful scrutiny, as to how far the alleged acts and conduct of plaintiff, his agent and pleaders before the arbitrators justify the inference of acquiescence and ratification sought to be deduced therefrom. I do not, therefore, uphold the findings of the lower Courts on the point of acquiescence.

The third point about the award being indefinite and incapable of enforcement and the arbitrators being guilty of misconduct has not been seriously argued before me and I do not think myself called upon to deal with it at any length.

The result is, that the appeal succeeds and is allowed. The reference and the award is set aside and the Court of first instance is directed to proceed with the trial of the case on the merits from the stage when the reference was made and to decide the suit in accordance with law. As regards costs of this appeal, they will be paid by the respondent Sita Bai out of the assets of Pannalal in her hands. The costs of the Courts below will be costs in the suit.

Z. K. *Appeal allowed.*

(14) 26 Ind. Cas 813; 10 N. L. R. 133 at. p 137.

LAHORE HIGH COURT.

CIVIL REVISION No. 673 OF 1923.

January 29, 1924.

Present:—Mr. Justice LeRossignol.

KEWAL RAM—PLAINTIFF—PETITIONER
versus
ALLAH DIYA AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Bond, execution of, proof of—Interest, covenant for payment of—Burden of roof.

When a stipulation as to the payment of interest is found in a bond the execution of which is either proved or admitted, the *onus* of proving that the covenant to pay interest has found its way into the bond without the consent of the debtor must be on the letter.

Revision against the decree of the Senior Subordinate Judge, with appellate powers, Ambala, dated the 9th July 1923, affirming that of the Subordinate Judge, 4th Class, Jagadhri, District Ambala, dated the 1st May 1923.

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—Plaintiff in this case sued defendant on a bond for Rs. 141. The sum due was to be paid by half-yearly instalments without interest but there was a stipulation that in case of default the instalment should be payable with interest at 2 per rupee per harvest. The Courts below have decreed for the plaintiff but only as regards the principal, on a plea by the defendant, who admitted the execution of the bond, that he had not covenanted to pay any interest.

The Courts below have held that plaintiff was not proved that there was any covenant to pay interest in case of default. They have thus laid the onus of proving the issue on the plaintiff. When such a stipulation is found in a bond, the execution of which is either proved or admitted, it seems to me that the onus of proving that a covenant to pay interest has found its way into a bond without the consent of the debtor must ordinarily lie upon the debtor.

For these reasons I accept the petition, but I do not think that plaintiff is entitled to all the interest he claims. The rate is a high

one, being 25 per cent. per annum. I allow him interest at the rate of 12½ per cent. per annum and modify the decree of the Court below by raising the sum payable to the plaintiff to Rs. 120 with proportionate costs throughout.

Z. K. *Petition accepted.*

PATNA HIGH COURT.

CIVIL REVISION No. 375 of 1922.

May 22, 1923.

Present :—Mr. Justice Mullick, and
Mr. Justice Macpherson.

UMAR BAHADUR *alias* NUNKU MIAN
PLAINTIFF—PETITIONER
versus
KHAJA MOHAMAD KARIM NAWAB
AND OTHERS—DEFENDANTS—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) s. 115, O. XXXIII, r. 5 (1)—Application for leave to sue in forma pauperis, *dismissal of—Revision, whether lies—Provincial Insolvency Act (V of 1920) s. 28—Insolvent undischarged, whether can sue to recover debt due after adjudication.*

Where a Court finds upon the materials placed before it that an applicant for leave to sue as a pauper is not unable to pay the Court-fees due from him, the High Court will not interfere with the order in revision.

Quaere :—Whether a person who has been declared an insolvent can, while his estate is still in the hands of the Receiver, maintain a suit for the recovery of his share in the dower of his daughter which has become due since the adjudication order was made against him.

Case law discussed.

Revision from an order of the Subordinate Judge, 1st Court, Patna, dated the 19th September 1923.

Mr. *S. K. Mitter*, for Mr. Md. Ishfaq, for the Petitioner.

Messrs. *S. M. K. Mullick* and *Kailaspati*, for the Opposite Party.

Mullick, J :—The question here is, whether the petitioner an undischarged bankrupt is entitled to sue *in forma pauperis* for the recovery of a debt which he claims to have become due since the adjudication order was made against him. The claim is for a sum of Rs. 12,929-10-8 on account of the petitioner's share of a dower-debt due to his deceased daughter from her husband the defendant No. 1.

Being unable to pay the Court-fees the petitioner applied for leave to sue as a pauper, and the Subordinate Judge after due inquiry having dismissed his application the petitioner now prays for the exercise of our revisional jurisdiction.

Now, the first question is whether the petitioner has any right of property in the debt. On behalf of the opposite party it is contended that he has no such right inasmuch as upon the passing of the adjudication order his properties vested in a trustee in bankruptcy who in this case is the Court itself. The law applicable is contained in section 28 of the Provincial Insolvency Act of 1920, which has to be interpreted with reference to the decided cases both in India and in England.

In *In Re New Land Development Association and Gray* (1) the question for decision was whether an undischarged bankrupt could not, even before the intervention of the trustee in bankruptcy, convey to a *bona fide* purchaser for value real estate acquired after the bankruptcy, so as to give a good title to the purchaser as against the trustee. It was necessary in this case to consider the earlier case of *Cohen* v. *Mitchell* (2), in which the broad proposition was laid down that, until the trustee intervenses, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after acquired property, whether with or without the knowledge of the bankruptcy, are valid against the trustee. The Court of appeal held in *In Re New Land Development Association and Gray* that the rule in *Cohen* v. *Mitchell*, (2) applied only to personal estate; and the Legislature thereupon in-

(1) (1892) 2 Ch. D. 138; 61 L. J. Ch. 323 : 66 L. T. 401; 40 W. R. 295.
(2) (1890) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207.

tervened by enacting section 47 of the Bankruptcy Act of 1914 (4 & 5 Geo. V, chapter 59) and gave statutory effect to the decision in *Cohen* v. *Mitchell* (2) and extended the benefit of it to real estate.

The bankrupt's interest has sometimes been called special property and it is reasonable, therefore, that he should be competent to deal with the estate subject to the rights of the trustee.

As regards the right of action, the general rule was that the right except for personal injuries and the like passed to the trustee ; but even where the right had passed to the trustee the bankrupt might sue, the amount recovered being subject to the right of the trustee to claim the proceeds. So it was held in *Wadling* v. *Oliphant* (3), that a bankrupt may sue for rent due and in *Buchan* v. *Hill* (4) that he may sue for partnership account. Having regard to the provisions of section 47 of the present English Bankruptcy Act, I have no doubt that the bankrupt will have the right to maintain an action in respect of property of evey kind subject to the intervention of the trustee.

In India there has been some conflict of opinion. In *Kristocomul Mitter* v. *Suresh Chunder Deb* (5) it was held that a prior purchaser from an undischarged insolvent of the latter's share in immovable family property was entitled to recover as against a subsequent purchaser from the Official Assignee. A contrary view seems to have been taken in *Rowlandson* v. *Champion* (6) and in *A. B. Miller* v. *Abinash Chunder Dutt* (7). Again, *Rowlandson's case* was distinguished in a later Madras case, namely, *Sriramulu Naidu* v. *Andalammal* (8) and the rule laid down in *Kristcomul's* (5) case was approved. Finally in this Court it was held in *Khilafat Husain* v. *Azmat Husain* (9) that a person who has been declared an insolvent cannot, while his estate is in the hands of the Receiver, maintain a suit in his own name for the deferred dower of his daughter even though the Receiver has refused to bring such suit. As this authority is directly in point and is binding upon us, it might have been necessary to make a reference to a Full Bench if I had not been of opinion that there was another clear ground upon which the application could be dismissed.

In my opinion there has been a due exercise of jurisdiction on the part of the Subordinate Judge and it is not competent for us to interfere in revision in this case. The Subordinate Judge has found upon the report of a Sub-Deputy Collector and upon other materials placed before him that the petitioner is not unable to pay the Court-fees due from him and that he has a house worth several thousands of rupees. The petitioner might with propriety have asked the Insolvency Court to bring the suit, but he has not chosen to take that course. In the circumstances, there is no merit in his application.

The application is dismissed with costs : hearing fee two gold mohurs.

Macpherson, J.—For the reasons given in the penultimate paragraph of the judgment just delivered by my learned colleague, I concur in the order proposed.

Z. K. *Application dismissed.*

(3) (1875) 1 Q. B. D. 145 ; 45 L. J. Q. B. 173 ; 33 L. T. (N. S.) 837; 24 W. R. 246.
(4) (1888) W. N. 233.
(5) 8 C. 556; 12 C. L. R. 253; 4 Ind. Dec. (N.S.) 358.
(6) 17 M. 21; 6 Ind. Dec. (N. S.) 14.
(7) 2 C. W. N. 872.
(8) 30 M. 145 ; 17 M. L. J. 14.
(9) 54 Ind. Cas. 699.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 870 OF 1923.

November 19, 1923.

Present :—Mr. Justice Moti Sagar.

Musammat ASGHARI BEGUM —DEFENDANT—APPELLANT
versus
IRSHAD-UD-DIN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) ss. 47, 144—Auction-purchaser, whether party to suit—Restitution, whether can be granted against auction-purchaser —Order refusing restitution, whether decree—Appeal.

ASGHARI BEGUM *v.* IRSHAD-UD-DIN

Restitution under section 144 of the Civil Procedure Code cannot be obtained as against a *bona fide* auction-purchaser at an auction-sale held by a Court which had jurisdiction to hold the same.

A *bona fide* auction-purchaser is not a party to the suit within the meaning of section 47 of the Civil Procedure Code and an order refusing restitution as against him is not, therefore, a decree and is, consequently, not appealable.

Rewa Mahton v. *Ram Kishen Singh*, 14 C. 18 ; 13 I. A. 105 ; 10 Ind Jur. 428 ; 4 Sar P. C. J. 746 ; 7 Ind. Dec. (N S.) 13 (P. C.) ; *Zainin-ul-abdin Khan* v. *Muhammad Asghar Ali Khan*, 10 A. 166 ; 15 I. A. 13 ; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 ; *Peary Lal* v. *Hanifunnissa Bibi*, 34 Ind. Cas. 303 ; 38 A. 240 ; 14 A. L. J. 302, relied on.

Miscellaneous second appeal from the order of the District Judge, Karnal, dated the 13th January 1923, affirming that of the Senior Subordinate Judge, Rohtak, dated the 3rd July 1922, rejecting the application for restitution of the house in dispute.

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The facts of the case giving rise to this second appeal are briefly these:

In 1909 one *Musammat* Asghari Begum executed a deed of mortgage in respect of a certain house in favour of one *Hafiz* Muhammad Yusaf. The house orginally belonged to Izhar-ud-din, husband of the mortgagor, but it is alleged that he had transferred it to his wife in lieu of her dower more than 25 years ago and that since then she had been in proprietary possession thereof. In 1913 Izhar-ud-din executed a deed of gift in respect of this very house in favour of his daughter *Musammat* Asmat-ul-Nisa. In 1915 *Hafiz* Muhammad Yusaf brought a suit for the recovery of his money due on the mortgage impleading all the three persons *Musammat* Asghari Begum, her husband and daughter as defendants to that suit. *Musammat* Asghari Begum and her husband did not put in an appearance and the suit was contested by Asmat-ul-Nisa alone. On the 4th December 1915 the suit was decreed against all the three defendants, the decree being *ex parte* against *Musammat* Asghari Begum. Against this decision an appeal was preferred to the District Judge but dismissed. A second appeal was filed in the High Court and met with the same fate. In the meantime, the decree was executed and the house which was under mortgage put to auction by the decree-holder. It was purchased by one Irshad-ud-din who is the only respondent to this appeal. On the 8th of August 1917 *Musammat* Asghari Begum made an application to the Senior Subordinate Judge of Karnal for setting aside the *ex parte* decree which was passed against her on the 4th of December 1915. This application was rejected on the ground that the Senior Subordinate Judge had no jurisdiction to entertain it. This order was subsequently set aside by the High Court on the 9th of March 1920, and the case remanded to the Senior Subordinate Judge of Karnal for the decision on the merits. On the 7th of June 1920 the *ex parte* decree was set aside and the defendant *Musammat* Asghari Begum directed to put in her written statement which she did the next day. The plaintiff, *Hafiz* Muhammad Yusaf, had by this time become insolvent and the Official Receiver to whom notice was issued by the Senior Subordinate Judge refused to proceed with the suit. An application was made by Irshad-ud-din, the auction-purchaser, to be impleaded as plaintiff to this suit but it was rejected. On the 13th August 1920 the order of the 7th of June 1920 setting aside the *ex parte* decree was cancelled. Against this order an appeal was filed and the order of the 13th of August 1920 was eventually set aside by the High Court and the case again remanded to the Senior Subordinate Judge of Karnal to be decided on the merits. It appears that when the case came back to the Senior Subordinate Judge the plaintiff failed to put in an appearance and the case was accordingly dismissed for default on the 12th of November 1921. *Musammat* Asghari Begum then put in an application for restitution against Irshad-ud-din under section 144 of the Civil Procedure Code alleging that the *ex parte* decree in execution of which the property had been sold had been set aside and that she was, therefore, entitled to the possession of the house. The Senior Subordinate Judge was of the opinion that section 144 of the Civil Procedure Code did not apply and rejected the application. This order was upheld on appeal by the learned District Judge on the 13th of January 1923.

Musammat Asghari Begum has now come up in second appeal to this Court, and it

has been contended on her behalf that the learned District Judge was wrong in holding that section 144 did not apply and that an application under that section was not competent. A preliminary objection has been taken by Mr. Jagan Nath on behalf of the respondent that no appeal lies. It is pointed out that the order appealed against is not a decree within the meaning of section 2 of the Civil Procedure Code and that an appeal is, therefore, not competent. In my opinion this contention is well founded and must prevail. It is not denied that Irshad-ud-din was a *bona fide* auction-purchaser for value and there is ample authority for holding that a *bona fide* auction-purchaser for value is not a party to the suit within the meaning of section 2 or section 47 of the Civil Procedure Code. The order in question is clearly not a decree and, therefore, not appealable. I am further of opinion that restitution cannot be obtained under section 144 of the Code of Civil Procedure as against a *bona fide* auction-purchaser at an auction-sale held by a Court which has jurisdiction to hold the same, see *Rew Mahton* v. *Ram Kishan Singh* (1), *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (2), and *Peary Lal* v. *Hanifunnissa Bibi* (3). No authority to the contrary has been cited by the learned Advocate for the appellant and there can be no doubt that the order passed by the learned Judge of the Court below is correct.

The result is that the appeal falls and is dismissed with costs throughout.

Z. K. *Appeal dismissed.*

(1) 14 C. 18 ; 13 I. A. 106 ; 10 Ind. Jur. 428 ; 4 Sar. P. C. J. 746 ; 7 Ind. Dec. (N.S.) 13 (P.C.).

(2) 10 A. 166 ; 15 I. A 13 ; 5 Sar. P. C. J. 129 ; 6 Ind. Dec. (N.S.) 112.

(3) 34 Ind. Cas. 303 ; 38 A. 240 ; 14 A. L. J. 302.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL ORIGINAL SUIT No. 707 OF 1921.

January 22, 1924.

Present :—Mr. Rupchand Bilaram, A. J. C.

MAHOMED FARUG—PLAINTIFF

versus

SIDIK AND OTHERS—DEFENDANTS.

Landlord and Tenant—Possession of property as tenant at will, when becomes adverse—Burden of proof—Non-payment of rent, effect of—Possession of tenants' heir, nature of—Suit for possession on being dispossessed by co-owner—Necessary parties—Limitation Act (IX of 1918) Sch. I, Art. 144.

When a person occupies a property as a tenant at will the onus is on him to prove that the relationship so created subsequently ceased to exist and that his possession became adverse to that of the lessor. [p. 64, col. 1.]

Mere non-payment of rent or discontinuance of payment of rent for twelve years by a tenant would not create adverse possession as against the owner. [p. 64, col. 1.]

Jagdeo Narain Singh v. *Baldeo Singh*, 71 Ind. Cas. 984; 49 I. A. 399 ; 3 P. L. T. 605 ; (1922) A. I. R. (P.C.) 272 ; 36 C. L. J. 499 ; 33 M. L. T. 1 ; (1923) M. W. N. 361 ; 2 Pat. 32 ; 27 C. W. N. 925 ; 45 M. L. J. 460 (P. C.) ; *Premsukhdas* v. *Bhupia*, 2 A. 517 ; 4 Ind. Jur. 650 ; 1 Ind. Dec. (N. S.) 1901, *Jungoo Lal* v. *Abdool Guffoor*, 4 C. 314 ; 3 C. L. R. 119 ; 3 Ind. Jur. 461 ; 2 Ind. Dec. (N. S.) 199 ; *Dadoba* v. *Krishna*, 7 B. 34 (4) Ind. Dec. (N. S.) 22, relied upon.

Nor would the carrying out of any alterations in the house by the tenant to suit his convenience be evidence of adverse possession. [p. 64, col. 1.]

When a person is in possession of a property as a tenant at will, the possession of his heir after his death does not *ipso facto* become adverse against the owner and he must show that by some subsequent act his possession became adverse to that of the owner. [p. 64, col. 1.]

Radhibai v. *Shane*, (1867) 4 Bom. High Court Appellate Judgment, 155, *Rangoo Lal* v. *Abdul Gaffoor*, (1879) I. L. R. 4 Cal. 314 and *Krishnaji* v. *Ramchandar*, (1893) I. L. R. 18 Bom. 255, relied upon.

Where an occupant of a house paid rent to nobody, used the place as his own openly and in his own right, to the knowledge of the person claiming to be the landlord, unequivocally disclaiming to hold it as a tenant, kept it under his lock and key when it was

not required, and his name was shown in the Municipal registers as an occupant and he continued to receive Municipal house tax bills :

Held that he acquired title to the house by adverse possession on the expiry of 12 years from the date of the disclaimer. [p. 64, col. 2.]

A tenant can, without giving up possession as such acquire right to a property by adverse possession. [p. 64, col. 2.]

Neither Article 139 nor Article 144 of the Indian Limitation Act contemplate that a lessee or tenant at will or a tenant at sufferance should give up possession of his property before the period of limitation commences to run. [p. 64, col. 2.]

Bilas Kunwar v. *Desraj*, 30 Ind. Cas. 299 ; 37 A. 557 at p. 562 ; 19 C. W. N. 1207 ; 29 M. L. J. 335 ; 2 L. W. 830 ; 18 M. L. T. 248 ; 13 A. L. J 921 ; 17 Bom. L. R. 1606 ; 22 C. L. J. 516 ; (1915) M. W. N. 757 ; 42 I. A. 202 (P. C.), distinguished.

When a person who had originally been in mere permissive occupation or possession, subsequently asserts adverse possession, Article 144 and not Article 139 of the Indian Limitation Act applies. [p. 65, col. 1.]

Gobindlal Seal v. *Debendranath Malik*, 5 C. 679 at p. 680 ; 5 C. L. R. 527 ; 2 Ind. Dec. (N. S.) 1040 ; *Gobind Lal Seal* v. *Debendranath Mullick*, 6 C. 311 ; 7 C. L. R. 181 ; 3 Ind. Dec. (N. S.) 203 ; followed.

In a suit for possession by one co-owner, other co-owners are not necessary parties. [p. 66, col. 1.]

Ahmed Sahib Shutari v. *Magnesite Syndicate, Limited*, 20 Ind. Cas. 60; 39 M. 501 ; 2 L. W. 460 ; 17 M. L. T. 387; 28 M. L. J. 598 ; *Bhagwarsa* v. *Maroti*, 43 I. C. 305, followed.

Mr. *E. V. Castelline*, for the Plaintiff.

Mr. *Dingomal Narainsing*, for the Defendants.

JUDGMENT.—The plaintiff, who was dispossessed of the property in suit under a decree of this Court passed in Suit No. 140 of 1918 under section 9 of the Specific Relief Act, now sues for possession of the same basing his claim on title. The following issues have been raised by the Court on the pleadings of the parties :—

1. Is the suit, or any part thereof barred by suit No. 140 of 1918 ?

2. Is the plaintiff the owner of the property in suit ?

3. If not, has the plaintiff or his predecessors-in-title been in adverse possession of the property in suit for the statutory period ?

4. Can plaintiff claim by way of adverse possession (*a*) being himself out of possession as alleged by him in the plaint (*b*) in the face of decree in suit No. 140 of 1918 ?

5. Is the suit in time ?

6. General.

Issues Nos. 2 and 3.—The two main issues in this case are issues Nos. 2 and 3. The plaintiff is the son of Pir Haji Jan. The defendants are the heirs of one Haji Yakub. It is admitted that the house in suit belonged to Haji Yakub. The plaintiff relies on his title, firstly, on the alleged purchase of the house by Pir Haji Jan from Haji Yakub in 1890, and possession of the property under such title from 1890 to 1917, and, secondly, on acquisition of title by adverse possession. He asserts that Pir Haji Jan carried out certain alterations to the building at the commencement of his occupancy; (*b*) that he paid no rent for the house; (*c*) that the plaintiff carried out certain repairs in 1902; (*d*) that the plaintiff paid no rent and continued in undisturbed possession of it, and (*e*) that he openly disclaimed the title of Haji Yakub in 1904 in his application Ex. 6 for raising attachment on the property, and followed it up by publishing a notice Ex. 18. The plaintiff further relies on the said acts as corroborative evidence of his purchase.

The defendants have, on the other hand, denied the purchase, and have pleaded that Pir Haji Jan was a monthly tenant, and that on his death the defendants obtained possession of it, and continued in possession till 1917 when the plaintiff attempted to forcibly obtain possession which led to a criminal complaint being filed by Sidik, son of Haji Yakub, and to the subsequent possessory suit which was decreed in his favour. It is admitted that Pir Haji Jan continued in possession of the house till his death which is said to have taken place in 1900, and that for a number of years he paid no rent. It is also admitted that certain alterations were effected at the time he went into possession. The communicating doors and an arch between the house in suit and the adjoining house occupied by Haji Yakub were closed. The plaintiff has given evidence that the walls were also raised to convert the house into a residential house for a Parda Pir family and that Pir Haji Jan

incurred the expenses, and I see no reason to disbelieve this evidence.

The question of vital importance on which the parties are at issue is, whether the plaintiff continued in possession after the death of Pir Haji Jan, and in dealing with it, the safe principle is to consider which story fits in with the probabilities of the case and with the admitted facts: *Davis* v. *Maung Shwe Go* (1). It is proved by Ex. 33 that the names of the Pirs were shown in the Municipal *Jamabandi* registers as the actual occupants of the house. These registers are prepared under section 63, cl. (*c*) of the Bombay District Municipal Act, III of 1901, and render the occupants shewn therein liable to pay house-tax under the *proviso* to section 68 of the Act, the owner being, however, primarily liable for payment of such tax. These entries are evidence that on inquiries made by the Municipal authorities, the Pirs were shown to be in actual occupation of the property.

The plaintiff has asserted in his evidence, and it has not been seriously contested, that in subsequent years also the Municipality submitted their bills for house-tax to the plaintiff.

In 1904 when the house in suit was ordered to be sold in execution of the mortgage-decree in suit No. 227 of 1903 passed against Haji Yakub, the plaintiff filed the application Ex. 6 under section 258, Civil Procedure Code, for raising attachment. This application was, however, incompetent as the property had not been attached. The Court did not hold any inquiry into his title, but passed an order Ex. 6-A, notifying his claim in the sale proclamation as a disputed claim. He followed up this application by a public notice Ex. 18 which he distributed at the Court auction, with the result that the property was not sold.

It is not likely that the plaintiff would put in his application Ex. 6 or issue the notice Ex. 18 or that the bidders would not buy the property unless the plaintiff had some colour of right. He possessed no document of title to prove his claim. It is, therefore, probable that he was in actual possession of the property.

(1) 11 Ind. Cas. 801 ; 13 Bom. L. R. 704 at. p. 705 ; 15 C. W. N. 934 ; (1911) 2 M. W. N. 79 ; 14 C. L. J. 250 ; 4 Bur. L. T. 229 ; 8 A. L. J. 1193 ; 38 C. 805 ; 10 M. L. T. 455 ; 21 M. L. T. 1127 ; 38 I. A. 155 (P. C.).

Haji Yakub himself applied to the Court on the 18th December 1907 claiming exemption from arrest and in that application, which is Ex. 8, he asserted that he was in possession of one house in which he and his family were residing. It is not likely that he would make a misstatement as to the fact of his being in possession of only one house when the two houses, though adjoining, stand on two separate Survey Numbers.

The inter-communicating doors which were blocked up in Pir Haji Jan's life-time were admittedly not opened till 1920 after the defendants obtained possession of the property in execution of the decree in the possessory suit as would appear from paragraph 10 of the affidavit of the defendant Sidik dated 23rd February 1920. If the defendants used the back portion of the house for storing boat accessories, it is least likely that they would keep the communicating doors blocked. They have not asserted that they used the front door of the house for access to the portion where they stored their boat accessories.

Their story that they reserved the front part of the house for use by neighbours on ceremonial occasions and that it remained locked up for seventeen years except on such occasions is inherently improbable. Haji Yakub was too poor to be so charitable. No neighbours have been called to show that they obtained permission from Haji Yakub to use the house and used it for their own purposes.

Mir Ayub Khan Ex. 12, a respectable citizen, a Special First Class Magistrate, Bar-at-Law, and belonging to the ruling family of Las Bela, has deposed that he visited the Pirs once every year in the house in suit from 1891 to 1904, and again from 1908 to 1917 after his return from England, and that he also visited them on other ceremonial occasions; that on all such occasions he visited them in the front part of the house in suit which was used as an *otak*, and that he has known the house in suit as the Pir's house. No doubt he admits that the plaintiff is his Pir and that he looks upon him with respect. This circumstance by itself would not be sufficient to discard his evidence specially when it fits in with the admitted facts and the probabilities of the case. The plaintiff,

Ex. 10, Kazi Abdul Aziz, Ex. 11, Abdul Rahim, Ex. 13, Ahmed Neki, a relation of the defendants, Ex. 14 and Sidik Ex. 15, all speak to the house being used by the Pir continuously up to the date of the disturbance.

The plaintiff has attempted to improve his case by asserting that not only this house was used as an *otak* after the death of Pir Haji Jan, but also used by him as a family residential house. The plaintiff admittedly had his own house opposite where he was living with his family during Pir Haji Jan's life-time. His statement that he had two wives and that one of them lived in the house in suit during the life-time of Pir Haji Jan, is not true, and is belied by Kazi Abdul Aziz Ex. 11, who states that the plaintiff married his second wife after Pir Haji Jan's death. In the possessory suit the plaintiff asserted that his nephews who were living in the house in suit at the time of Pir Haji Jan's death removed to his house and that he and his family removed to the house in suit. He did not allege then that his second wife was living in the house in suit. His story that he removed to the house in suit on Pir Haji Jan's death or that his nephews, sons of Pir Mahomed Sadik, shifted to his own house is improbable. Pir Mahomed Sidik had also purchased a plot for himself during Pir Haji Jan's life-time. It is not likely that after his purchase he would continue to live with his family and children in the house in suit, a part of which was used as an *otak*, and the remaining portion would be required by Pir Haji Jan for himself and his own wife or wives. It is not unlikely that after Pir Haji Jan's death the house in suit was used by the plaintiff as an *otak*, and occasionally for putting up his guests or relations and that when the plaintiff had no visitors to receive or no guests to put up, he kept the house under his lock and key.

I am not prepared to accept the version of the defendants that they had possession of the house for seventeen years and that without any colour of right the plaintiff attempted to take forcible possession of the house in December 1917. This version is against the probabilities of the case and is not supported by reliable evidence. The broker Vishinji Ex. 27 deposed to having visited the property at the time he brought about the mortgage transaction Ex. 17, and to have been told by Haji Yakub that the front portion of the house was vacant and under his lock and key while the back part of it was used for storing boat accessories. There was no occasion for him to visit the place in 1901, as Ex. 17 was not the first transaction between the parties. The same property was already mortgaged to the same mortgagee by the deed of 1899 Ex. 26. There was no occasion for Vishinji to visit the place and, curiously enough, if he did visit the place he does not get the door opened to inspect the accessories of the boats which were being mortgaged. Hajiani, defendant No. 4, (Ex. 28) is an old woman of eighty years and appears to have been tutored to give evidence. She cannot say if the plaintiff broke open the lock eight or ten months or two or three years after Pir Haji Jan's death.

The defendant Daood Ex. 29, has been recently convicted of theft. Joosa Ex. 30 is a cousin and friend of Sidik, deceased; Allahdin, the hotel-keeper, and Sale-Mahomed, the carpenter, Ex. 31 were called to prove that they saw the front door locked up and do not carry the case of the defendants very far.

Mahomed Ismail Ex. 20 states that Sidik offered to let the house on rent to him two or three months before the disturbance in December 1917. He did not, however, get the door opened. It may be that Sidik intended at that time to take forcible possession of the house and to let it out.

Defendant No. 4 admits that Sidik sold the adjoining house in which the defendants lived in 1917 about five or six months before the disturbance, for Rs. 7,000. It is very likely that as the defendants had to give up possession of their own house, they thought of ejecting the plaintiff who had paid no price for the house and claimed to be in adverse possession and that Sidik put his lock over the lock of the plaintiff. I hold that the plaintiff has proved that he continued in possession of the house from 1900 to 1917 till about the time of the disturbance. The plaintiff has also given evidence to prove that he carried out certain repairs after the cyclone of 1901. The defendants do not allege carrying out any repairs to the house after Pir Haji Jan's death. I see no reason to disbelieve the plaintiff's evidence on this point as well.

MAHOMED FARUG *v.* SIDIK

With regard to the alleged purchase of the house, it is said that Pir Haji Jan purchased it from Haji Yakub by a sale-deed for Rs. 1,000 and that the purchase-money was utilised in discharging the mortgage-deed, dated 12th November 1888, (Exhibit 16) executed by Haji Yakub in favour of Noor Mahomed Lalan. This sale-deed is said to have been lost in the cyclone of 1901-02. The plaintiff's story of the execution of this sale-deed is highly improbable. It is said to have been written on a stamped paper of Rs. 10 by a bond-writer. Though Kazi Abdul Aziz Ex. 11, the friend and adviser of the Pirs, admits that he knew that the deed required registration, and that he told Pir Haji Jan to have the deed registered, and mutation of the names of the property effected, Pir Haji Jan failed to get either the deed registered or the mutation of names effected. Even the *sanad* of the plot Ex. 19 remained with Haji Yakub and has been produced in Court by the defendants. The story of the alleged purchase is inconsistent with the subsequent conduct of Haji Yakub in mortgaging the same property during the life time of Pir Haji Jan in 1899 by Ex. 26 and again in 1901 by Ex. 17.

The plaintiff has considerably altered his case in the present proceedings, by setting up the sale and by attempting to show that Pir Haji Jan got into possession of the plot for the first time after his alleged purchase.

In his deposition in the possessory suit the plaintiff stated as follows:—

"The house was the property of Haji Yakub. My father occupied the house and he may have got permission from Haji Yakub. My father paid no rent to Haji Yakub. My father was not Haji Yakub's Pir, I don't know if he lived there rent free or if he paid rent" Kazi Abdul Aziz (Ex. 11, line 100, is not sure if Pir Haji Jan occupied the house prior to or after the alleged purchase of 1890.

Noor Mahomed Lalan (Ex. 21) in whose favour the mortgage-deed of 1888 Ex. 10 was executed states that Pir Haji Jan was living in the house at the time when he advanced the loan, and that Haji Yakub told him that he had allowed Pir Haji Jan to stay there as he was his Pir. It would appear from his evidence that Pir Haji Jan was in occupation of the house prior to the date of the alleged purchase. There is no reason why Noor Mahmed Lalan should give false evidence in favour of the defendants. His evidence finds support in the statement contained in Ex. 18 published by the plaintiff in 1904 where he states that the plaintiff had been in possession for seventeen years, *i.e.*, prior to 1888, and in paragraph 2 of the plaint in this suit wherein he claims title by adverse possession for thirty years, and also in his evidence wherein he states that Pir Haji Jan lived in the house for over twelve years. The carrying out of certain alterations by Pir Haji Jan at the time of his occupation or the non-payment of rent by him or the other acts relied on by the plaintiff are in no way inconsistent with Pir Haji Jan having been put in possession as a tenant or as a permissive occupant, and cannot be treated as proof of the alleged purchase. I hold that the plaintiff has failed to prove that alleged purchase. I further hold that Pir Paji Jan obtained possession of the house prior to the date of the alleged purchase. The plaintiff's case based on the alleged purchase, therefore, fails.

The defendants have alleged that Pir Haji Jan was put in possession as a monthly tenant on payment of Rs. 2 per month. There is no satisfactory or reliable evidence to prove that Pir Haji Jan agreed to pay rent. The only two witnesses who speak about it are Hajiani, defendant No. 4, (Ex. 28) and Ali Mahomed, a close relation of the defendants Ex. 32. Hajiani does not speak of the actual letting to the Pir but states that the Pir used to pay Rs. 2 per month as rent, though not always, and that as he was a Pir and their *Murshid* they did not always insist on payment of rent. According to Ali Mahomed, Haji Yakub did not wish to let the house on rent as he wanted it for his own use, and that he agreed to do so as the Pir threatened to curse him and told him that, in the event of his getting the house, he will occupy it for a period of only six months and then leave for Medina and that he continued to stay in it for ten or eleven years. Both the witnesses are interested and their evidence is not worthy of credit.

It is not likely that the Pir or Haji Yakub would close the communicating doors with dead walls or carry out other alterations in the house if the Pir wanted to occupy it for six months only or that, if Haji Yakub was

afraid of the Pir's curse, he will require payment of Rs. 2 as rent per month. It is more probable that Haji Yakub allowed the Pir to occupy the house free of rent on account of the sanctity attaching to his position as a Pir not as a tenant for the fixed period of six months or as a monthly tenant.

I hold that Pir Haji Jan occupied the house as a tenant at will and not as a monthly tenant or a tenant for any fixed period and having gone into possession as such, the onus is all the same on him to prove that the relationship so created subsequently ceased to exist, (section 107, Evidence Act), and that his possession became adverse to Haji Yakub's. The act of carrying out alteration, or the non-payment of rent when no rent was payable would not render his possession adverse to Haji Yakub.

Even if it be conceded that the Pir was a monthly tenant, mere non-payment of rent or discontinuance of payment of rent for twelve years would not create adverse possession against the owner : *Jagdeo Narain Sing* v. *Baldeo Sing* (2) *Premsukh Das* v. *Bhupia* (3) *Rungo Lall* v. *Abdul Guffoor* (4) *Dadoba* v. *Krishna* (5); nor would the carrying out of the alternations to suit his convenience be evidence of adverse possession.

I hold that the period during which Pir Haji Jan lived in the house was not adverse to the defendants.

The possession of the plaintiff after Pir Haji Jan's death would not *ipso facto* be adverse to the defendants. He was not a mere trespasser : *Radhabai* v. *Shane* (6) *Rango Lall* v. *Abdul Guffoor* (4) *Krishnaji Ramchandra* v. *Antaji Pandurang* (7). Being the heir of Pir Haji Jan, the plaintiff continued in possession as a permissive occupant and it is for him to show that by some subsequent act his possession became adverse to that of the defendants. The carrying out of repairs in 1902 or the non-payment, of rent would not by themselves be such acts. The plaintiff's case, however, stands on firmer ground when he relies on his open disavowal of Haji Yakub's title in Ex. 6 which was brought to the knowledge of Haji Yakub as would appear from Ex. 6 A. By Exs. 6 and 18, the plaintiff openly and unequivocally disclaimed to hold the house as a tenant and claimed in his own right to the knowledge of Haji Yakub. His adverse possession commenced from that time. His possession had all the qualities of adequacy, continuity and exclusiveness required to prove adverse possession. He was paying rent to nobody. He used the place as his *otak* and for his relatives to live in, and kept it under his lock and key when it was not so required. His name was shown in the municipal registers as the occupant, and he continued to receive the municipal house tax bills. On the expiry of twelve years after the date of Ex. 6 A, he acquired title to it by adverse possession. It is however contended that unless a tenant gives up possession of the property he cannot acquire right to it by adverse possession Reliance has been placed on *Bilas Kunwar* v. *Desraj* (8). This ruling does not support the defendant's contention. In that case the tenant did not claim to have acquired title by adverse possession subsequent to the date of his tenancy. He was put in possession as a tenant by the plaintiff on the 15th September 1900 and on the 3rd October 1905, two days after he had received notice from the plaintiff to quit, he purchased the property from a person who alleged to be its true owner and pleaded that the plaintiff had no title to the land at the date when he was put in possession. Neither Article 139 nor Article 144 of the Limitation Act contemplate that a lessee or a tenant at will or a tenant at sufferance should give up possession of their property before the period of limitation commences to run.

It is next contended that a disclaimer by a tenant, however notorious and public, is not by itself sufficient to enable the tenant to acquire title by adverse possession, and reliance has

(2) 71 Ind. Cas. 984 ; 49 I. A. 309 ; 3 P. L. T. 605 ; (1922) A. I. R. (P. C.) 272 ; 36 C. L. J. 499 ; 32 M. L. T. 1; (1923) M. W. N. 361 ; 2 Pat 38; 27 C. W. N. 925; 45 M. L. J. 460 (P. C.).

(3) 2 A. 517 ; 4 Ind. Jur. 650 ; 1 Ind. Dec. (N. S.) 901.

(4) 4 C. 311 ; 3 C. L. R. 119 ; 3 Ind. Jur. 461 ; 2 Ind. Dec. (N. S.) 199.

(5) 7 B. 34 ; 4 Ind. Dec. N. S. 22.

(6) 4 B. H. C. A. C. J. 155.

(7) 18 B. 256 ; 9 Ind. Dec. (N. S.) 679.

(8) 30 Ind. Cas. 299 ; 37 A. 557 ; at 562 ; 19 C. W. N. 1207 ; 29 M. L. J. 335 ; 2 L. W. 830 ; 18 M. L. T. 248 ; 13 A. L. J. 901 ; 17 Bom. L. R. 1606 ; 22 C. L. J. 516 ; (1915) M. W. N. 767 ; 42 I. A. 202 (P. C.).

been placed on the rulings in *Srinivasa Ayyar* v. *Muthusami Pillai*, (9) and *Raja of Venkatagiri* v. *Makku Narsayar* (10). Apart from the fact that the Madras High Court has taken a different view from that of the Bombay High Court, these rulings are distinguishable. The Madras rulings proceed on the principles underlying the provisions of section 111, clause (*G*) of the Transfer of Property Act which provides that a lease of immoveable property is determined by forfeiture, not merely by the act of the tenant in disclaiming the title of the landlord but by the act of the landlord showing his intention to determine the lease, it being open to the landlord to waive the forfeiture. These rulings would, therefore, principally apply to a continuing lease as defined in section 105 of the Transfer of Property Act and not to a tenancy-at-will or to a tenancy-at-sufferance.

In *Gobind Lall Seal* v. *Debendronath Mullick and others*, (11) where the plaintiff alleged that his predecessor-in-title had permitted *A*, the father of the defendant, to occupy the house without rent and that on the death of *A* which took place about twenty years before suit the defendant had been permitted to reside in the house without rent, Wilson, J., was of opinion that Article 139 of the Limitation Act would not apply, and in appeal *Gobind Lall Seal* v. *Debendronath Mullick* (12) Garth, C. J., and Pontifex, J., held that the proper Article applicable to the case was Article 144. I am of opinion that the present case is governed by Article 144 and not by Article 139. It is, therefore, not necessary for me to consider whether I should follow the Madras view in preference to the view taken by the Bombay High Court, where it has been held that an unequivocal assertion of title coulped with possession for the statutory period and the non-payment of rent during such period would be enough. I may further observe that section 111 of the Transfer of Property Act was not extended to Sind till 1st January 1915, and that it would be, therefore, difficult to apply the provisions of section 111, clause (*G*) to a case where the tenant had disavowed his tenancy prior to the date on which this section was extended to Sind or hold that the only methods in which a tenancy could be determined prior to the extension of section 111 are those contained in that section.

Lastly, it is contended that Exs. 6 and 18 were both engineered by Haji Yakub himself in order to save the property from sale in execution of the mortgage-decree, and that the plaintiff never intended to set up an adverse title to the property. Reliance has been placed on a subsequent application Ex. 7 made by Haji Yakub's sisters claiming interest in both the properties. I have given my careful consideration to this argument, and I cannot, from the mere circumstance of the two applications having been filed, conclude that Ex. 6 was a collusive application or that thereby the plaintiff did not intend to claim the property. The plaintiff has denied such collusion. Haji Yakub himself opposed the application Ex. 6. He stood to gain nothing by the application. He and his son were both mortgagors. They were not thereby avoiding their personal liability or saving their own residential house from sale. In Ex. 7 the applicants have claimed interest in both the properties and not only in one of them. In the absence of any positive evidence to prove collusion, I am not prepared to hold that the plaintiff went the length of engaging pleaders, filing the application Ex. 6 and subsequently incurring further expenses on having notices printed and published, in order to help Haji Yakub.

I hold on issues Nos. 2 and 3 that the plaintiff acquired title to the property in suit by adverse possession for over twelve years commencing from 18th July 1904, and that the rights of Haji Yakub and his heirs as owners were extinguished under section 28 of the Limitation Act on the expiry of such period.

Issue No. 1.—Section 9 of the Specific Relief Act expressly reserves the right of the losing party to file a regular suit to establish his title to the property which is the subject-matter of a possessory suit. I hold that this suit, is therefore, not barred by suit No. 140 of 1918.

Issue No. 4.—The plaintiff having acquired title to the property by adverse possession under section 28 of the Limitation Act before he was dispossessed, he has every right to maintain a suit based on his title within twelve

(9) 24 M. 246.
(10) 7 Ind. Cas. 202; 37 M. 1; 8 M. L. T. 258; (1910) M. W. N. 369.
(11) 5 C. W. N. 679 at p. 680; 5 C. L. R. 527; 2 Ind. Dec. (N. S.) 1010.
(12) 6 C. 311; 7 C L. R. 181; 3 Ind. Dec (N.S.) 203.

years of the date of his dispossession which took place in the year 1917, and the decree in suit No. 140 of 1918 is no bar to his right to claim the property by adverse possession. I hold on this issue in the affirmative.

Issue No. 5.—As the suit is filed within twelve years of the date of dispossession, it is within time. Mr. Dingomal has contended that the plaintiff should have brought a suit within one year of the date on which his application Ex. 6 was disallowed by the Court. There is no substance in this contention. The application Ex. 6 was made under section 258 of the old Civil Procedure Code for raising attachment when no attachment had been made on the property. The property was being sold in execution of a mortgage-decree and the application Ex. 6 was, therefore, not inquired into.

Issue No. 6.—At the close of the case Mr. Dingomal urged that as Pir Haji Jan left other heirs besides the plaintiff who were living, the plaintiff alone could not file the present suit. This argument was based on the answer given by the plaintiff in his evidence that he was the only male member in his family then living. No such plea was raised by the defendants in their written statement, nor was the point raised immediately after the plaintiff gave his evidence. If the other living heirs of Pir Haji Jan were necessary parties to the suit, I should have given permission to the plaintiff to amend the plaint. In view, however, of the fact that the plaintiff alone was dispossessed in the previous suit and also in view of the rulings in *Syed Ahmed Sahib Shutari* v. *Magnesite Syndicate Limited* (13), and *Bhagwansa* v. *Maroti* (14), it is not necessary to have the other co-heirs joined as parties. I hold that the plaintiff can maintain the present suit and is entitled to a decree though he may only be a co-owner of the property in suit.

As the plaintiff has not given true evidence on several points and has resiled from his deposition in the previous suit with the object of improving his case, I am of opinion that he should be made to bear his own costs of the suit. I hold that the plaintiff is entitled to a decree for possession and that he be put in possession of the property in suit and that each party do bear his costs.

P. B. A. *Suit decreed.*

K. S. D.

(13) 29 Ind. Cas. 60 ; 37 M. 50 ; 2 L. W. 460 ; 17 M. L. T. 387 ; 28 M. L. J. 598.

(14) 43 Ind. Cas. 395.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 20 OF 1923.

February 13, 1924.

Present :—Mr. Kinkhede, A. J. C.

DAJJI MAHAR—JUDGMENT-DEBTOR —APPELLANT

versus

MAHADEO KUNBI—DECREE-HOLDER —RESPONDENT.

Limitation Act (IX of 1908) s. 19—Acknowledgment —Admission of liability coupled with arrangement for satisfaction.

An unqualified admission of liability, coupled with an arrangement proposed for its satisfaction, amounts to an acknowledgment within the meaning of section 19 of the Limitation Act and operates to save limitation.

Periavenkan Udaya Tevar v. *Subramanian Chetti*, 20 M. 230 ; 6 M. L. J. 266 ; 7 Ind. Dec. (N. S.) 170 ; *Benode Beharaj Mookerjee* v. *Raj Narain Mitter*, 30 C. 600 ; 7 C. W. N. 651 ; *Rangasami Chetti* v. *Thangavelu Chetti*, 50 Ind. Cas. 380 ; 42 M. 637 ; (1919) M. W. N. 448 ; 26 M. L. T. 147 ; 10 L. W. 333, distinguished.

Maniram v. *Seth Rupchand*, 2 N. L. R. 130; 4 C. L. J. 94 (P.C.) ; 8 Bom. L. R. 501 ; 10 C. W. N. 874 ; 1 M. L. T. 199; 3 A. L. J. 525 ; 16 M. L. J. 300 ; 33 C. 1047; 33 I. A. 165 ; *Vithal* v. *Gopal Rao*, 41 Ind. Cas. 240 ; 5 N. L. R. 8, followed.

Appeal against the decree of the District Judge, Nagpur, dated the 11th November 1922, in Civil Appeal No. 100 of 1922.

Mr. *G. R. Pradhan*, for the Appellant.

Mr. *A. V. Zinjarde*, for the Respondent.

JUDGMENT.—This second appeal arises out of execution-proceedings. The respondent's father obtained a money-decree against

the appellant in Suit No. 145 of 1917 on 11th July 1917. Apparently, no execution was taken out since then. He applied on 28th January 1922 for execution of the decree and relied for its being within time upon the appellant's letter dated 1st December 1919 acknowledging his liability for the decretal debt within the meaning of section 19 of the Limitation Act. The first Court held that the letter was not genuine and that, the application was barred by limitation, while the District Judge held that the letter was genuine and extended limitation and that, consequently, the application was within time. The judgment-debtor appeals to this Court urging that the letter dated 1st December 1919 does not amount to an acknowledgment. His learned Counsel relied upon the following authorities in support of his contention :— *Periavenkan Udaya Tevar* v. *Subramanian Chetti* (1), *Benode Beharej Mookerjee* v. *Raj Narain Mitter* (2) and *Rangasami Chetti* v. *Thangavelu Chetti* (3).

The learned District Judge has already distinguished *Rangasami Chetti* v. *Thangavelu Chetti* (3) on the ground that the document referred to therein recited that the judgment-debtor once owed a debt and that he discharged it. Such a statement taken as a whole does not amount to an acknowledgment of a liability which is subsisting. There the admission of liability was coupled with an assertion that it was discharged. While here the admission is unqualified and is coupled with a declaration as regards the arrangement proposed for its satisfaction. It shows that the liability is subsisting and would be satisfied if and when the sale proceeds of the bale of cotton reach the decree-holder's hands. The document gives authority to the decree-holder to appropriate the sale proceeds towards the satisfaction of the decree. It is just like handing over a cheque which does not operate as a present satisfaction irrespective of the fact whether it is honoured or dishonoured. Just as the cheque gives to the holder a right to demand payment, similarly exhibit D. H. 1 gives to the decree-holder a right to demand from Hiralal Marwadi the sale proceeds of the cotton bale and to appropriate the same towards the satisfaction of the decree. The discharge or satisfaction of the obligation declared by the decree was contemplated to take the place in the future and not at the momeut of the execution of the acknowledgement Exhibit D. H. 1. The other cases are also similarly cases of extinction of liability and have no application.

I think the rulings in *Maniram* v. *Seth Rupchand* (4) and *Vithal* v. *Gopal Rao* (5) clearly apply to the facts of the present case and the exhibit D. H. 1 comes clearly within the scope of an acknowledgment as required by section 19 of the Indian Limitation Act and saves limitation.

I cannot, therefore, uphold the contention of the appellant. The appeal is dismissed with costs. The costs in Courts below will be paid as already ordered.

Z. K. *Appeal dismissed.*

(1) 20 M. 239; 6 M. L. J. 266; 7 Ind. Dec. (N. S). 170.
(2) 30 C. 699; 7 C. W. N. 651;
(3) 50 Ind. Cas. 380; 42 M. 637 ; (1919) M. W. N. 448; 26 M. L. T. 147; 10 L. W. 333.

(4) 2 N. L. R. 130; 4 C. L. J. 94 (P. C.); 8 Bom. L. R. 4501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525 ; 16 M. L. J. 300; 33 C. 1047; 33 I. A. 165.
(5) 1 Ind. Cas. 240; 5 N. L. R. 8.

LAHORE HIGH COURT.

CIVIL REVISION NO. 401 OF 1923.

December 22, 1923.

Present :—Mr. Justice Moti Sagar.

TEGHA AND OTHERS—DEFENDANTS—PETITIONERS
versus
RAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Arbitration—Death of party pending proceedings—Award, whether binding on representatives.

Where a dispute is referred to arbitration and one of the parties dies before the award is made, then if the hearing of the case had been completed before his death and nothing remained to be done except the delivery of the award, and it is shown that the intention of the parties was that not merely themselves but their legal representatives should also be bound by the decision of the arbitrator, the awared delivered after the death of the party would be binding on his

TEGHA *v.* RAM SINGH

representatives in interest. Where, however, the hearing had not been completed before the death of the party, the representatives of the deceased, who have not agreed to the submission, will not be bound by the award.

Perumalla Satyanarayana v. *Perumalla Venkata* 27 M. 112 ; *Manindra Nath Mandal* v. *Mohanunda Roy*, 13 Ind. Cas. 161 ; 15 C. L. J. 360 ; *Binayakdas Acharjee* v. *Nalivi Kumar Chakravarty*, 70 Ind Cas. 459 ; 26 C. W. N. 804, relied on.

Petition under section 44 of Act IX of 1919, for revision of the decree of the Subordinate Judge, 4th class, Kangra, dated the 5th April 1923, decreeing the claim with costs in accordance with the award.

Lala *Mehr Chand Mahajan*, for the Petitioners.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The facts of the case out of which this application for revision has arisen are very simple and are shortly these:—On the death of one *Musammat* Nagro her property was mutated in the names of her collaterals, the heirs of Naurang and Labha, in equal shares. Thereupon, on the 1st of June 1922, the plaintiffs, who are the heirs of Naurang, brought this suit for a declaration that they were the sole heirs of *Musammat* Nagro, that Labha had by his conduct relinquished his rights in her property and that the mutation effected in his favour by the Revenue authorities was null and void. During the pendency of the suit the parties decided to refer their dispute to arbitration, and on the 12th of October 1922 a deed of reference was drawn up and filed in Court appointing one Salig Ram as their sole arbitrator. On the 17th of October 1922 Labha is alleged to have died. No application to bring his legal representatives on the record was made to the Court in which the suit had been instituted. On the 6th of November 1922 two of the sons of Labha, who were prosecuting the case on behalf of their father as his *Mukhtars*, appeared before the arbitrator, and stated that they had no oral evidence to produce and that they relied on documentary evidence only. On the 8th of November the plaintiffs brought the fact of Labha's death to the notice of the arbitrator, and on the 18th of November 1922 they made an application before the arbitrator that the sons of Labha should be brought on the record as his legal representatives. On the 19th of November the arbitrator ordered that the sons of Labha should be summoned to appear before him on the 1st of December 1922. On that date all the parties were present including the sons of Labha, and the latter stated that they did not want to produce oral evidence and that they relied on the documentary evidence only which had already been produced. On the same date the arbitrator gave an award in favour of the plaintiffs which was filed in Court on the 7th of December. On the 18th of December the sons of Labha filed certain objections to the award and the very first objection taken by them was that as one of the parties had died before the arbitrator had delivered his award, his authority had come to an end, and that the award subsequently delivered was void and inoperative in law. The Trial Court disallowed the objections and passed a decree in terms of the award.

Against this decision the sons of Labha have come up in revision to this Court, and the only point urged on their behalf by Mr. Mehr Chand Mahajan is that the death of one of the parties before the award was made operated in law as a revocation of the authority of the arbitrator, and that the award must, consequently, be set aside. In my opinion this contention is well-founded and must prevail. It has been contended by Mr. Fakir Chand, on the authority of *Perumalla Satyanarayana* v. *Perumalla Venkata* (1) and *Manindra Nath Mandal* v. *Mohanunda Roy* (2), that "the rule of the English Law, that a submission to the arbitration stands revoked by the death of one of the parties is not applicable to this country, and that the test to be applied in such cases is what is the true nature of the submission." It is pointed out that regard must be had to the nature of the rights in controversy and that if it appears from the circumstances of the case that the intention of the parties was that not merely themselves but their representatives in interest should also be bound by the decision of the arbitrator, the submission clearly does not stand

(1) 27 M. 112.
(2) 13 Ind. Cas. 161 ; 15 C. L. J. 360.

revoked merely by the death of one of the parties. It is argued that in the present case the matter in difference submitted for the decision of the arbitrator was not personal to Labha but that the intention clearly was that his representatives-in-interest would also be affected by the decision of the arbitrator. There is no doubt that this was so, but it is also clear that if the arbitrator had not completed his inquiry and the representatives of the deceased party were to be held bound by the award, it must have been shown that they were parties to the submission. I am fortified in this view by certain observations made by the learned Judges in the case reported as *Manindra Nath Mandal* v. *Mahanunda Roy* (2) on which reliance has been placed by the learned Vakil for the respondents. The learned Judges in that case observe : "If the hearing had not been completed it would have been necessary to bring the representatives of the deceased party on the record and to make them parties to the submission." The same view has been held in *Binayakdas Acharjee* v. *Nalini Kumar Chakravarty* (3), where it has been laid down that there is no rule of procedure by which an arbitrator could substitute certain persons as legal representatives of a deceased party. It is true that if, before the death of a party, the hearing of the case has been completed and nothing remains to be done expect the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives-in-interest. In the present case, however, it is clear that the hearing had not terminated and a great deal remained to be done before the arbitrator could come to a final decision. In such circumstances, I do not think that the sons of Labha who had never agreed to the submission could be held bound by the award.

I accept the revision, set aside the award and remand the case to the lower Court under O. XLI, r. 23 of the Code of Civil Procedure for a decision in accordance with law. No order as to costs.

Z. K. *Revision accepted.*

(3) 70 Ind. Cas. 459 ; 26 C. W. N. 804

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 287 OF 1921.

February 6, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

CHAUBE BENAIK RAO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PUTTAIN SINGH—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105—Order setting aside decree—Appeal from final decree—Order, whether can be questioned—Hindu Law—Joint family—Alienation, subsequently born co-parcener, whether can challenge—Separated member, alienation by—Necessity, question of, whether can arise—Transfer of Property Act (IV of 1882), s. 82—Contribution between mortgagee and mortgagor

In the absence of an error, defect or irregularity affecting the decision of the case, an order of the Trial Court setting aside a decree on the ground that the defendant who was treated as a minor was really not a minor, cannot be questioned in an appeal from the final decree passed in the suit. [p. 71, col. 1.]

Gulab Kunwar v. *Thakur Das*, 24 A. 464 ; A. W. N. (1902) 136 ; *Tasadduq Husain* v. *Hayat-un-Nissa*, 25 A. 280 ; A. W. N. (1903) 39 ; *Kunja Mal* v. *Gauri Shankar*, 3 A. L. J. 30 ; A. W. N. (1905) 274 ; 1 M L. T. 52 ; *Nidha Lal* v. *The Collector of Bulandshahr*, 35 Ind. Cas. 209 ; 14 A. L. J. 610, followed.

A separated Hindu who has no son or other person joint with him is the absolute owner of his property and is entitled to mortgage it for any reason he pleases. [p. 71, col. 1.]

A co-parcener born subsequently to the date of an alienation of family property is entitled to challenge the alienation on the ground of want of necessity, provided there were other co-parceners in existence at the time of the alienation who were competent to challenge it. [p. 71, col. 2.]

CHAUBE BENAIK RAO *v.* PUTTAIN SINGH

No question of contribution can arise between the mortgagee and a representative of the mortgagor who is not a transferee from the latter. [p. 72, col. 2.]

First appeal from the decree of the Subordinate Judge of Mainpuri, dated the 15th April 1921.

Dr. *S. N. Sen* and Mr. *Baleshwari Prasad*, for the Appellants.

Messrs. *Iqbal Ahmad* and *S. N. Gupta*, for the Respondent.

Lindsay and Sulaiman, JJ.:—This is a plaintiff's appeal arising out of a suit on the basis of a mortgage-deed dated the 14th of November 1873. The deed in question was executed by Deota Prasad, his two nephews Raghubir Singh and Kure Lal and *Mussammat* Ugar Kunwar, the widow of his deceased brother Prag Dat. It was in favour of Jwala Prasad and Bansi Dhar, the predecessors-in-title of the present plaintiffs, the mortgage-deed was executed for a sum of Rs. 3,000 and was payable in ten years with interest at the rate of 13-annas 4-pies per cent. per mensem. Out of Rs 300 due on account of interest, Rs. 200, if not paid within the next six months, were to be compounded after the expiry of each such period. We may also point out one of the covenants of the deed under which it was stipulated that each of the three sets of mortgagors would be entitled to redeem his share of the mortgaged property on payment of a proportionate share of the mortgage-debt.

There was a prior mortgage by conditional sale under which the two villages mortgaged under the deed of 1873 had also been mortgaged. It is an admitted fact that in the year 1894 the present plaintiffs, in whose favour the previous deed of 1871 had stood, obtained a foreclosure decree in respect of one of the two villages mortgaged under the deed of 1873. Accordingly, the present claim is confined to the remaining village.

The present suit was instituted on the 6th of August 1910, within the extended period of limitation. No written statements were originally filed, and it was decreed *ex parte* on the 5th of June 1911. On the 16th December 1912 an application for setting aside the *ex parte* decree was filed on behalf of all the representatives of the mortgagors, the principal defendants on the record, except Mahendra Singh, and the decree on that application was set aside. We may note here that Puttain Singh the present defendant-respondent, was treated at that stage of the proceedings as a minor and was represented by a guardian *ad litem*. After the decree had been set aside a written statement by four of the defendants was put in but ultimately the case was compromised and a compromise was filed in Court on the 18th November 1913. This compromise was incorporated in a decree dated the 19th November 1913. As against the other defendants the suit was heard and decreed on the merits. A final decree for foreclosure was passed on the 14th April 1917.

In the year 1918 Puttain Singh put in an application for setting aside the decree passed against him on the allegation that in fact he had been a major all along and had been wrongly treated as a minor. He alleged that he had had no notice of the suit and that the entire decree was, therefore, a nullity as against him. Objections were raised to this application on behalf of the plaintiffs and evidence was led on both sides. The main issue which the learned Subordinate Judge took upon himself to consider was as to whether Puttain Singh had been properly represented as a minor. On the 2nd January 1919 the learned Subordinate Judge passed an order setting aside the decree as against Puttain Singh and restoring the case to the pending file as against him only. This was done because he came to the conclusion that Puttain Singh had really not been a minor and had been wrongly treated as a minor.

After the case had been rested so far as Puttain Singh is concerned, evidence was led again by the plaintiffs. The suit was ultimately decreed in part against Puttain Singh. The plaintiffs have come up in appeal and press their entire claim against the defendant Puttain Singh.

We may at the outset refer to one point which has been raised in appeal. The learned Advocate for the appellant wanted us to go into the evidence and consider whether the finding of the learned Subordinate Judge that Puttain Singh was in fact a minor, was or was not correct. On the other hand, the learned Advocate for the respondents has called our

attention to a number of cases of this Court in which it has been laid down that as in such an order there was no error, defect or irregularity the affecting decision of that case the point cannot be opened. We are satisfied that this has been the view taken in the previous cases of this Court, *vide* the case of *Gulab Kunwar* v. *Thakur Das* (1), *Tasadduq Husain* v. *Hayat-un-nissa* (2), *Kunja Mal* v. *Gauri Shankar* (3), and *Nidha Lal* v. *The Collector of Bulandshahr* (4).

The case relied upon by the learned Advocate for the appellants, namely, *Nand Ram* v. *Bhopal Singh* (5), is clearly distinguishable inasmuch as there an application for revision had been presented and the question had not been raised in an appeal from the final decree. We are, therefore, of opinion that we must accept the view taken by the learned Subordinate Judge that Putain Singh had in fact been major. There is no irregularity or defect in the procedure.

Coming to the merits of this case we may point out that the mortgage-deed in question was executed by three sets of persons. The learned Subordinate Judge has found that these three branches of the family were separate and the learned Advocate for the respondents has in express terms conceded that he is not prepared to challenge that finding. The result, therefore, is that we must take it that one-third share belonging to Deota Prasad, one-third share belonging to Kure Lal and Raghubir Singh and one-third share in the possession of *Mussammat* Ugar Kunwar inherited by her from her deceased husband had been mortgaged under this deed. So far as the one-third share of Deota Prasad is concerned, it is manifest that the present defendant-respondent is not entitled to challenge it on the ground that it was not for any legal necessity. Deota Prasad being separate form the other members and having no son or any person joint with him was the absolute owner of his property and was entitled to mortgage it for any reason he pleased. We have already pointed out that the right of each set of the mortgagors to redeem his one-third share was fully preserved. The plaintiffs' claim as against the one-third share of Deota Prasad cannot be seriously disputed. The result will, therefore, be that Putain Singh will be entitled to redeem this one-third share on payment of one-third of the entire amount due on the mortgage-deed with interest up to date. The question of interest we shall hereafter consider separately. In case of default of payment, this one-third share shall stand foreclosed.

As to the interest of Kure Lal and Raghubir Singh we are of opinion that Dutain Singh is entitled to put the plaintiffs to proof of necessity for this mortgage debt. Raghubir Singh was the grandfather of the plaintiff. It is true that the plaintiff himself was not born at the time of the mortgage-deed, nevertheless there were other members in his family who were then alive. His right to challenge this transaction, therefore, cannot be disputed. Under the mortgage-deed there were three items which were borrowed ; Rs. 946 were received in cash in order to pay off the money due under a decree against *Musammat* Ugar Kunwar. Rs. 450 were required to pay off the arrears of instalments on account of a mortgage-deed (of the year 1871) which had been executed by Prag Dat as well as the other male mortgagors. And a sum of Rs. 1,604 was paid in cash. There is no evidence on the record to show that the decree against *Mussammat* Ugar Kunwar was anything but a personal decree against her. We are, therefore, unable to hold that Kure Lal and Raghubir Singh were in any way bound to pay it off or to undertake liability therefor. As regards the sum of Rs. 1,604 the learned Subordinate Judge has found that, on the plaintiff own showing, this sum was required in connection with the expenses of the marriage of *Musammat* Ugar Kunwar's daughter. Such a marriage, though a necessity for *Musammat* Ugar Kunwar, should not be considered to be a necessity for Kure Lal and Raghubir Singh who had been separate from her deceased husband. We are, therefore, of opinion that *qua* this one-third share the defendant Putain Singh is not bound to pay this amount. The result, therefore, is that, so far as the one-third share of the defendant's branch is concerned, it can be redeemed by him on payment of one-third of Rs. 450 with

(1) 24 A. 464 ; A. W. N. (1902) 136.
(2) 25 A. 280 ; A. W. N. (1903) 30.
(3) 3 A. L. J. 30; A. W. N. (1905) 274; 1 M. L. T. 52.
(4) 35 Ind. Cas. 200; 14 A. L. J. 610.
(5) 16 Ind. Cas. 1 ; 34 A. 592. at p. 595; 10. A. L. J. 130.

interest up to date. In default of payment of this sum this share also will stand foreclosed.

Coming to the one-third share which was in the possession of *Musammat* Ugar Kunwar, we may note that the first item of Rs. 946 which was due under a decree is an item for which there is no other direct evidence as to the exact necessity. The learned Advocate for the appellants has asked us to presume, after this long lapse of time, specially having regard to the consent given by the other reversioners, that this item must have been borrowed for necessity. If there had been any recital in the deed showing the nature of the necessity we might have made that presumption. There is, however, only this fact that a decree had been passed against *Musammat* Ugar Kunwar. We do not know under what circumstances this decree had been passed and to what extent she was liable under it. We are, therefore, unable to differ from the view taken by the learned Subordinate Judge that this item cannot be held to have been incurred for legal necessity. On the other hand, we are unable to appreciate the reasoning on which he has disallowed the sum of Rs. 1,604. The plaintiffs' case was that this sum had been incurred in order to meet the sxpenses of the marriage of the daughter of *Musammat* Ugar Kunwar. In support of this case the plaintiffs produced two witnesses, Patrakhan and Lachmidhar, whose statements were that this sum was required for the expenses of the marriage. So far as Patrakhan is concerned, the learned Subordinate Judge distinctly believed his testimony in connection with the execution of the document by the lady. He went on to remark that this witness had also stated that this sum was required for the expenses of the marriage of the daughter and then added,—

" It would thus appear that, excepting the amount of Rs. 450, the rest of the money under the mortgage in suit was taken by *Musammat* Ugar Kunwar for her sole use."

The other witness Lachmidhar has not been referred to by him at all. Our attention has been drawn to a subsequent mortgage-deed dated the 14th of March 1883 under which Raghubir Singh had borrowed a sum of money for the expenses of the marriage of a daughter of this daughter. As the learned Subordinate Judge has believed the evidence of Patrakhan and as it is most likely that the other male members of the family would not have joined in the execution unless they had been satisfied that this large sum was being borrowed for some urgent necessity we are of opinion that this sum should be allowed.

We may note here that the learned Subordinate Judge had recorded a finding that the plaintiffs had failed to prove that the mortgage-deed in question had been attested in the manner required by law. This finding has not been supported by the learned Advocate for the respondent. In fact, the mortgage-deed was executed prior to the coming into force of the Transfer of Property Act and no question of attestation really arises. The learned Advocate for the respondent has not disputed the finding that *Musammat* Ugar Kunwar had actually executed this deed and borrowed this sum.

The last argument urged on behalf of the respondent is that, inasmuch as the plaintiffs themselves had foreclosed one village in the year 1894 they are not now entitled to throw the entire burden of the mortgage-debt on the remaining village In our opinion this contention has no force. In the the first place, the defendant Puttain Singh is the representative of the mortgagor himself and is not a transferee from the mortgagors. No question of contribution, therefore, at all arises. In the next place, the mortgagee was entitled to recover his debt by foreclosure of any part of the mortgaged property. One village has already been foreclosed on the strength of the prior deed and, in our opinion, the plaintiff can now foreclose the remaining village for the amount due on the second deed.

The other question that remains is one of interest. The learned Subordinate Judge came to the conclusion that interest at the contract rate would run only for the period of ten years fixed in the mortgage-deed, and that thereafter there was no stipulation for payment of any interest and the utmost amount which the plaintiffs could get would be interest for six years prior to the suit by way of compensation.

We are unable to agree with this view. There is, admittedly, no provision in the mortgage-deed under which it was stipulated that interest would cease to run after expiry of

ten years. The ordinary presumption is that money was lent and interest was agreed to be charged all along. There is an express provision for payment of interest at a fixed rate at the expiry of the term. There is also a condition in the deed that, —

" If we fail to pay up the money the mortgagees shall have power to foreclose the property mortgaged in lieu of the entire amount due to them."

There is also a covenant to pay compound interest at the contract rate on default of payment of interest. We are, therefore, unable to distinguish this case from that reported in *Mathura Das* v. *Raja Narindar Bahadur* (6) or *Bindesri Naik* v. *Ganga Saran Sahu* (7). The learned Subordinate Judge has relied on a case reported in *Balwant Singh* v. *Gayan Singh* (8). In that case it was pointed out that the question depended on the proper interpretation of each document. The learned Chief Justice who delivered judgment in that case distinguished it in the later case in *Abdul Ahad* v. *Mahtab Bibi* (9). We are, therefore, satisfied that the intention of the parties must have been that interest would be payable even after the expiry of the time fixed and that there was no stipulation on behalf of the mortgagees that interest would cease to run as soon as the ten years expired. It is true, that the mortgagees have waited for all these years in bringing the suit for foreclosure ; on the other hand, the mortgagors also have not thought fit to redeem it earlier. In our opinion the interest, therefore, at the contract rate will be charged up to the date fixed for payment.

The result, therefore, is that the decree of the Court below is modified to this extent that, as against Puttain Singh, defendant-respondent, a preliminary decree for foreclosure in the ordinary form against one-third share of Deota Prasad on payment of one-third of the total amount due under the mortgage-deed with interest at the contract rate up to the date to be fixed by this Court's decree (which will be six months from the present day) will be given.

As against the one-third share of Raghubir Singh and Kure Lal there will be a preliminary decree for foreclosure in the ordinary form on payment of one-third of Rs. 450 with interest at the contract rate up to the date fixed for payment. In default, the property will be foreclosed.

As against the one-third share of *Musammat* Ugar Kunwar there will be a preliminary decree for foreclosure on payment of one-third of Rs. 450 with interest up to the date fixed for payment plus Rs. 1,604 with intereet at the contract rate up to the date fixed for payment at the same rate. In case of default the property will be foreclosed.

This modification of the decree is only in favour of Puttain Singh, defendant-respondent. So far as concerns the other defendants, who are parties to the compromise decree, as against whom the decree has not been set aside and a final decree has been passed, their rights and liabilities will be determined by the former decree and will not be affected by the present decree. As the appeal has succeeded in part and failed in part we direct that the plaintiffs-appellants shall get half their costs incurred here and in the Court below since the date of the restoration against Puttain Singh who will bear his own costs.

Z. K. *Decree modified.*

(6) 19 A. 39 ; 23 I. A. 138 ; 1 C. W. N. 52 ; 6 M. L. J. 214; 7 Sar. P. C. J. 88 ; 9 Ind. Dec. (N. S.) 25, (P. C).

(7) 20 A. 171 ; 2 C. W. N. 129 ; 25 I. A. 9; 7 Sar. P. C. J. 273 ; 9 Ind. Dec. (N. S.) 471, (P. C.).

(8) 21 Ind. Cas. 253 ; 11 A. L. J. 829 ; 35 A. 534.

(9) 24 Ind. Cas. 674.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1244 OF 1920.

December 19, 1923.

Present :—Mr. Justice Broadway and Mr. Justice Fforde.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

SHRIMATI SARLA DEVI CHAUDHRANI —OBJECTOR—RESPONDENT.

Land Acquisition proceedings—Market—value, assessment of—Experts, opinions of, value of—Offers, value of—Procedure.

In assessing the value of land for purposes of land acquisition the opinions of experts are admissible in evidence, but the value to be attached to such evidence depends upon the quality of the evidence. [p. 75, col. 1.]

Harish Chundr Neogy v. *Secretary of State for India in Council*, 11 C. W. N. 875 at p. 877 ; *Government of Bombay* v. *Merwanji Muncherji Cama*, 10 Bom. L. R. 907 at pp. 913, 914; *Government of Bombay* v. *Karim Tar Mahomed*, 3 Ind. Cas. 273 ; 33 B. 325 ; 10 Bom. L. R. 660, relied on.

The evidence of offers made by irresponsible brokers on behalf of undisclosed principals, or perhaps for their own purposes without any principal behind them, is, however, useless. [p. 75, col. 2.]

The fairest and most favourable principle of compensation to the owners is to estimate the market-value of the property not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it. [p. 75, col. 1.]

First appeal from the order of the District Judge, Lahore, dated the 30th April 1920.

The *Government Advocate*, for the Appellant

Mr. *Dev Raj Sawhney*, Lala *Badri Das*, R. B., and Babu *S. K. Mukerji*, for the Respondent.

JUDGMENT.—By a notification No. 343 G. S. published in the *Punjab Gazette* of the 18th June 1917, the Government acquired a property known as the *Phuswali Kothi*, the total area of the land being 1·23 acres, or 11 *kanals* 19 *marlas* and 95 square feet. The property consisted of a bungalow and compound together with the usual appurtenances. There were also a certain number of trees standing on the land. The *Phuswali Kothi* belonged to *Srimati* Sarla Devi Chaudhrani, and her husband, the late *Chaudhri* Ram Bhaj Datta, acted for her during the acquisition proceedings as well as in the Court of the District Judge. The Land Acquisition Collector, after the usual inquiry, made an award allowing a sum of Rs. 34,721-12-5 to which was added the usual 15 *per cent.*, the total coming to Rs. 39,930-0-8. The value of the land alone, apart from buildings and trees, was fixed at Rs. 29,927-12-5, the rate allowed being Rs. 2,500 per *kanal*.

Objection was taken to this award and the matter referred in due course to the District Judge. As noted by the learned District Judge it was with considerable difficulty that the objector was prevailed upon to file any written statement of her demands. The record shows, however, that the objector was claiming a rate of Rs. 8,000 per *kanal*. The learned District Judge came to the conclusion that the rate fixed by the Collector was too low and raised it to Rs. 4,710 per *kanal*, thus increasing the value of the land from Rs. 29,927-12-5 to Rs. 56,520. The value fixed of the trees and the buildings was not interfered with.

The Government has preferred an appeal against the enhancement of the value of the land by the learned District Judge throuh the Government Advocate. Mr. Dev Raj Sawhney for the objector has not attacked the findings of the learned District Judge *qua* the value of the buildings or the trees; and the only point for determination is as to whether the market-value of the land has been rightly fixed.

The learned District Judge has held that in this case the only evidence which could be taken into consideration in determining the correct value of the land was that of actual sales. He has eliminated from consideration the testimony of expert witnesses, who have given their opinions as to what the land was worth, and also the evidence given by certain brokers and others as to offers made to the objector for the property. It has been contended by Mr. Dev Raj Sawhney that the expert evidence and the evidence as to the offers has been wrongly excluded and was valuable evidence of the value. In my opinion, the learned District Judge acted rightly in excluding this evidence. It has been excluded not on the ground of its being inadmissible but on the ground that its value was nil. In *Harish Chunder Neogy* v. *Secretary of State*

in Council (1) it was held that although the opinion of experts was evidence their value was not great and that it would not be safe to place much reliance on this kind of evidence unless it was supported by, or coincided with, other evidence. In *Government of Bombay* v. *Merwanji Muncherji Cama* (2), it was remarked that the opinion of an expert witness is admissible in evidence not only when it rests on the personal observation and inquiry of the witness himself or on the facts within his own knowledge, but also when it is founded on the case as proved by other witnesses at the trial but that it was settled law that an expert may not be asked purely speculative, hypothetical, questions having no foundation in the evidence. In *Government of Bombay* v. *Karim Tar Mahomed* (3), it was held that a "surveyor's opinion by itself is good evidence. What value the Court would put on it depends entirely "on the effect of the cross-examination." The expert evidence in this case consists of the opinions of certain brokers and an examination of this evidence shows, in my opinion, that it is entirely worthless. None of them have produced any account-books or registers showing that they had been selling similar plots in the vicinity, at or near the time the Notification was issued and have given no real data in support of their opinions.

Take, for instance, Das Mal (page 23 of the Printed Paper-Book). He says that *if* the site of the *Phuswali Kothi* is sold in small plots the value is Rs. 7,000 per *kanal*. If it is sold as one block the value would be Rs. 6,000 per *kanal*. In cross-examination he admits that he has bought no land in the vicinity of the *Phuswali Kothi* and that he keeps no registers. Similarly, Kanhaya Lal gives his opinion that if the site in question was sold in small plots the price would be Rs. 8,000 or Rs 9,000 per *kanal*. He, however, in cross-examination admits that the *Phuswali Kothi* is three-quarters of a mile from the Railway Road and that he had no dealings in land in the vicinity of this *Kothi*. Amar Nath, another broker, admits that he had never had any dealings in land anywhere near the *Phuswali Kothi*. While, therefore, Mr. Dev Raj Sawhney is right in contending that the evidence of experts is admissible, in my opinion, the evidence of the experts produced in this case has rightly been excluded from consideration as affording no assistance in arriving at the correct value of the site in question.

Again, it seems to me that even, if the evidence of offers be admissible, such evidence can rarely be of any real value. In the present case several letters have been put in addressed to *Chaudhri* Ram Bhaj Datta making certain offers and advising that the property should be sold in plots. An offer, however, amounts merely to an expression of opinion on the part of the offeror and this can only be proved by the evidence of the offeror himself. In the present case most of the offers have come from or through brokers and with regard to these I would refer to the following remarks to be found in *Government of Bombay* v. *Merwanji Muncherji Cama* (2). "The evidence of offers made by irresponsible brokers on behalf of undisclosed principals, or perhaps for their own purposes without any principal behind them, is useless, even supposing it is relevant." I do not think it necessary to discuss this matter further and I cannot regard the evidence under this head as of any value whatsoever. It is worthy of note that, although *Chaudhri* Ram Bhaj Datta went into the witness-box and produced a large number of documents he never made any reference whatever to these offers and the witnesses themselves say that he never replied to them.

I think the learned District Judge has rightly adopted the method of considering the price paid within a reasonable time, for land adjacent to the land acquired and possessing similar advantages, but it seems to me that in approaching the question from this point of view he has committed certain errors. He decided to consider only the evidence of the sales of lands situated within a distance of a quarter of a mile from the site acquired and has then proceeded to consider five sales. The record shows that every one of these five sales relates to lands situated at more than a quarter of a mile from the site in question. One of these five was a sale effected on the 27th October 1915 of 4 *marlas* of land for Rs. 1,500 giving the rate of Rs. 7,500 a *kanal*.

(1) 11 C. W. N. 875 at. p. 877.
(2) 10 Bom. L. R. 907 at. p. 913; 919.
(3) 3 Ind. Cas 273; 33 B. 325; 10 Bom. L. R. 660.

Admittedly, the value of land has been increasing at an extraordinary rapaid rate from 1914 onwards. There is nothing on the record to show the circumstances under which this transaction in 1915 was entered into and it is a well known fact that a purchaser may be willing to pay a sum far in excess of the real value for small plot of land when that plot of land was needed by him in order to round off his own property or for some other such reason.

The learned Government Advocate has taken exception to the omission from consideration by the District Judge of two sales, which took place of lands within a very short distance of the land acquired on the 14th May 1917. These two sales have been proved and the plan on the record shows that they are very close to the site acquired although not adjacent thereto. In my opinion, the omission of these two sales was a serious error. The rate per *kanal* according to these two transactions comes to Rs. 1,638.

The learned Government Advocate strongly urged that the five sales relied on by the learned District Judge should not have been considered ; firstly, as to the one referred to above relating to 4 *marlas* of land on the ground that it took place in 1915. I think there is force in this contention. The land is not only situated at a considerable distance but the sale took place nearly two years before the present site was acquired. Secondly, as to the other four transactions, it was objected that they related to small plots of land and that the sale of small plots of land did not form a correct basis for the valuation of a large site such as was acquired in the present case. On the other hand, it has been repeatedly held that the fairest and most favourable principle of compensation to the owners is to estimate the market-value of the property not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it. This principle has been recognised and the objectors could have put forward a scheme showing how the site in question could have been developed by splitting it up in various plots. While evidence has been led to show that the value of land acquired would be greater if split up in small plots, no scheme for such a development has been put forward and no evidence has been led to show that there was any real demand for small houses or shops in this vicinity. At the same time, I think that the four sales under reference may well be looked at as they all took place two or three months prior to the Notification.

The site in question has two frontages and abuts on two roads. It is situated in the heart of the scholastic world of Lahore and close to the District Court and the possibility of its being split up for small tenements cannot, I think, be disregarded. It is true that the fours sales referred to relate to lands situated at a little distance from the site and nearer to the City but the distance is not so great as to entitle me to ignore them wholly. I think these four sales can reasonably be taken into consideration along with the sales omitted by the learned District Judge and referred to above as having taken place on the 14th May 1917. The average of these six sales comes roughly to Rs. 3,537 per *kanal* and I think that that may be regarded as a fair rate to fix in the present case.

In coming to this conclusion I have not lost sight of the fact that in a reference made by the Acquisition Officer to the Tahsildar the latter fixed the value of this land at Rs. 7,000 a *kanal*. The opinion of a Tahsildar has been held to be relevant by the Madras High Court in a case reported in *Rathanamasari* v. *Secretary of State for India in Council* (4) while a contrary view appears to have been taken by the Chief Court in *Farman Shah* v. *Secretary of State for India in Council*. (5) Even assuming, however, that the *Tahsildar's* report is relevant in this connection, a reference to it shows that it is based mainly on the objector's opinion as to the value and his claims made before the *Tahsildar*. It has, therefore, practically no evidential value. I have also taken into consideration the fact that the position of this land is decidedly superior to that of the land to which the sales of the 14th May 1917 relates. In my opinion the learned District Judge has fixed too great a value on the land acquired while the Collector's estimate was too small.

I would, therefore, accept this appeal and fix the rate at Rs. 3,537 per *kanal* and reduce

(4) 72 Ind. Cas. 214 ; 44 M. L. J. 132 ; 17 L. W. 114 32 M. L. T. 279 ; (1923) A. I. R. 332.
(5) 63 P. R. 1907 ; 83 P. W. R. (N.S.) 1907.

the amount payable for the land from Rs. 56,520 to Rs. 42,444 plus the usual 15 % for compulsory acquisition. The appellant will get costs in proportion.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1237 OF 1922.

November 23, 1922.

Present :—Mr. Justice Stuart.

RESHMA BIBI—PLAINTIFF—APPELLANT

versus

BHAWANI SARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901) ss. 4 (12), 88—Occupancy tenant, well constructed by on land belonging to Zemindars—Improvement—Consent of Zemindars, except one—Tenant, whether can be compelled to close well.

An occupancy tenant constructed a masonry well on waste land belonging to the *Zemindars* for irrigating his occupancy holding. All the *Zemindars* except one, acquiesced in his so doing ; but the one who had not given his consent sued to have the well closed ;

Held, that the well was an improvement within the meaning of section 4 (12) of the Agra Tenancy Act and the Court would not compel the tenant to close the well at the instance of the solitary *Zemindar* who had not acquiesced in the construction of the well.

Appeal against the decree of the Sub-Judge, Cawnpore, dated the 24th April 1922.

Mr. *M. A. Aziz*, for the Appellant.

JUDGMENT.—There are 18 *zemindars* in the village Kunwardah in the Cawnpore District. On the facts, a tenant, Bhawani Saran, has constructed a masonry well on waste land belonging to all these 18 *zemindars* at a cost of Rs. 500 for irrigating his occupancy holding. Seventeen of the *zemindars* have acquiesced in his so doing. The 18th, a widow called Reshma Bibi, who is the present plaintiff-appellant, has sued Bhawan Saran and asked for the relief that he should close this well which he has constructed at a cost of Rs. 500, joining the remaining 17 *zemindars* as defendants. The lower Appellate Court has found clearly that the well was constructed with the consent of all the *zemindars* save the plaintiff-appellant, at considerable expense, upon waste land, for the irrigation of Bhawani Saran's occupancy holding. The well is admittedly an improvement within the meaning of section 4 (12) of the Tenancy Act. Under the Tenancy Act an improvement need not be executed on the holding if it is executed directly for its benefits and an improvement includes a masonry well. Under section 88 of the same Act every tenant not being a non-occupancy tenant is entitled to make an improvement. It is urged by the learned Counsel for the plaintiff-appellant, that, on the face of it, whatever be the law, an occupancy tenant has no right to trespass on the *zemindar's* land for the making of an improvement. I agree with him to a certain extent, but in such a case as this, where 17 out of the 18 *zemindars* have agreed to the making of the improvement, I do not think that a Court should interfere. The benefit of the occupancy holding is the benefit of the whole village whether the plaintiff appellant has an interest in that particular occupancy holding or not, I do not see that any useful purpose will be gained by issuing 18 notices in this matter, the number of notices which would be necessary if the appeal was admitted. I dismiss it under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 177 OF 1921.

February 21, 1923.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

Firm PRASANNA KUMAR PAL SANATAN KUNDA—PLAINTIFFS—APPELLANTS

versus

PANAULLA MIJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872) s. 25—Limitation Act (IX of 1908) s. 19—Stamp Act (II of 1899) s. 35, Sch. I.

PRASANNA KUMAR PAL SANATAN KUNDA *v.* PANAULLA MIJI

Art. 5—Acknowledgment and promise to pay difference between—Construction of Document—Promissory-Note —Agreement.

Whether a statement contained in a particular document is a mere acknowledgment within the meaning of section 19 of the Limitation Act, or is a promise to pay within the meaning of section 25 of the Contract Act, must depend upon the language of the instrument under consideration.

Defendants executed a document in the following terms :—" Account of money, In the name of Panaullah Miji and Umer Ali Miji of Nanupur, Mokam Chandpore. Amount due, brought forward from the account of Panaulla Miji at page 24 of this book Rs. 3,535. Interest at the rate of one rupee per mensem, stipulated time for payment the month of Bhadra of the year 1318 B. S:"

Held, (1) that the document contained a promise to pay within the meaning of section 25 of the Contract Act ;

(2) that the document was not a promissory-note, but an agreement within the meaning of Article 5 of Schedule I to the Stamp Act, and was not affected by the provisions of section 35 of that Act.

Case law discussed.

Appeal against the decree of the Sub-Judge, 3rd Court of Zilla Tipperah, dated the 18th May 1921.

Babus *J. C. Roy*, *P. C. Majumdar* and *R. P. Mookerjee*, for the Appellants.

Babus *S. C. Basak* and *P C. Basu*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for money advanced on loan. There were transactions between the parties, followed by an adjustment of accounts on the 4th April 1911, when Rs. 3,535 was found due from the defendants to the plaintiffs. Thereafter, there were three successive adjustments on the 2nd April 1914, 6th April 1917 and 8th February 1920. On the 3rd August 1920, the plaintiffs instituted the present suit to recover the sum of Rs. 5, 200 with interest and costs. The defendants resited the claim on the ground, amongst others, that it was barred limitation. The Subordinate Judge has found on the merits in favour of the plaintiffs but has dismissed the suit on a twofold ground, namely, first, that the claim was barred by limitation and, secondly, that the document which recorded the adjustment on the 4th April 1911 was not admissible in evidence as not duly stamped. On the present appeal, these positions have been controverted and we have come to the conclusion that the view taken by the Subordinate Judge cannot be supported.

As regards the first question, namely, that of limitation, the Subordinate Judge has held that the plaintiffs are not entitled to the benefit of section 19 of the Indian Limitation Act, inasmuch as they have not established that, at the time when the accounts were adjusted on the 4th April 1922, the sum found due was still legally recoverable. The appellants have, in answer, urged that the document evidences something more than an acknowledgment and is in essence an agreement to pay a barred debt within the meaning of section 25, sub-section (3) of the Indian Contract Act. This argument has been put forward on the assumption that the sum determined to be due on the 4th April 1911 was in fact not legally recoverable by reason of the operation of the statute of limitations, though the debtor might not have been aware that the claim was barred ; *Mati Sheikh* v. *Baikantha Nath Kar* (1), *Bhowani Misser* v. *Peari Jha* (2), *Simon* v. *Arogiasami Pillai* (3).

Section 25, sub-section (3), provides that an agreement made without consideration is void, unless it is a promise made in writing and signed by the person to be charged therewith, to pay wholly or in part a debt of which the credior might have enforced payment but for the law for the limitation of suits. Whether the statement contained in a particular document is a mere acknowledgment within the meaning of section 19 of the Indian Limitation Act, or whether it is a promise to pay within the meaning section 25 of the Indian Contract Act, must manifestly depend upon the language of the instrument under consideration. In the case before us, the document executed by the defendants on the 4th April 1911 was in the following terms :—

" Account of money, in the name of Panaullah Miji and Umer Ali Miji of Nanupur, Mokam Chandpore. Amount due, brought forward from the account of Panaulla Miji at page 24 of this book Rs. 3,535. Interest at

(1) 20 Ind. Cas. 809 ; 18 C. L. J. 269.
(2) 21 Ind. Cas. 254 ; 18 C. L. J. 329.
(3) 25 Ind. Cas. 361 ; 16 M. L. T. 122.

the rate of one rupee per cent. per mensem, stipulated time for payment the month of *Bhadra* of the year 1318 B. S." Then follow the signatures of the executants on one-anna stamp.

It is plain that the provision for payment of interest is not an acknowledgment of the existing debt but is a promise to pay interest in future on the dedt specified. We need not consider whether such a promise to pay interest may not necessarily involve a promise to re-pay the debt; for we have the further expression "stipulated time for re payment" which unquestionably contained a promise to repay the amount found due. Consequently, on a consideration of the document before us, the inference is legimate that it sets out a promise made in writing and signed by the persons to be charged therewith to pay wholly the debt specified therein. But the respondents have urged that a distinction must be observed between an acknowledgment within the meaning of section 19 of the Indian Limitation Act and a promise to pay within the meaning of section 25 of the Indian Contract Act. This may be conceded, notwithstanding the observation of the Judicial Committee in *Maniram Seth* v. *Seth Rup Chand* (4), namely, that an unconditional acknowledgment has always been held to imply a promise to pay, because that is the only inference, if nothing is said to the contrary; it is what every honest man would mean to do. There are, however, authorities which show that in view of the provisions of secion 19 of the Indian Limitation Act, which make an acknowledgment available only when it is in respect of a debt not yet barred by limitation, the Court should be reluctant to imply in every case of acknowledgment a promise to pay a barred debt; in this connection, reference may be made to the decisions in *Chowksi Himutlal* v. *Chowksi Achrutlal* (5), *Jethi Bai* v. *Putli Bai* (6), *Ganga Prosad* v. *Ram Dayal* (7), and *Gobinda Das* v. *Saru Das* (8). In the case of *Chandra Prosad* v. *Varajlal* (9), a *khata* signed by the defendant was produced. It contained an entry in the following terms: "Rs. 200 was found to be due on account of the previous *khata* having been made up. For the same this *khata* is passed. The moneys are payable by me. I am to pay the same whenever you may make a demand." It was ruled that the *khata* was not a mere acknowledgment of the debt, but was a promise to pay within the meaning of section 25 of the Indian Contract Act. To the same effect are the decisions of the Punjab Chief Court, in *Mahbub Jan* v. *Nuruddin* (10), *Bhagwan Singh* v. *Munshi Ram* (11), and *Tirkhu* v. *Rizak Ram* (12). In the case last mentioned, the principle was enunciated that when debtors strike a balance in the account-book of the creditor, promising in writing to pay the debt due to him, a suit may be brought on the bassis of the balance under sub-section (3) of section 25 of the Indian Contract Act, and the claim is enforceable regardless of the question of limitation. Where the balance operates to acknowledge a debt, a statement of future interest to be paid at a certain rate imports a promise to pay the debt as well. This view was supported by a reference to the earlier decision of a Full Bench of the Punjab Chief Court in *Daula* v. *Gonda* (13). We hold that in the present case the document is a promise within the meaning of section 25; this does not ignore the distinction between an acknowledgment and a promise to pay, which was emphasised by the Patna High Court in *Ram Bahadur Singh* v. *Damodar Prosad Singh* (14). The view we take is supported by the instructive judgment of Lord Sumner in *Spencer* v. *Hemmerde* (15) where the grounds of the distinction between an acknowledgment and a promise to pay were historically reviewed. The conclusion follows that the plea of limitation cannot possibly succeed.

As regards the second question, namely, that of the admissibility of the document

(4) 33 C. 1047; 33 I. A. 165; 4 C. L. J. 94; 8 Bom. L. R. 504; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130 (P. C.).
(5) 8 B. 194; 4 Ind. Dec. (N. S.) 503.
(6) 17 Ind. 722; 14 Bom. L. R. 1020
(7) 23 A. 502 A. W. N. (1901) 150
(8) 30 A. 208; 5 A.L.J. 333; A. W. N. (1908) 129
(9) 1 Bom. L. R. 644.
(10) 102 P. R. 1905; 22 P. L. R. 1906; 134 P. W. R. 1905.
(11) 41 Ind Cas. 415; 66 P. R. 1917; 135 P. W. R. 191;
(12) 8 Ind Cas. 811; 138 P. W. R. 1901; 8 P. L. R. 1911.
(13) P. K. 1903; 101 P. L. R. All. 6903;
(14) 60 Ind. Cas. 514; 6 P. L. J. 121; 2 P. L. T. 303.
(15) (1922) 2 A. C. 507; 91 L. J. K. B. 941; 66 S. J. 692; 38 T. L. R. 869.

which records the adjustment of the 4th April 1911, the Subordinate Judge has found in favour of the defendants. We are of opinion, however, that the document is an agreement or a memorandum of agreement within the meaning of Art. 5, clause (c) of Schedule I of the Indian Stamp Act; in support of this proposition reference may be made to a long series of decisions of this Court. In *Murari Mohan Roy* v. *Khetter Nath Mulluk* (16) a document was executed in these terms:

"This document, a hand-note, is executed by me for the purpose of purchasing a *ghor*. I take from you Rs. 7. I will pay interest on the same at half anna per rupee per mensem. Having received Rs. 7 in cash, this hand-note is executed." Mr. Justice Wilson held, with the concurrence of Mr. Justice O'Kinealy, that this was not a promissory-note nor a bond, but was an agreement to pay, and as such was chargeable with duty under clause (5) of Schedule I of the Indian Stamp Act. It was pointed out that this view was in accord with the earlier decision in *Ferrier* v. *Ramkalpa Ghose* (17). The same view has been consistently adopted in subsequent cases; *Mulchand Lala* v. *Kashi Kashibullah Biswas* (18) and *Enatullah Biswas* v. *Gajaruddi Biswas* (19). A similar view was adopted by the Allahabad High Court in *Mutusaddi Lal* v. *Harkesh* (20) and *Mohadev Kori* v. *Sheoraj Ram* (21). The decision of this Court in *Mul Chand* v. *Kashi Ballab Biswas* (18), approved that of the Bombay High Court in *Laxumibai* v *Ganesh Raghumull* (22). It is possible, however, that a different view was indicated in the Bombay High Court in *Reference under the Stamp Act, section* 60 (23) but the decision of the Madras High Court in *Tirupathi Goundan* v. *Rama Reddi* (24), accords with the view adopted in Calcutta and Allahabad. As a last resort, the respondent has strenuously argued that the document in question is a promissory-note and has relied upon the definition of the expression promissory-note contained in section 2, clause (22) of the Indian Stamp Act, where a promissory-note means a promissory-note as defined in the Negotiable Instruments Act, 1881. The definition in the Negotiable Instruments Act is in the following terms: "A promissory-note is an instrument in writing, not being a bank-note or a currency-note, containing an unconditional undertaking signed by the maker, to pay a certain sum of money to, or to the order of, a certain person or to the bearer of the instrument." It is not necessary for the purposes of the present case, to examine the very wide terms of this definition. But we may usefully recall the important observation of Pollock, C. B., in *Sibree* v. *Tripp* (25) where a question arose, whether the document before the Court was a promissory-note: "It is difficult to lay down a rule which shall be applicable to all cases; but it seems to me that a promissory-note, whether referred to in the Statute of Anne or in the text books, means something which the parties intend to be promissory-note. We cannot suppose that the Legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes; and this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be rather an agreement than a promissory-note." In the case before us, there is no suggestion, indeed, the suggestion, if made, would have no solid foundation, that the parties ever intended this to be a promissory-note. We are of opinion that the document is an agreement within the meaning of Art. 5 of Schedule I of the Indian Stamp Act and is consequently not affected by the provisions of section 25.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The suit will stand decreed for Rs. 5,200 with interest at 6 per cent per annum from the date of institution of the suit till the date of realisation. The plaintiffs are entitled to their costs throughout.

Z. K. *Appeal allowed.*

(16) 15 C. 150; 7 Ind. Dec. (N. S.) 684.
(17) 23 W. R. 403
(18) 35 C. 111; 1 C. W. N. 1120.
(19) 11 C. W. N. 1122.
(20) 21 Ind. Cas. 601; 36 A. 11; 11 A. L. J. 966.
(21) 51 Ind. Cas. 116; 41 A. 356; 17 A.L.J. 381.
(22) 25 B. 373; 2 Bom. L. R. 132.
(23) 4 Bom. L. R. 912.
(24) 21 M. 49; 7 M. L. J. 291; 7 Ind. Dec. (N. S.) 391.
(25) (1846) 15 M. & W. 23 at p. 35; 15 L. J. Ex. 318; 153 E. R. 746; 71 R. R. 545.

FEROZ-UD-DIN AHMAD *v.* SIRDAR SHAH

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2017 OF 1920.

April 2, 1924.

Present :—Mr. Justice Scott-Smith
and Mr. Justice Fforde.

Hafiz FEROZ-UD-DIN AHMAD—
—PLAINTIFF—APPELLANT
versus
SIRDAR SHAH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Evidence Act (*I of* 1872) *s.* 92—*Deed of gift—Oral evidence to vary terms of deed, admissibility of—Muhammadan Law—Gift and* hiba-bil-ewaz, *distinction between—Delivery of possession, whether necessary.*

Where a deed purports to evidence a gift pure and simple, oral evidence cannot be admitted as between the parties to the deed or their representatives for the purpose of showing that the transaction was really what is known under the Muhammadan Law as a *hib-bil-ewaz*, that is, a gift for consideration.

Maung Kyin v. *Ma Shwe La*, 42 Ind. Cas. 642 ; 45 C. 320 ; 15 A. L. J. 825 ; 33 M. L. J. 648 ; 3 P. L. W. 185 ; 6 L. W. 777 ; 22 C. W. N. 257 ; 23 M. L. T. 36 ; 27 C. L. J. 175 ; 20 Bom. L. R. 278 ; (1918) M. W. N. 300 ; 9 L. B. R. 114 ; 1 Bur. L. T. 21 ; 44 I. A. 236 (P. C.) ; *Serajuddin Haldar* v. *Isab Haldar*, 70 Ind. Cas. 203 ; 49 C. 161 ; 25 C. W. N. 833 ; (1922) A. I. R. (C.) 258 ; *Sukumari Debi* v. *Kalipada Mukherjee*, 45 Ind. Cas. 13, distinguished.

A *hiba-bil-ewaz* has incidents very different from those of a simple gift. Under the Muhammadan Law delivery of possession is necessary to validate a gift pure and simple, whereas in the case of a *hiba-bil-ewaz*, delivery of possession is not necessary.

Appeal against the decision of the District Judge, Lahore, dated the 29th April 1920.

Mr. *Des Raj Sawhny*, for the Appellant.

Lala *Ram Chand*, *Manchanda*, for the Respondents.

JUDGMENT.

Scott-Smith, J.—This is a second appeal from the order of the lower Courts dismissing the plaintiff's suit for possession of certain land in Muzang, gifted to him by Chaudhri Nabi Bakhsh by a registered-deed of gift dated the 14th March 1907. The suit was brought on the 12th March 1919, in other words two days before the expiration of 12 years from the date of gift. At the time when the suit was brought Sardar Shah, respondent, and Mehtab Shah, his brother, were in possession as vendees from Chaudhri Shuja-ud-Din, the son of Chaudhri Nabi Bakhsh, to whom Sardar Shah and Mehtab Shah alleged it had been gifted by his father. The Courts below held that plaintiff had never obtained possession of the land and that, therefore, there was no valid gift in his favour in accordance with the Muhammadan Law which requires that a gift to be valid must be with possession. To get over the difficulty about possession plaintiff alleged that though the deed was executed as a deed of gift pure and simple in consideration of many years' friendship yet, in reality, Rs. 1,000 was paid by him to the donor and that the deed was really what is known as a *hiba-bil-ewaz* and that to validate such a transaction the giving of possession is not necessary. The lower Court dismissed the suit holding that plaintiff was precluded by section 92 of the Indian Evidence Act from producing oral evidence to prove that the transaction was a *hiba-bil-ewaz* contrary to the terms of the deed which shows that it was a gift pure and simple.

In appeal it is contended, firstly, that section 92 does not bar the admission of oral evidence to prove the real nature of the transaction and that in any case the chief defendants are not the representatives-in-interest of Chaudhri Nabi Bakhsh, a party to the deed. Finally, it was urged that under proviso (2) to section 92, Indian Evidence Act, plaintiff is entitled to prove the existence of a separate oral agreement as to a matter on which the deed of gift was silent. As regards the applicability of section 92, Counsel referred us to *Maung Kyin* v. *Ma Shwe La*, (1), *Serajuddin Haldar* v. *Isab Haldar* (2), and *Sukumari Debi* v. *Kalipada Mukherjee* (3). None of these authorities appears to me to be in point. Moreover, in *Serajuddin Haldar* v. *Isab Haldar* the Judges quoted a *dictum* of Huda, J., in *Jidda Jan Bibi* v. *Sheikh Baktar* (4) in which it was pointed out that a *hiba-bil-ewaz* has incidents very different from those of a simple gift. This is clear from the very fact that the taking of

(1) 42 Ind. Cas. 642 ; 45 C. 320 ; 15 A. L. J 825 ; 33 M. L. J 648; 3 P. L. W. 185; 6 L W. 777; 22 C. W. N 257 ; 23 M. L. T. 36 ; 27 C L. J. 175 ; 20 Bom. L. R. 278 ; (1918) M W. N. 300 ; 9 L. B. R. 114 ; 11 Bur. L T. 21 ; 44 I A. 236 P. C.).

(2) 70 Ind. Cas 203 ; 49 C. 161 ; 25 C. W. N. 833 ; (1922) A I. R. (C) 258.

(3) 45 Ind. Cas. 13.

(4) 53 Ind. Cas. 420 ; 24 C. W. N. 926.

BADRI SINGH *v.* TULSI RAM

possession is necessary to validate a gift pure and simple, whereas, in the case of a *hiba-bil-ewaz* the taking of possession is not necessary, see in this connection Mulla's Muhammadan Law 7th, Edition, page 123, *Ranee Khujooroa-nissa* v. *Roushan Jehan* (5) and *Chaudhury Mehdi Hasan* v. *Muhammad Hasan* (6). The same is the view of Sheikh Ameer Ali at p. 63 of Vol. I of his Muhammadan Law.

I also do not consider that proviso (2) to section 92 has any applicability to the facts of the present case. It cannot be said that the payment of Rs. 1,000 as consideration is a separate oral agreement not inconsistent with the terms of the document itself within the meaning of the proviso. Further, I have no difficulty in holding that Sardar Shah and Mehtab Shah are the representatives-in-interest of Chaudhri Nabi Bakush, the original owner of the property, for they represent his estate so far as the property in suit is concerned.

I am, therefore, of opinion that the Courts below were right in holding that plaintiff could not be allowed to adduce evidence to prove contrary to the terms of the deed of gift that the transaction was in reality a *hiba-bil-ewaz*.

I would, therefore, dismiss the appeal with costs to Sardar Shah, respondent.

The appeal has already been dismissed as against the representatives of Mehtab Shah who died whilst the appeal was pending in this Court.

Fforde, J :—I agree.

Z. K. *Appeal dismissed.*

(5) 3 I. A. 291 at pp. 301, 307, 308 ; 2 C. 184 ; 26 W. R. 36 ; 1 Ind. Dec. (N. S) 412 (P. C.).

(6) 10 C. W. N. 706 ; 3 A. L. J. 405 ; 8 Bom. L. R. 387 ; 28 A. 430 ; 9 O. C. 196 ; 4 C. L. J. 295 ; 1 M. L. T. 163 ; 33 I. A. 68 (P. C.).

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 316 OF 1921.

November 14, 1922.

Present :—Sir Grimwood Mears, Kt., Chief Justice, Justice Sir P. C. Banerji and Mr. Justice Muhammad Rafiq.

BADRI SINGH—DEFENDANT—APPELLANT
versus
TULSI RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 88—Rules framed by Local Government, r. 32—Auction-sale—Execution—Co-sharers and strangers, equal bids by—Sale, confirmation of, in favour of stranger—Co-sharer, whether can sue to recover possession.

B. and T. bid at an auction of certain property put up for sale in execution of a decree. T. asserting himself to be a co-sharer, capped each bid with a bid of correspondingly equal value intending to exercise his preferential right as a co-sharer. When the matter came up before the Collector, T. was absent though served and the sale was confirmed in favour of B. T. then sued to recover possession of the property:

Held, that under the circumstances T was not competent to bring the suit and the Collector's order was final.

Appeal from a decree of the Additional Judge, Bareilly, dated the 7th January 1921, reversing a decree of the City Munsif, Bareilly, dated the 20th September 1919.

Babu *Satish Chandra Das*, for the Appellant.

Munshi *Damodar Das*, for the Respondent.

JUDGMENT.—On the 20th of August 1913, certain property in the village of Ghausganj Narayan was put up to auction. Badri Singh and Tulsi Ram bid on that occasion, and Tulsi Ram, asserting himself to be a co-sharer, capped each bid as it was made, with a bid of a correspondingly equal sum, intending to exercise the preferential right which is accorded to a co-sharer under the provisions of O. XXI, r. 88. Badri Singh was prepared to pay Rs. 160 for the plot. So also was Tulsi Ram. A report was made of these circumstances and, in due course, the matter came up before the Collector of Bareilly, on the 24th of October 1913, for the confirmation of the sale. In none of the Courts was

the document, which we are now about to read, laid before the Courts. Mr. *Damodar Das* has furnished to us a certified copy of the actual order of the Collector. It is evident from that document that Tulsi Ram had been served with a notice that the matter would be heard and determined on the 24th of October. Tulsi Ram was absent, and, in his absence, there was no evidence before the Collector as to whether his allegation that he was a co-sharer had or had not a foundation in fact, and the Collector passed an order that the sale was to be confirmed in favour of Badri Singh. The actual words are: "Present, Badri Singh in person. Tulsi Ram absent, despite due service of notice. The pre-emptor Tulsi Ram has failed to appear and prove his claim to pre-empt. Sale may be confirmed in favour of the purchaser Badri Singh." After that, the usual certificate of sale was issued to Badri Singh and mutation proceedings instituted and appropriate order made in favour of Badri Singh.

In 1915 Tulsi Ram brought a suit against Budri Singh to recover possession of this property. That suit was, however, withdrawn with liberty to Tulsi Ram, if so advised, to commence a new suit. Nothing whatever was done until the 26th of July, 1919, just within six years from the date of the order of the Collector. That suit also sought to get possession of the land which had formed the subject-matter of the sale by auction, and asked for a declaration that, by virtue of a right of pre-emption, according to law, Tulsi Ram was the owner of the shares, and also that it might be declared that the sale certificate, the delivery of possession, and the mutation of names effected in favour of the defendant were ineffectual against the plaintiff's property and further asked that the defendant might be dispossessed and the plaintiff put into possession.

The question which has arisen is, whether that was a competent action to bring under the circumstances which we have already detailed.

Our attention has been drawn to O. XXI, r. 92. That rule, as will be seen, is incorporated in the Notification of Government, No. 1887, dated the 7th of October 1911, in exercise of the power conferred by sections 68 and 70 of the Code of Civil Procedure of 1908. The subject which is dealt with is the sale of ancestral land in execution of Civil Court decrees in the United Provinces of Agra and Oudh. The operative part of r. 32 is in precisely the same language as the operative part of O. XXI, r. 92. The full text of r. 32 is as follows:—"Where no application is made under r. 30 or r. 31, or where such application is made and disallowed, the Collector shall make an order confirming the sale, and, thereupon, the sale shall become absolute." Now, it is conceded that that is the only rule which gives to the Collector the power of making an order confirming the sale. It is agreed that, in the circumstances, there was, in fact, no application either under r. 30 or r. 31, and, therefore, the Collector had this one duty before him, either of canfirming the sale or declining to confirm it. It was with the object of arriving at a proper decision that he had given notice to Badri Singh and Tulsi Ram to appear before him. Therefore, Tulsi Ram was given the proper opportunity of presenting the facts of his case to the Collector with a view to bring himself within the language of O. XXI, r. 88, which has its counterpart in r. 29 of the rules made by the Local Government. Had he proved that he was a co-sharer, had he proved that he had made the same bid which had been made by Badri Singh, it is scarcely conceivable that the Collector would not have passed an order in favour of Tulsi Ram. Tulsi Ram had this opportunity and he did not avail himself of it, nor did he make subsequently to the Collector any application, for good reasons shown, that the indulgence should be granted to him of having the matter re-heard. What he did, in fact, was to commence his suit. The question is whether the commencing of that suit was not in direct defiance of r. 32, cl. (3). We have already given the text of r. 32 and pointed out that the Collector was adjudicating on the 24th of October 1913 on this question of confirming or refusing to confirm the sale. Clause (3) is as folllow:—"No suit to set aside an order made under this rule shall be brought by any person against whom such order is made." Tulsi Ram was the person against whom such order was made. The order, in fact, that was made was that Badri Singh was to be declared purchaser, and we are of opinion that r. 32, cl. (3), in the circumstances, is a

complete answer to this suit, and Tulsi Ram was incompetent to bring it. That order of the Collector of the 24th of October, 1913, was an order made under r. 32, was good at the date of the commencement of the suit, and is good to-day, and no proceeding by way of suit, in our view, was capable of being instituted by Tulsi Ram on the day on which he brought this action. We are, therefore, of opinion that clause (3) operates as a bar to this action. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2548 OF 1919.

November 6, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

GOBIND RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALI MUHAMMAD AND OTHERS—PLAINTIFFS—KUMRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Shamilat *land, whether accessory to proprietary holding—Sale of proprietary land, whether includes* Shamilat—*Jhang District, villages of, rule applicable to*

The rights of proprietors in the *shamilat* of a village are not a mere accessory to the land separately held by them and the *onus* lies on a purchaser of proprietary land to show that a sale to him included a share in the *shamilat*.

Ram Das v. *Amir Shah*, 113 P. R. 1901, 31 P. L. R. 1902 ; *Saleh* v. *Bakhtawas*, 36 Ind. Cas. 601 ; 3 P. R. 1917 ; 200 P. W. R. 1916 ; *Ahmad* v. *Ahmad*, 6 Ind. Cas. 1003 ; 75 P. W. R. 1910, followed.

Dun Chand v. *Muhammad Bakhsh*, 8 P. L. R. 1907; 36 P. W. R 1907, distinguished.

The *shamilat* lands of villages in the Jhang District were clearly defined at the Settlement of 1856, and alienations of proprietary land in villages in that District subsequent to 1856 should not, in the absence of evidence to that effect, be held to carry with them rights in the *shamilat* of the village.

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 26th of July 1919, reversing that of the Senior Subordinate Judge, Jhang, dated the 1st November 1918.

Mr. *Jiwan Lal Kapur* and Lala *Har Gopal*, for Lala *Faqir Chand*, for the Appellants.

Dr. Sir *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—The parties to the suit out of which the present second appeal arises are proprietors in the village of Sapra in Chiniot tahsil of the Jhang District. The plaintiffs-respondents are the descendants of the original founder of the village and they are admittedly co-sharers in the *shamilat deh*. The land in the possession of the defendants-appellants was acquired by them or their predecessors either by gift or purchase or as a result of the lapse of mortgages. The plaintiff sued for a declaration that they were the sole owners of the *shamilat deh* to the exclusion of the defendant. The lower Appellate Court gave them a declaratory decree to the effect that alienations of proprietary land in the Sapra village subsequent to 1855 should not ordinarily be held to carry with them the rights of *shamilat* of the village.

In our opinion this decision is correct. The principle has been well established by various rulings of this Court, including those reported as *Ram Das* v. *Amir Shah* (1) and *Saleh* v. *Bakhtawas* (2) that the rights of proprietors in the *shamilat* of the village are not a mere accessory to the land separately held by them and that the *onus* lies on the purchaser of the proprietary land to show that the sale to him included also a share of the *shamilat*. The *shamilat* lands of villages in the Jhang District were clearly defined at the Settlement of 1856 and it is on that account that the learned District Judge has made a distinction between those acquired prior and subsequent to that date. The case reported in *Ahmad* v. *Ahmad* (3) also supports the view taken by the learned District Judge. In the case reported as *Shahmad* v. *Ibrahim* (4) the Punjab Weekly

(1) 113 P. R. 1901 ; 31 P. L. R. 1802.
(2) 36 Ind. Cas. 631 ; 3 P. R. 1917 ; 200 P. W. R. 1915 ; 1916.
(3) 6 Ind. Cas. 1003 ; 75 P. W. R. 1910.
(4) 30 Ind. Cas. 100 ; 57 P. R. 1915 ; 134 P. W. R. 1915; 60 P. L. R. 1916.

Reporter case is distinguished. It does not, in our opinion, assist the appellants in any way. In the case reported as *Duni Chand* v. *Muhammad Bakhsh* (5) the defendants acquired their rights in the village prior to the time when *shamilat* rights were defined. Therefore, that case also is of no assistance to the defendants-appellants.

In our opinion the decision of the learned District Judge is perfectly correct and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(5) 8 P. L. R. 1907 ; 36 P. W. R. 1907.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 428 OF 1921.

December 4, 1922.

Present :—Mr. Justice Piggot and Mr. Justice Walsh.

RAJ NARAIN MAL AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

SANTI LAL AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 181—*Civil Procedure Code* (*Act V of* 1908) *O. XXXIV, r.* 6—*Mortgage-decree—Application for personal decree—Limitation, commencement f.*

In execution of a mortgage-decree theCourt directed the mortgaged properties to be sold through a Receiver. The Receiver obtained the sanction of the Court to the bargains proposed by him on 23rd February 1918, but the sale deeds with respect to some of the items were not completed till 31st August 1918. On 29th March 1921 the decree-holders made an application under O. XXXIV, r. 6 of the Civil Procedure Code, asking for a decree for the balance of the decretal amount still due, on the ground that the proceeds of the sales had proved insufficient to satisfy the amount of the decree ;

Held, that the sale of the mortgaged properties was not complete till the last sale-deed had been executed and the decree-holders were entitled under Article 181 of Schedule I to the Limitation Act to a period of three years from 31st August 1918 to make the application and the application was, therefore, within limitation.

Appeal from a decree of the Sub-Judge, Agra, dated the 23rd May 1921.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This is an appeal in an execution matter. The difficulty which the Court below has felt is due to the fact that a procedure perfectly legal, but somewhat unusual, and in respect of which this Court has not seen fit to lay down any definite rules, was followed in connection with the execution of a mortgage-decree. Instead of putting up the mortgaged property for sale by auction in the usual way, the Court appointed a Receiver whom it authorised, by an order of the 17th of July 1915, to take all the properties covered by the decree into his possession and to make arrangements for selling the same for the highest price which he could obtain in respect of each of them. It was specially provided that before parting with an item of property he must report to the Court, stating the price offered, and obtain the sanction of the Court before he actually sold it. For some reason or other the Receiver's proceedings were much protracted and it was not until the 22nd of October 1917 that he entered into an arrangement with the decree-holders by which the latter were to purchase the property themselves upon certain terms. The Receiver reported this matter to the Court and, on the 23rd of February 1918, the Court proceeded, by two separate orders, to deal with this matter. In the first place, it overruled an objection filed by the judgement-debtors protesting against the terms which the Receiver had settled. In the second place, it took into consideration the Receiver's report, approved of the arrangements which he had made, and directed him to proceed as soon as possible with the preparation of sale-deeds. Subsequently to the date of this order, a number of sale-deeds were executed, between the 9th of March and the 31st of August 1918, by which different items of property were formally conveyed to the decree-holders. We gather from the record that this delay was largely, if not entirely, due to the fact that draft sale-deeds were submitted for the approval of the Court before the transaction was engrossed upon paper bearing the requisite stamp and the conveyance formally executed by the Receiver.

TASADDUQ HUSSAIN *v.* RAM KISHEN

The appeal now before us arises out of an application made by the decree-holders on the 29th of March 1921, asking the Court to pass, under O. XXXIV, r. 6 of the Code of Civil Procedure, a decree for the balance of the amount still due, on the ground that the proceeds of the various sales held in the year 1918 had proved insufficient to satisfy the amaunt of the decree. The Court below has held that this application is barred under Art. 181 of the first Schedule to the Indian Limitation Act, because it was made more that three years after the 22nd of February 1918. In appeal it is contended on behalf of the decree-holders that it was nct until the last of the series of sale-deeds had been executed, on the 31st of August 1918, that it could be said that the net proceeds of the sales held in execution of the preliminary decree, had proved insufficient, and that their right to apply accrued to them on that date and not before. The proper Article of the Indian Limitation Act is 181 of the first Schedule; but this throws no light on the question in dispute, inasmuch as it merely gives the decree-holder three years from the date on which the right accrued to him to make this application. We have come to the conclusion that the conveyance of the mortgaged property by way of sale was not legally completed untill the sale-deeds had been executed, and that the decree-holders are, therefore, entitled to claim limitation for a period of three years from the 31st of August 1918. We, therefore, set aside the order of the Court below and remand the case to that Court with orders to re-admit the decree-holder's application on to its pending file and to dispose of it according to law. The appellants decree-holders will get the costs of this appeal including fees on the higher scale.

Z. K. *Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1136 of 1923.

January 21, 1924.

Present :—Mr. Justice Campbell.

TASADDUQ HUSSAIN—DEFENDANT—APPELLANT
versus
RAM KISHEN—PLAINTIFF—*Musammat* RANI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Gift to daughters subject to life-estate in favour of widow—Death of daughter before widow—Devolution of estate.

A Hindu testator directed in his Will that subject to a life-estate in favour of his widow his property would go to his two daughters in equal half shares ;

Held, that the gift by the testator in favour of his daughters was in definite shares, so that if one of them happened to die before the widow, her heirs would step into her shoes and the entire estate would not devolve on the other daughter of the testator.

Gopi v. *Jaldhara*, 7 Ind. Cas. 697 ; 33 A. 41 ; 7 A. L. J. 941 ; *Kishari Dubain* v. *Mundra Dubain*, 10 Ind Cas. 565 ; 33 A. 665 ; 8 A. L. J. 757 ; *Munni* v. *Umrao Singh*, 1 Ind. Cas. 720 ; 39 P. R. 1909 ; 55 P. W. R. 1909 ; 59 P. L. R. 1909, relied on.

Second appeal from the decree of the District Judge, Karnal, dated the 7th February 1923, reversing that of the Munsif, 1st Class, Karnal, dated the 28th November 1921, and decreeing the plaintiff's claim.

Lala *Rama Nand*, for the Appellant.

Mr. *K. J. Rustomji*, for the Respondents.

JUDGMENT.—The facts of this case have been stated in the judgment, dated the 29th of November 1922, of Mr. Justice Harrison, who dealt with the case on a preliminary point and remanded the appeal to the District Judge for decision on the issues other than that regarding the powers of alienation conferred upon *Mussammat* Bhagirthi by the Will of her deceased husband, Shib Chand.

The learned District Judge has now reversed the decision of the first Court and decreed the plaintiff's suit. The defendant, Tasadduq Hussain, has come again to this Court on second appeal.

SANTI LAL *v.* RAJ NARAIN

One of the learned District Judge's findings was that the suit was within time and this is the only point now before this Court. The question is whether Article 125 of the Limition Act governs the suit. If it does, the suit admittedly was within time.

The application of the Article in turn depends upon whether Ram Kishen was the person entitled to possession of the land in suit, at the date of instituting the suit, if *Mussammat* Bhagirthi was then dead.

The family pedigree is as follows :—

Shib Chand-*Mussammat* Bhagirthi

| |

Mt: Manbhari: Pt. Lakshmi Narain of Hyderabad, Deccan. | *Mt*: Rani living M. Sardha Ram.

|

Ram Krishen, Plaintiff.

Mussammat Manbhari, mother of Ram Kishen, died after Shib Chand, and after the alienation, which is the subject of this suit, and before the institution of the suit. The Will, as interpreted by Mr. Justce Harrison. bequeathed the property to the two daughters, *Musammat* Manbhari and *Musammat* Rani in equal shares, subject to a life estate of *Musammat* Bhagirthi. The pertinent words are:—"*meri har do dukhtaran mazkurabala ba hissa nisf nisf malik hongi.*"

The trial Court held that, since the Will did not say anything about who was to succeed if one of the daughters died before the estate came to them, it was to be presumed that the testator intended the ordinary rule of inheritance, according to Hindu Law, to apply which rule is that two or more daughters succeeding as heirs to their father take not as tenants in common but as joint tenants with rignts of survivorship. The learned District Judge pointed out that this rule applied only to the inheritance of property of a joint Hindu family, that in this case each of the two daughters had married into a different family, and that the words used in the Will *be hissa nisf nisf* it is clear that the gift by the testator was one in definite shares. He held, therefore, that Ram Kishen stepped into the shoes of his mother at her death.

After hearing arguments by the learned Counsel representing the parties, I hold that the learned District Judge's decision is correct. It is fortified by other authorities, *viz.*, *Gopi* v. *Jaldhara* (1), and *Kishari Dubain* v. *Mundra Dubain* (2), *Munni* v. *Umrao*, *Singh* (3).

No other point has been argued, and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 7 Ind. Cas. 697; 33 A. W. 1 ; 7 A. L. J. ; 941,
(2) 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757.
(3) 1 Ind. Cas. 720 ; 39 P. R. 1909 ; 55 P. W. R. 1909; 59 P. L. R. 1909.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 6 OF 1923.

June 21, 1923.

Present:—Sir Grimwood Mears, Kt., K. C., Chief Justice, and Mr. Justice Piggot.

SANTI LAL AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS
versus
RAJ NARAIN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Decree-holder's application for personal decree—Order, whether final—Appeal to His Majesty in Council, whether competent.

An order of the High Court deciding that a decree-holder's application under O. XXXIV, r. 6 of the Civil Procedure Code for the preparation of a personal decree against the judgment-debtor is not time barred, is a final order within the meaning of s. 109, Civil Procedure Code, inasmuch as it goes to the very foundation of the matter in dispute, and leave to appeal to His Majesty in Council against such order should be given.

Saiyid Muzhar Hossein v. *Bodha Bibi*, 17 A. 112 ; 5 M. L. J. 20 ; 22 I. A. 1 ; 6 Sar. P. C. J. 580 ; 8 Ind. Dec. (N. S.) 397, followed.

Baijnath Das v. *Sohan Bibi*, 3 Ind. Cas. 967 ; 6 A. L. J. 786; 6 M. L. T. 94; 31 A. 545 ; *Ahmed Husain* v. *Govind Krishna Narain*, 9 Ind. Cas. 932 ; 33 A. 391 ; 8 A. L. J. 192, distinguished.

Application for leave to appeal to His Majesty in Council.

SANTI LAL *v.* RAJ NARAIN

Mr. *M. L. Sandal*, for tho Appellants.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against an order of this Court, dated the 4th of December 1922. There are materials on the record quite sufficient to show that the value of the subject-matter in dispute between the parties in the proceedings resulting in this Court's order above referred to exceeded Rs. 10,000. This Court did not affirm the decision of the Court below. What is objected to is that the order in question is neither a decree nor a final order within the meaning of section 109 (*a*) of the Code of Civil Procedure. On behalf of the applicant it is contended that the order in question is at any rate a final order within the meaning of the clause above referred to. Apart from this, it is contended that, under the circumstances, the case ought to be certified as a fit one for appeal to His Majesty in Council, merely on the ground that it is an appeal from an order of this Court, and any difficulty as to whether the order in question was or was not a final order could be avoided by applying the provisions of section 109 (*c*) above referred to. It is necessary to exmine the circumstances under which this matter came to the Court. It was an execution appeal arising out of a mortgage-decree. The decree-holders were the appellants in this Court. They had obtained execution of their mortgage-decree in a somewhat unusual, but perfectly lawful manner. They had exhausted the whole of the property covered by the decree, and they alleged that a very considerable portion of the decree still remained unsatisfied. They applied to the Court below for the preparation of a decree covering this unsatisfied balance, under the provisions of O. XXXIV, r. 6 of the Code of Civil Procedure. The office report prepared at the time the application was made is on this record. It is to the effect that the amount due under the decree on the date of the said report, namely, the 23rd of May 1918, was Rs 32,119-7-6, and that the total amount realised by sale of the mortgaged property was only Rs. 18,600. We do not say that the parties are necessarily bound by these figures. They may require further investigation in the Court below. We refer to them, however, as showing that *prima facie* the amount of the subject-matter in dispute was considerably in excess of Rs. 10,000. The judgment-debtors objected that the application for a decree under O. XXXIV, r. 6 was statutebarred under the appropriate Article of the Indian Limitation Act. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal, a Bench of this Court held that the application was within time. The order of the Court below was, therefore, set aside and the Execution Court was ordered to re-admit the application of the decree-holders on to its file of pending applications and to dispose of it according to law. Under the circumstances, this amounted to a direction that a decree under O. XXXIV, r. 6 should be prepared, the details of which were left for the Execution Court to settle. It is against this order that the judgment-debtors now desire to appeal to His Majesty in Council.

We have been referred to two cases of this Court, namely, *Baijnath Das* v. *Sohan Bibi* (1), and *Ahmad Husain* v. *Govind Krishna Narain* (2), in which leave to appeal to His Majesty in Council against an order passed by this Court under O. XLI, r. 23 of the Code of Civil Procedure was refused, on the ground that the order sought to be appealed against in each case was neither a decree nor a final order. Authority on the other side is to be found in the case of *Saiyid Muzhar Hossein* v. *Musammat Bodhi Bibi* (3). In that case leave to appeal was refused by this Court against an order passed under the section of the former Civil Procedure Code corresponding to O. XLI, r. 23 of the present Code, but special leave to appeal was granted by His Majesty in Council. The learned Judges of this Court who decided the case of *Baijnath Das* v. *Sohan Bibi* (1) distinguished *Muzhar Hosein's case* (3) from the one then before them, on the ground that the order passed by this Court in *Muzhar Hossein's case* (3), decided a point which went to the very root of the case, all the other defences raised being of a subordinate character. Clearly, the learned Judges were of opinion that, in the case of an

(1) 3 Ind. Cas. 967; 6 A. L. J. 786; 6 M. L. T. 94; 31 A. 515.

(2) 9 Ind. Cas. 932; 33 A. 391; 8 A. L. J. 192.

(3) 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P. C. 580; 8 Ind. Dec. (N. S.) 397.

order of remand by this Court of which it could be said that it had determined the only really substantial question in issue between the parties, the precedent set by their Lordships in *Muzhar Hossein's case* (3) ought to be followed and leave to appeal granted. The present seems to us such a case; it is clearly distinguishable from either of the two cases above referred to in which leave to appeal was refused. It is only necessary to glance at the reports in those two cases to see that the facts were materially different. In the case now before us this Court disposed of one substantial objection raised by the judgment-debtors to the decree-holder's application. The case was sent back to the Execution Court because the steps which remained to be taken, in order that a proper decree under O. XXXIV, r. 6 might be prepared, could more conveniently be taken in that Court. We are by no means certain that, under these circumstances, the order of this Court might not fairly be described as a final order, within the meaning of that expression as used in section 109 of the Code of Civil Procedure. In any case, we are satisfied that we ought to follow the precedence set in *Mazhar Hossein's case* (3) and grant the certificate asked for. We order accordingly.

K. S. D. *Leave to appeal granted.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 35 OF 1922.

September 25, 1923.

Present :—Mr. Kennedy, J. C. and Mr. Raymond, A. J. C.

MOTOOMAL—PLAINTIFF—APPELLANT

versus

TEOOMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Uncertified adjustment of decree, whether can be recognised—Fraud of decree-holder—Estoppel—Doctrine, whether applies.

A Court of Execution cannot recognise a payment or adjustment of a decree unless it has been certified in the manner allowed by law even though the non-certification may be due to the fraudulent conduct of the decree-holder.

Allahrakdhio Abdulla v. *Ladkih Sachoo*, 51 Ind. Cas. 567 ; 130 L. R. 71 ; *Eslis Enas Panloo* v. *Kitter Philip Gowrya*, 64 Ind. Cas. 490 ; 23 Bom. L. R. 981; 46 B. 226 ; (1922) A. I. R. (B.) 380 ; *Alathoor Badrudeen* v. *Gulam Mohideen*, 12 Ind. Cas. 562 ; 36 M. 357 ; 10 M. L T. 396 ; (1911) 2 M. W. N. 473 ; 24 M. L. J. 541 ; *Biroo Garain* v. *Jaimurat Koer*, 13 Ind. Cas. 68 ; 16 C. W. N. 923 ; 16 C. L. J. 174, followed.

Trimback Ramkrishna Ranade v. *Hari Laxman*, 7 Ind. Cas. 940 ; 34 B. 575 ; 12 Bom. L. R. 686 ; *Hansa Godhaji* v. *Bhawa Jagaji*, 33 Ind. Cas. 232 ; 40 B. 383 ; 18 Bom. L. R. 22, dessented from.

The general law as to estoppel cannot be allowed to override the special rule of law laid down in O. XXI, r. 2, Civil Procedure Code.

Trimback Ramkrishna Ranade v. *Hari Laxman*, 7 Ind. Cas. 940 ; 34 B. 575 ; 12 Bom. L. R. 686, followed.

Appeal from the judgment and decree, dated the 21st June 1922, of the District Judge, Sukkur.

Mr. *Lunidaram Tikamdas*, for the Appellant.

JUDGMENT.—On the 1st October 1920 plaintiff-appellant obtained an *ex parte* decree against the two defendants-respondents and on the 1st June 1921 applied for execution by the sale of certain immoveable property belonging to one of the defendants Teumal. It was alleged by the defendants that the decree had been adjusted on the 15th November 1920 by the payment of a portion of the decretal amount to the judgment-creditor and the execution of a bond for the balance. It was further alleged that, subsequent to the adjustment, an application was written in which the terms of the adjustment were set out and the judgment-creditor and the judgment-debtor Teumal proceeded to the Court for the purpose of filing it and the former entered the Court premises while the latter remained outside and after a few minutes the judgment-creditor came out and informed the judgment-debtor that the application notifying the adjustment had been presented in Court whereas, as a matter of fact, it was not. The Subordinate Judge to whom the application for execution was made was inclined to accept the statement of the judgment-debtor and

refused to grant the application on the ground that the judgment-creditor had perpetrated a deliberate fraud not only upon the judgment-debtor but also on the Court. His order was upheld on this point by the District Court of Sukkur.

The latter Court, in arriving at the conclusion at which it did, thought itself bound by the judgments of the Bombay High Court in the cases of *Trimback Ramkrishna* v. *Hari Laxman* (1) and *Hansa Godhaji* v. *Bhawa Jagaji* (2) whether good or bad " Apparently the decision by a Bench of this Court in *Allahrakhio Abdulla* v. *Ladlik Sachoo* (3) which dissents from the aforesaid Bombay decisions was not brought to its notice else the District Judge would probably have arrived at a different conclusion.

Clause (3) of O. XXI, r. 2, Civil Procedure Code, is as follows :—" A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any Court executing the decree." This rule is a rule of procedure and its provisions are mandatory. The principle of the rule is as stated by Macleod, C. J , in *Ellis Enas* v. *Kitter Philip* (4), that the Court executing the decree shall not be troubled with any disputes between the parties with regard to any payment or adjustment unless the same has been duly recorded and certified. If there is a case of fraud then the party defrauded will have his right of action." Though both the lower Courts were of the opinion that the judgment-creditor had perpetrated a fraud upon the judgment-debtor by deceitfully leading the latter to believe that the application notifying the adjustment had been filed in Court, and also upon the Court by concealing from it the fact of the adjustment yet, admittedly, the adjustment had not been certified or recorded at the instance of either party and to discuss it in execution proceedings would be entirely to defeat the mandatory provisions of cl. (3) to O. XXI, r. 2.

Mulla in his commentaries to the Civil Procedure Code at p. 547 of the 7th edition disagrees with the views expressed by the Bombay High Court in the two aforesaid judgments and approves of the Calcutta and Madras High Court rulings on the point. He says in *Hansa Godhaji* v. *Bhawa Jagaji* (2), it was said in effect that the Court of first instance having found as a fact that there was fraud on the part of the decree-holders the lower Appellate Court should have dismissed the application. But this is begging the whole question, for the question is whether it is competent for the Court to enquire into the charge of fraud and admit evidence on that charge if the sole object of the enquiry be to recognise an uncertified payment or adjustment which the law says it shall not recognise. If such an enquiry were allowed the provisions of cl. (3) would be nugatory. To the same effect was the judgment in *Allahrakhio Abdulla* v. *Ladlik Sachoo* (3) above referred to where the defence was that the judgment-creditor was guilty of fraud in that he omitted to show the adjustment and payment in the execution application. It was observed that this fraud could not be established. Without proof of the adjustment and payment and as the Court is forbidden to recognise the fact under O. XXI, r. 2, cl. (3) the defence of fraud must fail.

In *Badrudeen* v. *Gulam Mohideen* (5) the Bombay judgment in *Hansa Godhaji* v. *Bhawa Jagaji* (2), was not followed and it was held that a payment or adjustment can not be recognised by any Court executing the decree unless the same has been certified in the manner allowed by law. The case of *Biroo Garain* v. *Musammat Jaimurat* (6), deals very exhaustively with the point under consideration. It held that, " it is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in O. XXI, r. 2, cl. (3) even when the conduct of the decree-holder is alleged to have been fraudulent." It was pointed out that a judgment-debtor was not entirely without remedy in a case of fraud by the decree-holder for it was open to him to institute a suit for damages for fraud and the decree-holder also renders himself liable to a proceeding under the criminal law.

(1) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686.
(2) 33 Ind. Cas. 232; 40 B. 333; 18 Bom. L. R. 22.
(3) ; 51 Ind. Cas. 567; 13 S. L. R. 71.
(4) 64 Ind. Cas. 490; 23 Bom. L.R 981; 46 B. 246; (1922) A. I. R. (Bom.) 380.)

(5) 12 Ind. Cas. 562; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541.
(6) 13 Ind. Cas. 63 ; 16 C. W. N. 923 ; 16 C. L. J. 174.

It appears to us that both the lower Courts were in error in recognising an uncertified adjustment though it may have been due to the fraud of the decree-holder and in dismissing his execution application.

We do not think any question of estoppel arises in this case for cl. (3) of O. XXI, r. 2, Civil Procedure Code enacts a special law for a special purpose and the general law as to estoppel cannot be allowed to override the special law: see *Trimback Ramkrishna* v. *Hari Laxman* (1).

We set aside the order dismissing the execution application with costs.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1026 OF 1920.

April 3, 1924.

Present :—Mr. Justice Martineau and Mr. Justice Moti Sagar.

KHURSHAID ALAM AND OTHERS —PLAINTIFFS—APPELLANTS
versus
CHAUDHRI PHANGO *alias* ARMA —DEFENDANT—RESPONDENT.

Custom—Ala *and* adna maliks—*Death of* adna malik *without heirs*—*Land whether reverts to* ala malik.

In some parts of the country the *ala maliks* are the real proprietors, the *adna malik* being little more than a tenant with a right of occupancy, in other parts the *adna maliks* are the real proprietors, the *ala malik* being merely a *talukdar*, receiving a certain percentage on the revenue. In the latter case, when an *adna malik* dies without heirs, the land owned by him will not revert to the *ala malik*.

Surjan v. *Lalu*, 175 P. R. 1888, explained.

Sardar Sarup Singh v. *Sundar*, 9 P. R. 1898, followed.

Appeal under section 39 of Act IX of 1919 against the decision of the Sub-Judge, 1st class, Sialkot, dated the 16th of February 1920.

Dr. Sir *Mohamad Iqbal*, for the Appellant.

Bakhshi *Tek Chand* and Lala *Ramchand Manchanda*, for the Respondent.

JUDGMENT :—The question in this case is as to the right of an *ala malik* in a village to succeed to the *adna milkiat* when the line of the *adna malik* has become extinct. One Hoshiara was the *adna malik* of the land in suit. He was succeeded by his widow, and on her death, as he left no relations, it was held by the Collector that the rights in the *adna milkiat* escheated to the Crown and they were sold by auction. The plaintiff is the heir of one Chela, whose widows were entered in the Revenue Records in 1862 as *ala maliks*. The widows having died, the plaintiff claims to be entitled to the land by virtue of his being the *ala malik*. He has been given a decree, from which there are two appeals, one (No. 1026 of 1920) by the auction-purchasers and the other (No. 1106 of 1920) by the Secretary of State.

The argument for the respondent is that he is the overlord, his rights in the land being limited only by those of the *adna malik*, and that consequently he becomes the full owner when the line of the *adna malik* has died out; but the fact as to the acquisition by the *adna* and *ala maliks* of their respective rights are opposed to the argument. Hoshiara was the owner of one-fourth of the village, which was founded by his ancestor Pargu, as stated in the note to the pedigree table of the Settlement Record of 1865 (page 11 of the paper-book). There was no community of interest between Hoshiara and Chela, who belonged to a different tribe and was not an owner in the village, and it appears that Chela's widows were recorded as *ala maliks* only as the result of a redemption suit brought against them by Hoshiara in 1862, in which the Courts held that they were entitled to 10 *per cent.* on the land revenue as *talukdari* dues on account of Chela having given financial aid to Hoshiara's father when the latter was pressed by one Takhat Mal for the payment of money that he owed.

In these circumstances, the plaintiff is not, in our opinion, entitled to succeed to the

land. *Surjan* v. *Lalu* (1), on which he relies, does not lay down any universal rule as to the rights of *ala maliks*. This was pointed out in *Sardar Sarup Singh* v. *Sundar* (2), and it was also observed that, while in some parts of the country the *ala maliks* are the real proprietors, the *adna malik* being little more than a tenant with a right of occupancy, in other parts the *adna maliks* are the real proprietors, the *ala malik* being merely a *talukdar*, receiving a certain percentage on the revenue. In the present case, just as in the *ala malik* is entitled only to a percentage on the revenue, and there is no provision in the *wajib-ul-arz* to the effect that if the *adna malik's* line dies out his land will revert to the *ala malik*, nor is there any other evidences in proof of such a custom.

We accordingly accept both the appeals, reverse the decree passed by the lower Court, and dismiss the suit with costs throughout.

Z. K. *Appeals accepted.*

(1) 175 P. R. 1888.
(2) 9 P. R. 1898.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEALS NOS. 51 TO 57 OF 1921.

CIVIL MISCELLANEOUS PETITIONS NOS. 900, 902, 904, 906, 908, 910 AND 912 OF 1922.

December 17, 1923.

Present:—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Wallace.

P. KANNIAPPA CHETTIAR AND OTHERS--DEFENDANTS—APPELLANTS

versus

K. RAMACHANDRAIYAR AND OTHERS PLAINTIFFS--RESPONDENTS.

Madras City Tenants Protection Act (III of 1922) s. 9, applicability of--Decree for ejectment, not executed—Tenant, whether can exercise option—Market-value ascertainment of, mode of—Hindu Law—Temple property—Lease granted by trustee, validity of—Test—Building lease—Option for renewal.

An appeal is really a continuation of the proceedings in a suit. [p. 93, col. 2.]

Latifa Bi v. *Mattai Ammal*, 72 Ind. Cas. 141 ; 46 M. 836 ; 44 M. L. J. 271 ; 17 L. W. 341 ; (1923) M.W. N. 233 ; 32 M. L. T. 290 ; (1923) A. I. R. (M.) 320 ; *Kristnama Chariar* v. *Mangammal*, 26 M. 91 (F. B.) ; *Setappa Goundan* v. *Muthia Goundan*, 31 M. 268 ; 4 M. L. T. 77 ; *Balide Kamayya* v. *Pragada Papayya*, 37 Ind. Cas. 414 ; 40 M. 259 ; 21 M. L. T. 82 ; (1911) M. W. N. 217 and 246; 5 L. W. 558 ; 32 M. L. J. 471; *Rai Charan Mandal* v. *Biswanath Mandal*, 26 Ind. Cas. 410 ; 20 C. L. J. 107, relied on.

Section 9 of the Madras City Tenants Protection Act applies to pending suits and also to suits in which decrees have been passed but not executed. [p. 95, col. 1.]

Ponnamma v. *Arumugam*, (1905) A. C. 383 ; 74 L. J. P. C. 102 : 92 L. T. 740 ; 21 T. L. R. 524, dissented from.

The whole object of section 9 of the Madras City Tenants Protection Act is to allow a tenant who is liable to ejectment, whether under a decree or not, to purchase the landlord's right. So long as the decree for ejectment has not been executed, what the reasons for non-execution may be, and whether or not it was due to an application by the tenant himself for stay of execution, do not matter and cannot affect the applicability of the section [p. 95, col. 1.]

Under section 9 of the Madras City Tenants Protection Act, the Court has to fix the price of the landlord's interest according to the market-value of the land on the date of the order. The principle of valuation in a case where the option is exercised by sub-tenants against their landlord, would be to ascertain the market-value of the landlord's interest in the land as on the date of the order. In arriving at that market-value the Court will have to take a reasonable rent from the day of the expiration of the notice to quit until the date of the order, and then to capitalise the value of the rent for the remainder of the landlord's term, *less* the amount of rent for the balance of the term which the landlord was liable to pay to his superior landlord, and which will now become payable by the sub-tenants. It will also take into account any enforceable power to review that the landlord may have. [p 94, cols. 1 and 2.]

Where a lease of temple property granted by the trustee of the temple is challenged the question to be determined is whether it is a lease that a prudent man would grant under the circumstances in the interests of himself if it were his own property or in the interests of others if he were doing his best for them.

A lease of agricultural or undeveloped lands belonging to a temple granted by the trustee of the temple for building purposes for a period of twenty-one years with an option of renewal at an enhanced rate of rent for a further period of twenty-one years is perfectly valid.

Appeals against the decrees of the City Civil Court, Madras, in Original Suits Nos. 256, 257,

258, 260, 262, 263 and 267 of 1921 and Petitions praying that, in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue an order directing the respondents herein to sell to the petitioners herein the lands described in the schedules to the plaints in the said original suits.

Mr. *S. E. Sankara Iyer*, for the Appellants.

JUDGMENT.

The Chief Justice.—These are appeals from the decrees of the City Civil Court for ejectment and mesne profits. The plaintiff is a lessee from the trustees of a temple of the lands in question which have been sub-let to the defendants in smaller portions. Several grounds of appeal were raised in the notice of appeal, but they have all been abandoned before us except one ground, namely, that the amount awarded for mesne profits was awarded without any evidence before the Court to justify the amount. The plaintiff had alleged in his plaint that the proper rent of the land is so much. The defendants in their written statements had not admitted that that figure was correct. Without hearing any evidence, the learned Judge accepted the figure as given in the plaint. In my judgment there was no justification for that, and, in the absence of evidence to the contrary, he ought to have taken not that figure but the figure of the rent actually being paid by the various defendants. We are told that nothing was said about the matter in the Court below, and that the plaintiff does not accept the view that the rents actually payable are the proper rents. In the circumstances of the cases, I think it is right that these cases should be sent back to the Judge, City Civil Court, for an enquiry into, and on proper evidence to decide the proper amount payable for mesne profits.

But the important question before us is rather raised by petitions presented to this Court by the various defendants under the Madras Act, III of 1922. That Act came into opearation after the decrees in these suits but before the execution of those decrees, which, in fact have never been executed, this Court having granted a stay pending the hearing of these appeals. The applications are under section 9 of that Act, which section provides in certain cases for the purchase by a tenant of his landlord's interest in the land. It is contended on behalf of the plaintiff that that section has no application to a case where a decree for ejectment has been made, as I understand the argument, whether an appeal is pending from that decree or not or whether a decree has or has not been executed. The argument is mainly based on the decision in *Latifa Bi* v. *Mottai Ammal* (1). In that case, the decree for ejectment had been passed, had come up to this Court on appeal and had, on appeal, been confirmed : but the decree had not been executed when the petition for leave to purchase under section 9 was made. It was held that the decree having been passed and confirmed, the Court had no jurisdiction to grant the petition. That these suits are pending in this Court, I think, is clear from a series of decisions, which decide that in this country an appeal is really a continuation of the proceedings or, as it has been put, is a stage in and part of the proceedings in a suit. Vide *Krishnamachariar* v. *Mangammal* (2), *Settappa Goundan* v. *Muthiah Goundan* (3), *Kamayya* v. *Papayya* (4), and particularly the very learned judgment of MOOKERJI, J., in *Rai Charan* v. *Biswanath* (5). See also the decision of the Privy Council in an appeal from Ceylon, *Ponnamma* v. *Arumugam* (6). In *Latifa Bi* v. *Mottai Ammal* (1) the Court based its judgment mainly on the view that, because section 10 in terms applied the provisions of this Act for compensation for tenants to cases where there had been decrees for ejectment which had not been executed, it followed that section 9 was not applicable in such cases. But it is to be observed that section 10 also applies the compensation sections to cases in which suits are pending, and on the same argument, it would follow that section 9 need not apply to cases where suits for ejectment are pending, whereas in fact section 9 applies principally to such cases. The answer, in my judgment, is that section 10

(1) 72 Ind. Cas. 141 ; 46 M. 836 ; 44 M. L. J. 271 ; 17 L. W. 341 ; (1923) M. W. N. 233 ; 32 M. L. T. 290 (1923) A. I. R. (M) 340.

(2) 26 M. 91 F. B.

(3) 31 M. 268 ; 4 M. L. T. 77.

(4) 37 Ind. Cas. 414 ; 40 M. 259 ; 21 M. L. T. 82 ; (1917) M. W. N. 217, 246 ; 5 L. W. 558 ; 32 M. L. T. 477.

(5) 26 Ind. Cas. 410 ; 20 C. L. J. 107.

(6) (1905) A. C. 383 ; 74 L. J. P. C. 102 ; 92 L. T. 740 ; 21 T. L. R. 524.

is dealing with compensation cases, and section 9 is dealing with cases of purchase and is in itself a complete Code for those cases ; and on an examination of section 9 it is clear that it is intended to apply to cases in which suits are pending and cases in which suits have resulted in decrees but such decrees have not been executed, because in sub-section (3), it says that on an order for conveyance of the land after payment of the price fixed by the Court being made, "any decree or order in ejectment that may have been passed but which has not been executed shall be vacated." and there would be no meaning to be attributed to those words at all if it was not contemplated by that section that application could be made in cases where a decree had been passed, but had not been executed.

In my judgment all these cases come directly under section 9. The tenants are persons who would be entitled to compensation under section 3. They have made their applications within 15 days after the date of the coming into force of the Act, and they have made their application to the proper Court, namely, this Court, in which the suits were then pending. In my judgment, if there had been no appeal pending, they could properly have made their application to the City Civil Court, because, in my view, it was the intention, and must have been the intention, of this Act that, after the decree but before the execution at any time, application could be made to the Court having had control of the suit.

It follows from what I have said that I do not agree with the decision in *Latifa Bi* v. *Mottai Ammal* (1). I do not think that it makes any difference that the decree of the City Civil Court in that case had been affirmed by this Court, so long as the decree had not been executed.

Under section 9 we have to fix the price according to the market-value of the land on the date of the order and for this purpose "land" means "the interest in the land and all other interests which the landlord can convey under any power." For the assistance of the Court in fixing that value, this matter must be referred to some suitable person. The principle of the valuation in such a case will be to ascertain the market-value of the plaintiff's interest in the land as on the date of the order, that is, to-day. In arriving at that market-value, he will have to take a reasonable rent from the day of the expiration of the notice to quit until to-day, and then to capitalize the value of the rent for the reminder of the plaintiff's term *less*, of course, the amount of rent for the balance of the term which the plaintiff had to pay to his superior landlord and which will now become payable by the tenants. He will take into account any enforceable power to renew that the plaintiff may have.

The question of mesne profits which we propose to remit to the City Civil Court will become unnecessay for decision in the event of the price fixed for the land being paid, and, therefore, the further hearing before the City Civil Court must be stayed pending the final disposal of the petitions under section 9.

The appellants have succeeded in this appeal. It is true that the main part of the argument has turned on the petitions, but they were entitled to come here and complain that an order for mesne profits was made against them which was wrong, and the usual result will follow that the first respondent must pay the costs of the appellants—one set. It might have been a case where we should order less costs to be paid but for the fact that the first respondent has refused to admit the right of the appellants under section 9, and it is by reason of that refusal that this appeal has really been substantially fought.

The appellants have brought the superior landlord before the Court quite unnecessarily and quite wrongly, and they must pay for having done so his costs—one set.

The further consideration of the petitions will be adjourned until Monday the 8th instant. The question of costs on the petitions is reserved.

Wallace, J.—I agree. I only wish to say a word or two on the interpretation of sections 9 and 10 of Act III of 1922. Section 10, as I read it, is intended to introduce into the obligation for compensation by landlords to tenants, a similar species of relief proceeding parallel with the trial of the suit and postponing the obtaining of a decree or prevent-

ing its execution when obtained, as section 9 applies to the privilege granted to tenants to purchase the landlord's right. Section 9 obviously applies to pending suits, otherwise a reference to a *summons* is unmeaning, and it also applies to suits in which decrees have been passed but not executed, as sub-section (3) clearly indicates. It, therefore applies to both, the stages of suits which are contemplated also by section 10. I, therefore, must disagree with the judgment of SPENCER and VENKATASUBBA RAO, JJ., in *Latifa Bi* v. *Mottai Ammal* (1) in so far as they interpret the omission cf section 9 in section 10 as implying that section 9 cannot apply to suits in which a decree has been passed before the Act came into force, although not executed. The whole object of section 9 appears to me to be to allow the tenant who is liable to ejectment, whether under a decree or not, to purchase the laddlord's right. So long as the decree for ejectment has not been executed, what the reasons for non-execution may be and whether or not they were due to an application by the tenant himself for stay of execution do not matter and cannot affect the applicability of the section.

In the present case, section 9 in terms applies. There are suits instituted against the defendants and decrees which have not yet been executed ; and there are applications put in by them, within 15 days of the coming into force of the Act, to the Court, that is this Court, before whom the suits (in their stages as appeals) were then pending. Therefore, the defendants are fully entitled to take full advantage of section 9 and have their applications under section 9 heard and determined.

I, therefore, fully agree with the order proposed by the learned Chief Justice.

These Petitions coming on for further hearing on Monday, the 8th January 1923, the Court made the following

ORDER.—The parties having failed to agree to price of the lands, we refer the matter to the Official Referee to fix the price of the lands, on the principles laid down in this judgment and to report to us accordingly.

Ten days will be allowed for filing objections after the receipt of the report.

In compliance with the above order, the Official Referee submitted the following

REPORT :—The first respondent is a lessee of certain pieces or parcels of land situate on the Royapettah High Road, Madras, under a registered Instrument of Lease, dated the 4th July 1910 entered into between him and the second respondent described in the said Instrument of Lease as trustee for the time being of Apparswami Temple, Mylapore, Madras.

The pieces and parcels of land were acquired by one Chidambaraswami who died in May 1871; the lands were by him dedicated in trust for the maintenance of Apparswami Temple and for the performance of Pujas, Ootsavams and other celebrations in the said shrine. In and by his last Will and Testament, dated the 4th May 1871, the said Chidambaraswam appointed one Ratnavelu Mudaliar, the father of the second respondent, as one of the executors to the said Will. On application of the second respondent, Letters of Administration with Will annexed were granted to him on or about the 7th August 1895 with the consent and concurrence of the other sons of the said Ratnavelu Mudaliar.

The present petitioners and petitioners in C. M. P. Nos. 901, 903, 905, 907 and 909 their predecessors-in-title and interest have been in occupation of portions of the entire area comprised in the lease in favour of the first respondent, for over 45 years, as lessees of the portions in their respective use and enjoyment. They were possibly in occupation when Chidambaraswami purchased the land.

After the second respondent took out Letters of Administration to the estate of the said late Chidambaraswami with the Will of the said deceased annexed thereto, he obtained from the tenants (the petitioners in C. M. P. Nos. 900 to 912) rental agreements in his favour with reference to the pieces of land in their respective occupation.

The rent-deeds are not produced; but it is clear that the rent fixed was the same as was paid by them for a considerably long time for the pieces of land in their respective holdings.

One of the terms and conditions of the Instrument of Lease entered into between the first and second respondents is that the second defendant shall cause the required leases to be executed and registered by the present tenants in favour of the first respondent in respect of the portion of the demised lands now in their respective possession, enjoyment use and occupation and that under the terms under which they are at present held.

In terms of the said provision in the said lease-deeds, the tenants on the land (the petitioners in C.M.P. Nos. 900 to 912) executed rental agreements in favour of the first respondent.

The leases were not for any fixed term and were terminable by the first respondent at his pleasure. The first respondent determined the tenancies by notice and instituted suits in the City Civil Court and obtained decrees for ejectment and for mesne profits, against the tenants. The tenants preferred appeals against the said decrees and pending disposal of the appeals obtained stay of proceedings. During the pendency of the appeals, the tenants filed petitions under the provisions of section 9 of Madras Act III of 1922 in which they seek to purchase out their landlords interest in the land so as to secure to them immunity from eviction.

The order of reference directs me to determine the market-value of the interest of the first respondent (intermediate landlord) in the land comprised in each of the petitions as on the date of the order.

In arriving at the market-value of the first respondent's interest in the land I am asked to determine the reasonable rent which each piece of land could have fetched to the first respondent from the date of termination of the lease, *i.e.*, from 1st September 1916, to the date of the order, namely, the 8th January 1923, and then to capitalize the net rental which the intermediate landlord the first respondent would be able to realize from his tenants up to the termination of his lease by effiux of time, *i. e.*, up to the 30th June 1931. I am also directed to take into consideration any enforceable power to renew that the plaintiff (first respondent) may have.

The rents reserved under the rental agreements executed by the petitioners in respect of the portion of land in their respective use and occupation and the extent of such portion are as set out hereunder :—

Name of tenant.	Extent of land leased.	Rent per month. Rs. A. P.
Kanniappa Chetty	... 4,940 square feet	... 1 12 0
Kanniappa Chetty	... 1,705 „	... 0 5 0
Velu Gramani	... 2,240 „	... 0 8 0
Lakshmana Mudali	... 1,260 „	... 0 4 0
Janakiammal	... 1,200 „	... 0 5 0
Thoyarammal	... 1,800 „	... 0 7 0
Ponnammal	... 1,645 „	... 0 6 0

The agreements were all executed between the 22nd and 31st August 1912 but the rate of rent was not determined at the date of the lease. According to the evidence of the petitioners the amount of rents fixed in the several instrument of lease were the same which each of them were bound to pay to the second respondent under rental agreements executed by them in his favour, and that such rents were fixed on the basis of rents which they have been paying for the land covered by their respective lease-deeds for upwards of 40 years.

It is, therefore, undisputed that the rates of rent prescribed by the rental agreements were those that were adopted more than 40 years ago and not the rates for which the lands could reasonably have been let out on the date of the lease. The amounts fixed by the rental agreements could not, therefore, afford any basis for determining what the reasonable rent would be in respect of the land in the holding of each individual tenant on the date of the termination of the tenancies, *i. e.*, on the 1st September 1916, which date is within four years of the date of the commencement of the tenancy under the said rental agreements.

The first respondent filed a number of building leases executed in his favour in respect of other portions of the land which at the date of the lease in his favour were unoccupied.

KANNIAPPA CHETTIAR *v.* RAMACHANDRAIYAR

In the plan annexed hereto I have marked the positions and dimensions of the several pieces of land in the possession of the petitioners and I have, for purposes of comparison and reference, also marked the sites comprised in the lease deeds, Exhibits A to G.

The rents provided by the agreements executed by the petitioners, except the petitioner in C. M. P. No. 900 of 1922, give an average of about 0-8-0 per ground of 2,400 square feet per month while the lease deed to which C. M. P. No. 900 of 1922 relates give a rate of 0-13-6 per ground per month. The reason of the difference is apparent. The land comprised in the petition has a frontage of 66 feet on the road; the other lands all face the Arrack Godown Street; the leases, Exhibits A, B, C. E, F, G, appear to prescribe a monthly rent calculated at the rate of 1-0-0 per ground of 2,400 square feet, the lease-deeds are of different dates; the earliest was on 17th April 1918 and the latest is so recent as the 1st December 1922.

In the case of the lease covered by Exhibit D, however, the rate is about 1-7-0 per ground per month. This, in my opinion, is accounted for by the fact that the land comprised in the lease has a frontage of 80 feet on the Royapettah High Road while the other plots of land are situate in the interior, with access through narrow lanes.

The rate of rent as deduced from the lease-deeds Exhibits A—C and E—G has remained uniform from 1918 to 1922. I am of opinion that, regard being had to the situation of the lands in the use and enjoyment of the petitioners, a rate of 1-8-0 per ground per month for the land on which premises 1 and 2 stand and a rate of 1-0-0 per ground per month for the other lands may be accepted as a fair and reasonable rent from 1st September 1916 to the 8th January 1923.

I set out hereunder as against each tenant the amount of mense profits calculated at the above rate, and the amount realised by the plaintiff (first respondent) in execution of the decrees obtained by him against the several tenants.

	Door No.	Name of tenant.	Mesne profits from 1—9—1916 to 1—1—1923. (76 months) Rs. A. P.	Amount realised. Rs. A. P.
1.	1 & 2	Kanniappa Chetty	234 13 0	71 14 0
2.	3	Do.	54 0 0	93 8 0
3.	4	Velu Gramiani	70 15 0	2 13 0
4.	6	Lakshmana Mudali	39 14 5	48 1 0
5.	8	Janakiammal	38 0 0	89 3 0
6.	9	Ponnammal	52 1 5	89 3 0
7.	10	Thoyammal	57 0 0	43 7 0
				52 5 0
				40 8 0

The lease in favour of the first respondent would expire by efflux of time on the 30th June 1931. Under the instrument of lease, however, the lessee has the option to renew the lease for a further term of 21 years at a slightly enhanced rate of rental. In fixing the maket-value of the first respondent's interest in the land I am asked to take into account any enforceable power to renew that the plaintiff may have.

I am not referred to any authority which places any limitations on the powers of a Trustee of a Hindu Religious Endowment in granting leases of immoveable properties appertaining to the trust. It appears to me to be well established that permanent leases either

with a fixed or unvarying rent or with a premium paid at the commencement of the tenancy would amount to an alienation of trust properties and could only be justified on grounds on which an alienation of trust properties could be sustained : *Palaniappa Chetty* v. *Sreenath Daivasikamony Pandara Sannadhi* (7), and that such leases are not *ab initio* void but are only voidable : *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (8), *Kadiri Masthan Rowther* v. *Segammall* (9).

The case reported in *Gajendra Nath Dey* v. *Ashraf Hassain* (10), is based on the principle of Muhammadan Law which restricts the power of *Muthuvalis* in the granting of leases of *wakf* properties and has consequently no application to the present case.

Section 36 of the Indian Trust Act provides that, except with the permission of the Principal Civil Court of original jurisdiction no trustee shall lease trust property for a term exceeding 21 years from the date of execution of the lease nor without reserving the best yearly rent than can reasonably be obtained. This Act does not apply to public or private religious or charitable endowments.

The case reported in *Kadir Ibrahim* v. *Arunachelam Chettiar* (11), arises out of a lease for 25 years granted by a lay Trustee ; the provisions of the Trust Act would apply. It was held in that case that the lease was not void but only voidable at the instance of the *cestui que trust*. Reference is made to the principle laid down in that decision in the judgment of SPENCER, J., in case reported *Kadiri Masthan Rowther* v. *Segammall* (9), as lending support to the view that a lease by a trustee of a Hindu Religious Endowment for a period exceeding 21 years should by analogy be deemed to be voidable and not void.

(7) 39 Ind. Cas. 722 ; 40 M. 709 ; 21 C. W. N. 729; 15 A. L. J. 485 ; 1 P. L. W. 697 ; 33 M. L. J 1 ; 19 Bom. L. R. 567 ; 22 M. L T. 1 ; (1917) M. W. N. 507 ; 26 C. L. J. 153 6 L. W. 222 ; 44 J. A. 147 (P. C).

(8) 38 Ind. Cas. 73 ; 40 M. 212 ; 31 M. L. J. 777 ; 20 M. L. T. 490 ; 5 L. W. 625 ; (1917) M. W. N. 400.

(9) 55 Ind. Cas. 655 ; 48 M. 433 at p. 495 ; 38 M. L. J. 198 ; 11 L. W. 197 ; (1920) M. W. N. 185 ; 27 M. L. T. 286.

(10) 69 Ind. Cas. 707 ; 27 C. W. N. 159 ; 36 C. L. J. 48 (1923) A. I. R. (C). 130.

(11) 33 M. 397 ; 4 Ind. Cas. 1082 ; 19 M. L. J. 737.

The lease in the present case is for a period of 21 years with a proviso for renewal for a further period of 21 years at the option of the lessee, subject, however, to the condition that if the lessee should exercise his option he should pay Rs. 22½ a month for the said renewed term instead of Rs. 20 provided for the first term of 21 years.

In effect it is a lease for a period of 42 years with liberty to the lessee to determine it at the expiry of 21 years. If the underlying principle on which section 36 of the Indian Trusts Act is based should bedeemed to apply to Hindu Religious Trusts and to control the powers of such trustees in dealing with immoveable properties vested in them there can be very little doubt the lease would not be binding on the trust, as it would be in excess of the period prescribed and would not be, at the same time, reserving the best rent. If the principle would not apply the question is whether the first defendant or his succesor in interest could enforce the term as to renewal on the termination of the current subsisting lease.

Clause (*e*), section 21 of the Specific Relief Act relates to contracts made by Trustees in excess of their powers or in breach of their trust and includes such contracts in the category of contracts which cannot be specifically enforced.

The illustrations appended to the section as referable to this clause clearly indicate the scope of the clause. In my opinion, the principle laid down is, that Courts of Law would prevent trustees from acting in excess of their powers as regulated by the instrument of trust or from committing breaches of trusts. It does not necessarily follow that other contracts entered into by trustees would all be enforceable in law.

In my judgment the test is whether the obligation which the agreement in the present case imposes on the second respondent to grant to the first respondent a lease of the lands in question for a further period of 21 years on the termination of the present lease at a slightly enhanced rent would be binding on the trust, whether, regard being had to the fact that the rental value of lands for building purposes in the City has a tendency to rise, the introduction of a provision that at the

expiration of the current lease the rent should be only 12½ per cent. higher than at the inception in 1910 and that for a period of 21 years thereafter could be considered to be an act of prudent management or deemed to have been done in the best interests of the trust. The amount of rent fixed under the lease-deed is Rs. 20 a month for a period of 21 years and Rs. 22½ a month for a further period of 21 years. On the basis that the extent of land available for being leased out is only 100 grounds, the amount of gross rental which the first respondent would be able to secure at the rate of Re. 1 per ground per month will be about Rs. 100 per month; making allowance for payments which the first respondent has to make under his lease the net rental would be about Rs. 68-12-0 as will appear later in this Report. The first respondent's case is that he is entitled to obtain compensation for being deprived of the advantgae he is securing by his under-leases.

I have no hesitation in coming to the conclusion that the agreement as to renewal is not binding on the trust as in my opinion such an undertaking could not be deemed to have been given as an act of prudent management on the part of the second respondent.

In the view I have taken I do not assign any market-value on the provision as to renewal.

In assessing the market-value of the interest of the intermediate landlord I have to take into consideration the rent he could realize from the land during the unexpired period of the lease and deduct therefrom the amount payable by him to or on account of the superior landlord during the said period in terms of the conditions and stipulations contained in the instrument of lease.

The amount of rent reserved under the lease-deed is Rs. 20 a month ; in addition to the said monthly rent, the first respondent is under his engagement with his landlord bound to pay and discharge all taxes, rates and assessments whatsoever that may thereafter during the term of the lease become payable for and in respect of any buildings that may thereafter be erected upon the said lands.

The extent of land comprised in the lease in favour of the first respondent is 108 grounds ; for the purpose of determining the proper proportion of rent which the tenants would have to pay to the superior landlord by virtue of the statutory provision which would in effect make them the assignees *pro tanto* of the intermediate landlords' interest in the portions in their respective use and occupation, I have to take into consideration only the actual extent of land available for being leased out to tenants and not the entire extent covered by the lease.

It is admitted that a portion of the land is covered by a tank and that deduction should be made for the area covered by the tank and also for the extent that will be taken up by roadways and pathways which are and have to be provided for in the allotment of the land as building sites.

It is agreed that the actual extent of land available for being leased out may be taken to be 100 grounds.

It is also admitted by the first respondent (without prejudice to any possible contentions he may have against his landlord) that for the purpose of the present enquiry the amount of half-yearly assessment imposed by the Corporation of Madras on the land and which is being paid by him may be treated as an amount which under his lease-deed he is under an obligation to pay and discharge.

The amount of rent payable by the first respondent to his landlord per month is Rs. 20 ; the amount of assessment imposed on the land and paid by him is Rs. 62 for every half year or $10\frac{1}{3}$ Rupees per month.

The incidence of the burden on each ground would be $\frac{30\frac{1}{3}}{100}$ Rs. per month or Re. 0-4-10 or, say, Re. 0-5-0 per ground.

KANNIAPPA CHETTIAR *v.* RAMACHANDRAIYAR

The interest of the first respondent in the land is the income he would be able to realize from the land less the burden imposed on him under his lease.

In assessing the amount of mesne profits payable by the several petitioners herein from the date of the termination of their respective leases I have recorded it as my conclusion that in the case of the land occupied by premises Nos. 1 and 2, Arrack Godown Street, Rs. 1-8-0 per ground per month may be taken to be the reasonable rental value, while in the case of other lands Re. 1 per ground per month may be taken as a fair rental. I have, in coming to that conclusion, adopted the *data* furnished by the leases granted by the first respondent for other lands comprised in his lease. Those leases are for periods coterminous with the lease in his own favour, I, therefore, assume that if the first respondent were entering into fresh engagements with the petitioners or into engagements with third parties on eviction of the petitioners from the land, he would be prescribing the same scale of rent as he has been able to secure for other lands in the area and that for the period expiring with termination of his own lease.

I hereunder set out in tabular from (1) the names of the tenants, (2) the door No. of the house standing on the land comprised in the holding, (3) the extent of ground covered by each holding, (4) the rate of rent per ground per month in respect of each holding as set out above, (5) the proper proportion of the burden which the petitioners by virtue of their purchase would have to pay to the superior landlord per ground per month, and (6) the net amount representing the interest of the first respondent in the land comprised in each separate holding.

1	2	3	4		5		6	
Name.	Door No.	Extent of Land in sq. feet.	Rate per ground.		Deduction		Net Rental.	
			Rs.	A. P.	Rs.	A. P.	Rs.	A. P.
1. Kanniappa Chetty ...	1 & 2	4,940	1	8 0	0	5 0	2	7 5
2. Do. ...	3	1,705	1	0 0	0	5 0	0	7 9
3. Velu Gramani ...	4	2,240	1	0 0	0	5 0	0	10 3
4. Lakshmana Mudali ...	6	1,260	1	0 0	0	5 0	0	5 9
5. Janakiammal ...	8	1,200	1	8 0	0	5 0	0	5 6
6. Ponnammal ...	9	1,645	1	0 0	0	5 0	0	7 6
7. Thoyammal ...	10	1,900	1	0 0	0	5 0	0	8 3

I have now to capitalise the intermediate landlords' interest. Having regard to the present condition of the money market, the interest which investors would be able to realise by loans on the mortgage of immoveable properties and the high rate of interest from Government securities with a definite prospect of such interest continuing for many years to come. I consider that the lowest rate of interest which would be deemed by investors in landed properties as satisfactory would be 7½ per cent. per annum.

I append below a statement noting against each of the tenants the amounts representing the first respondent's interest in the land in the holding of the individual tenant; and the amount which, if invested at 7½ per cent. per annum, would give the return representing the intermediate landlords' net return. That

amount would yield to the intermediate landlord by way of interest at 7½ per cent. the equivalent of the net income he would be able to realise month after month from each individual tenant. But the amount so capitalised would be set free on the termination of the first respondent's tenancy, *i.e.*, on the 30th June 1931, and would be re-payable on that date to the respective tenants.

The equivalent at the present moment of the amount so re-payable to each individual tenant at the expiration of the lease, would be the *present worth* of that amount; and the same would have to be deducted from the amount, the balance so ascertained would represent the capitalised value of the intermediate landlord's interest in the land, and would be the consolidated equivalent in value at the present moment of the monthly payments to be made during the next 102 months of the tenancy.

Name.	Door No.	Net income of landlord per month.	Investment.	Present worth.	Capitalised value.
		Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.
1. Kanniappa Chetty	...1& 2	2 7 5	894 2 8	240 11 4	153 7 4
2. Do.	... 3	0 7 9	77 8 0	47 5 2	30 2 10
3. Velu Gramani	... 4	0 10 3	102 8 0	62 9 4	39 14 8
4. Lakshmana Mudali	... 6	0 5 9	57 8 0	85 1 10	22 6 2
5. Janakiammal	... 8	0 5 6	55 0 0	33 9 5	21 6 7
6. Ponnammal	... 9	0 7 6	75 0 0	45 12 10	29 3 2
7. Thoyammal	... 10	0 8 3	82 8 0	50 6 1	93 1 11

The amounts shown in the last column in the above statement would be the amount which each individual tenant would have to pay to the first respondent to purchase out his interest in the land in their respective holding.

To the figures returned in the last column must be added the amounts of balance of mesne profits due by the tenants from date of termination of the tenancy up to 1st January 1923, as exhibited in the statement embodied in an earliar portion of this Report. In the case of two of the tenants the realisations by first respondent are in excess of the mesne profits recoverable. The amount of such excess will be deducted from the figures shown against their names in the last column of the above statement.

In the following statement I give against each of the petitioners the amount which, according to my conclusions, would represent the capitalised value at the present moment of the intermediate landlord's interest in the land in the use and enjoyment of each petitioner; the amount due by or to them in respect of mesne profits payable by them, after crediting them with the amounts realised by first respondent.

Name of petitioners.	Door No.	Capitalised value.	Amount due for mesne profits or amount realised in excess.	Total or net amount due.
		Rs. A. P.	Rs. A. P.	Rs. A. P.
Kanniappa Chetty...	1 & 2	153 7 4	+120 10 0	304 4 2
Do. ...	3	30 2 10	+ 22 14 0	62 12 8
Velu Gramani ...	4	39 14 8	+ 11 5 0	23 1 7
Lakshmana Mudali.	6	22 6 2	— 1 3 0	20 3 7
Janakiammal ...	8	21 6 7	+ 8 10 5	37 13 7
Ponnammal ...	9	29 3 2	— 35 13 0	— 3 11 1
Thoyammal ...	10	32 1 11		

KANNIAPPA CHETTIAR *v.* RAMACHANDRAIYAR

These Appeals and petitions coming on for final hearing on Friday the 14th December 1923, after the submission, by the Official Referee, of the Report called for herein, upon perusing the petitions and the affidavits filed in support thereof, the judgment delivered on the 5th January 1923 in C. C. C. Appeals Nos. 51 to 57 of 1921, the said Report by the Official Referee and the memoranda of objections thereunto filed by the Petitioners and the first respondent respectively and upon hearing the arguments of Mr. S. E. Sankara Ayyar, Vakil for the petitioner in all the petitions and Mr. K. Ramachandra Ayyar, the first respondent in person, and the second respondent in all the petitions not appearing in person or by Pleader, the Court delivered the following

JUDGMENT.

The Chief Justice.—These appeals were remanded for a finding to the Official Referee and they come to us on report. The relevant facts are that the trustee of a temple granted a lease to the first respondent of certain building lands, and he sub-let part of these lands to the petitioners. On an attempt to eject the petitioners by the respondent, the petitioners under the Madras Act, III of 1922, which had come into operation meanwhile, claimed to purchase the respondent's interest and the matter was referred to the Official Referee to determine what the value of the respondent's interest in the land was.

The Official Referee has reported and he has fixed the proper annual rent of the property ; he has deducted therefrom what he considers a proper proportion of the rents, rates, etc., payable to the superior landlord, the trustee of the temple, appropriate to the petitioners' portions of land; he has capitalized the amount payable on a 7½ per cent. basis. In respect of the last I do not agree with the basis on which he has capitalized. I think that, in a matter of this kind, a 6 per cent. basis is quite sufficient, as the amount of the Court interest allowed is about the amount that can be obtained by investing in Government securities and I see no reason at all why in arriving at a figure in a case of this kind we ought to assume that the person receiving the money will invest it at a higher rate of interest in some speculative form of investment. As regards the deduction of amount for rents, rates, etc., payable to the superior landlord, it is not at all clear that it is a proper deduction to make, because there is no provision in the Act under which the superior landlord can be made to look to the sub-tenant who is taking over part of the interest of the tenant and, in the absence of an agreement by the superior landlord, the tenant would be left liable to pay him at any rate the rent in respect of those portions. This is merely a matter of adjustment. If that liability is to be left totally on the shoulders of the tenant, it is obvious that the sub-tenant cannot, in arriving at the amount payable by him for compensation, have the sum worked out on the basis that these amounts would be payable by him. However, we are informed that it is possible that the superior landlord will come to terms with these tenants under which he will take the rents, rates, and such like payments from them and relieve the tenant *pro tanto*. This case had better, therefore, be adjourned to Monday next to see if any and what terms could become to in that respect.

That leaves an important question, and that is whether the lease by the temple trustee being for 21 years with an option to the tenant to renew it at the end of the 21 years at an enhanced rent is good or bad. It has been held by the Official Reference that the second 21 years, that is to say, the option period, is not to be taken into consideration in arriving at the compensation, because in his view that option is bad in law on the ground that the trustee had no power to enter into a lease for that period, as he looks upon it as a lease for a period of 42 years with liberty to the tenant to determine it at the expiry of 21 years, and holds that the lease is void. I do not agree with him. The question to be determined in such cases is whether it is a lease that a prudent man would make under the circumstances in the interests of himself if it were his own property, or in the interests of others if he was doing his best for them. The Indian Trusts Act provides in the case of ordinary trustees for the length of lease which they may grant and this lease is for a period longer than would be allowable under that Act, but that Act expressly does not in-

clude trusts like the present trust. It may be a very good guide in arriving at the answer to the question whether this was a proper agreement to enter into because one would assume that the Legislature in fixing a period as between an ordinary trustee and a *cestui que trust* was considering what was reasonably a prudent thing for a trustee to do with trust property. But in this case there is an element which comes into consideration which does not appear to have entered into the consideration of the Legislature in passing the Indian Trusts Act and which, in my judgment, removes this case outside any consideration based on that Act altogether and that is that the lease in question was a building lease. The whole object of the lease was to turn agricultural or undeveloped land into building land, that the tenant under the lease should build upon the land and pay an enhanced rent over and above the agricultural rent because he was going to build upon it, and that at the determination of the tenancy the structure should fall in to the landlord at a valuation. It is obvious that no one is going to enter into an agreement of that kind unless he has a reasonable time before him to make it remunerative; and so we find in England that it has been held as regards trustees who are letting any land for building purposes on a ground rent that the minimum period is 60 years and the maximum 99 years. Here where we are dealing with town property we find that the trustee enters into an agreement for 21 years with an option of renewal at an enhanced rent for 21 years. I can find nothing unreasonable or unlawful in the transaction at all, and I am quite clear that the option that he has granted in this case is perfectly valid, and, that being so, it is necessary that the option of 21 years should be valued. In arriving at that valuation I think we must first enquire what the rental value of the land is. With some hesitation, I have come to the conclusion that the Official Referee's figure is the right one. The matter was before him; he saw this land and enquired into the matter; and though I am clear that he has not erred on the side of liberality, I think, there is not enough for us to distrub his finding in that respect. Therefore, we must take the same rate as he has taken for the period down to the end of 21 years for the option period. Then, again, that will be subject to the question which is still left open as to whether it is to be reduded or not by reason of the amounts for rents, rates, etc., which are payable to the landlord and that will again have to be capitalized on the same basis that I have held is right in respect of the other sum, that is, 6 per cent. As, however, this decision is not binding upon the superior landlord and it will be open to him, if he is so advised, notwithstanding this judgment to litigate the question as to whether this option is good or bad, it has been agreed between the parties that the amounts found due for the 21 years period shall be paid into Court and invested, that the income thereof shall be paid to the first respondent until the renewal has been granted, or it has been finally decided that the trustee is not bound to grant it, and that the amount shall be paid out to the first respondent or in proper proportion to the petitioners if and when that course becomes possible by reason of the final determination of that matter. By reason of this amount remaining in Court there must be liberty to apply to the City Civil Court. The compensation for the other period will, of course, be paid to the first respondent. No order as to costs.

Wallace, J.—I agree.

The Petitions coming on for orders.

ORDER:—The parties have now come to an agreement on the basis of our preliminary judgment of December the 14th. That agreement signed by the Vakil for the appellant and by the first respondent with the statement of account annexed will be filed and the decree drawn up accordingly. There will be liberty to apply to the City Civil Court in respect of this matter generally.

Z. K. *Order accordingly.*

GAJADHAR BAKHSH SINGH *v.* BAIJNATH

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 372 OF 1922.

January 24, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

GAJADHAR BAKHSH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAIJNATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Necessity—Antecedent debt, what is—Pious obligation of sons, whether can validate alienation.

A voluntary alienation of joint family property by a Hindu father can be supported on two grounds only, *viz.*, (1) necessity, and (2) antecedent debt.

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689 ; 28 C. W. N. 253 ; 21 A. L. J. 934 ; 46 M. L. J. 23 ; 5 P. L. T. 1 ; (1924) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. and A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 23 M. L. T. 457 (P. C.), followed.

To satisfy the validity of an alienation of joint family property on the basis of antecedent debt, the alienation must be by the father for his debts antecedent in time and in fact to the alienation supporting it.

The mere circumstance of the pious obligation of a Hindu son to pay his father's debts would not validate a mortgage of family property by the father, which is invalid for want of legal necessity or of the necessity for the payment of antecedent debts.

Gajadhar Bakhsh Singh v. *Baijnath*, 65 Ind. Cas. 967 ; 8 O. L. J. 605 ; *Ram Chhattar* v. *Ram Lal*, 65 Ind. Cas. 950 ; 24 O. C. 395 ; *Ram Sarup Singh* v. *Jageshar Singh*, 73 Ind. Cas. 466 ; 26 O. C. 341 ; 9 v. and A. L. R. 157 ; (1923) A. I. R. (O.) 150 ; *Raran* v. *Sheo Lal*, 76 Ind. Cas. 1055, 26 O. C. 321 ; 9 O. and A. L. R. 672, followed.

Appeal against the decree of the Addl. District Judge, Lucknow, at Sitapur, dated 25th July 22 confirming decree of the Sub. Judge, Sitapur, dated 13th September 1920.

Messrs. *H. K. Ghosh* and *B. Bisheshar Nath Srivastava*, for Mr. *A. P. Sen*, for the Appellant.

Mr. *Chhail Behari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for the recovery of a sum of Rs. 3,232-12-9 by sale of certain property specified in the plaint. The suit is founded on a deed of mortgage, dated the 17th July 1911, executed by Gajadhar Bakhsh Singh. Tirbhawan Singh and Bisheshar Bakhsh Singh in favour of the plaintiffs. Bisheshar Bakhsh Singh has since died. His minor son, Rudra Partab Singh, is the defendant No. 3 in the present suit. Gajadhar Bakhsh Singh and Tirbhawan Singh are defendants Nos 1 and 2 respectively. The three executants were sons of Anand Singh. The property in respect of which the mortgage in suit was executed is admittedly the property of the joint family of the defendants. Several defences were raised to the suit. We are, however, concerned with one only. It was pleaded that the mortgage in suit was effected without any legal necessity or without any antecedent debt to support it. The lower Appellate Court has found that there was neither legal necessity nor antecedent debt to justify the alienation of the joint family property under the mortgage in suit.

It appears, however, that this property was previously mortgaged to the same mortgagees by Anand Singh on the 22nd July 1904 (Ex. 2) and the mortgage now in suit (Ex. 1) is almost wholly a renewal of the previous mortaage. Anand Singh had died before the mortgage in question was executed by his three sons. The Court below has held that the three sons of Anand were under a pious obligation to discharge the debt incurred by Anand Singh under the mortgage of the 22nd July 1904, and that consequently the plaintiffs were entitled to enforce the mortgage of the 17th July 1911. On these grounds the Court below has maintained the decree of the Court of first instance for sale of the property mortgaged. The only point argued on behalf of the appellants by his learned Advocate is, that the alienation of the joint family property on the bare ground of pious obligation to discharge the debt of the deceased father by his sons is invalid.

We are of opinion that the argument is sound. We took time to consider our judgment and, since the hearing of the appeal, a decision of a Bench of this Court consisting of other Judges in the case of *Ram Sarup Singh* v. *Jageshar Singh* (1) has been reported. The

(1) 73 Ind. Cas. 466 ; 26 O. C. 341 ; 9 O. and A. L. R. 157 ; (1923) A. I. R. (O.) 150.

point decided in that case was precisely the same, which we are called upon to decide in the present appeal. The case law bearing on the matter under consideration has well and fully, if we may say so, been discussed. Apart from the authoritative character of that ruling, we find ourselves in complete agreement with the conclusion reached in that case. It is therein held that the "mere circumstance of the pious obligation of a Hindu son to pay the father's debt does not validate a mortgage which is invalid for want of legal necsssity or of the necessity for the payment of antecedent debt" : (Head-note). Besides the decisions of this Court in the cases of *Ram Chadttar* v. *Ram Lal* (2) *Gajdhar Bakhsh Singh* v. *Baijnath* (3) to which reference is made in the case of *Ram Sarup Singh* v. *Jageshar Singh* (1) we may mention in support of our opinion another decision in the case of *Pran* v. *Sheo Lal* (4) Further, it seems to us that the point is covered by the recent decision of their Lordships of the Privy Council in the case of *Brij Narain Rai* v. *Mangla Prasad* (5). Lord Dunedin, in delivering the judgment of the Privy Council in that case, categorically laid down the following propositions of law :—

"(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity.

"(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

"(3) If he purports to burden the estate by mortgage, then, unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

"(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

"(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

It would follow from the propositions Nos. 1 and 3 that a voluntary alienation of the joint family estate by the father can be supported on two and two grounds alone (1) necessity and (2) antecedent debt. Indeed, the exception founded on the ground of antecedent debt against the general rule of the *Mitakshara* forbidding alienation of the ancestral immoveable estate rests ultimately on the ground of pious obligation. If we accept the decision of the Court below as correct, we would be engrafting further exception to the general principle of the *Mitakshara*.

The learned Advocate for the respondents, besides pressing the view of law taken by the Court below upon us, wanted to support the decree of that Court on the ground that the debt incurred under the deed of mortgage in suit was antecedent. In agreement with the Court below we are of opinion that it was not The previous debt was incurred by Anand Singh for the security of which he alienated the joint ancestral property of the family. He then died. The persons who made the second alienation, that is, the mortgage in suit, were the sons of Anand Singh. The previous debt, therefore, cannot be treated as the antecedent debt. Here, again, if we accept the contention of the learned Advocate for the respondents the result would be that we would create another exception to the general rule of the *Mitakshara* already adverted to. To satisfy the validity of an alienation of the undivided estate on the basis of antecedent debt, the alienation must be by the father for his debts antecedent in time and in fact to the alienation supporting it.

We, therefore, allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff-respondent's suit with costs throughout.

Z. K. *Appeal allowed.*

(2) 65 Ind. Cas. 950 ; 24 O. C. 395.
(3) 65 Ind. Cas 967 ; 8 O. L. J. 605.
(4) 76 Ind. Cas. 1055 ; 26 O. C. 821 ; 9 O. and A. L. R. 672.
(5) 77 Ind. Cas. 689 ; 28 C. W. N. 253 ; 21 A. L. J. 984 ; 46 M. L. J. 28 ; 5 P. L. T. 1 ; (1924) M. W. N. 68 ; 19 L. W. 72; 2 P. L. R. 41 ; 10 O. and A. L. R. 82 ; (1924) A. I. R. (P. C.) 50 ; 38 M. L. T. 457 (P.C.)

MUKAT SINGH *v.* MISRA PARAS RAM

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 406 OF 1923.

July 30, 1923.

Present :—Mr. Justice Kanhaiya Lal.

MUKAT SINGH AND OTHERS—
DEFENDANTS—APPELLANTS
versus
MISRA PARAS RAM AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882) s. 106—Landlord and tenant—Ejectment—Notice—Denial of landlord's title—Agreement to vacate on demand—Execution of decree—Sale—Judgment-debtor, whether can object to validity of sale in subsequent proceedings—Auction-purchasers, position of.

Where a tenant is sought to be ejected without notice on the ground of denial of the landlord's title, it must be shown that the title of the landlord had been denied prior to the suit.

Haidri Begam v. *Nathu*, A. W. N. (1894) 196 ; 8 Ind. Dec. (N. S.) 353 ; 17 A. 45, followed.

Where a tenant agrees to vacate the demised premises whenever required to do so, section 106 of the Transfer of Property Act becomes inapplicable to the case, and the tenant is not entitled to notice before ejectment. A judgment-debtor who might have raised objections to a sale in execution of a decree against him, or who might have appealed against the order for sale, but who refrains from doing so has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable.

Umed v. *Jas Ram*, 29 A. 612 ; A. W. N. (1907) 193 ; 4 A. L. J. 519 ; *Pandurang Balaji* v. *Krishnaji*, 28 Bom. L. R. 125 ; 5 Bom. L. R. 799 ; *Dwarkanath Pal* v. *Tarini Sankar Roy*, 34 C. 199 ; 5 C. L. J. 294 ; 11 C. W. N. 513 ; *Lala Ram* v. *Thakur Prasad*, 47 Ind. Cas. 947 ; 40 A. 680 ; 16 A. L. J. 691 ; **relied on.**

Katwari v. *Sita Ram Tewari*, 63 Ind. Cas. 264 ; 3 W. P. L. R. (A) 99 ; 43 A. 547 ; 19 A. L. J. 473, **distinguished.**

So far as the parties to an execution-sale are concerned, a person who is a stranger to the suit is justified in believing that the Court had authority to attach and sell the property.

Malkarjan v. *Narbari*, 25 Bom. 337 ; 5 C. W. N. 10 ; 2 Bom. L. R. 927 ; 27 I. A. 216 ; 10 M. L. J. 368 ; 7 Sar. P. C. J. 739 (P. C.) **followed.**

Second appeal against the decree of the District Judge of Mainpuri, dated the 23rd February 1922.

Mr. *Panna Lal*, for the Appellants.

Mr. *G. Agarwala* for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for the recovery of possession of a certain house and a wall which they allege to have purchased at an auction-sale held in execution of a decree against Mukat Singh and the other defendants. The allegation of the plaintiffs was that they purchased the house on the 5th of November 1914 and got possession through Court on the 12th of January 1917 and that after such possession had been obtained the defendant took the house from them on an agreement to pay a rent of Re. 1 per mensem. It was further stated that it was settled at the time that the plaintiffs would, when they would like, be entitled to have the house vacated. The defendants denied the tenancy and pleaded that they had no knowledge of the auction-sale, and that even if the defendants were proved to be the tenants of the plaintiffs, they could not have been ejected without notice. There was a further plea that they were cultivators and that the sale, if any, was invalid.

The Court of first instance dismissed the claim, holding that no tenancy was proved. The lower Appellate Court, however, held that the plantiffs had puschased the house at auction on the 5th of November 1914 and got formal possession in 1917 and that the defendants had subsequently taken a lease of the house from the plaintiffs on an agreement to pay a rent of Re. 1 per mensem. On the question of notice, the latter Court observed that inasmuch as the defendants had denied the title of the plaintiffs no notice was necessary. There was no proof, however, that the title of the plaintiffs had been denied, prior to the suit; and, as held in *Haidri Begam* v *Nathu* (1), that ground cannot be sustained.

But it still remains to consider whether a notice was in the circumstance alleged in the plaint, at all necessary. Section 106 of the Transfer of Property Act. (No. IV of 1882) does not require the sending of such a notice where there is a contract on local usage to the contrary. The allegation in the plaint was

(1) 17 A. 45 A. W. N. (1894) 196 ; 8 Ind. Dec. (N. S.) 353.

that the defendants had agreed to vacate the house on demand. That agreement was sought to be proved by the evidence of two witnesses, Lalta Prasad and Sirnam Singh, whom the lower Appellate Court believed. Those witnesses said that the defendants had agreed to vacate the house whenever the plaintiffs wanted them to do so. One witness also said that a lease was agreed to be written out, but it is admitted that none was actually reduced to writing. There is no allegation that any term was fixed for the tenancy ; and, in view of the evidence, which goes to show that the defendants had agreed to vacate the house when the plaintiffs wanted, section 106 cannot be made applicable and the omission to give the notice cannot be regarded as fatal to the present suit.

It remains also to consider the other objection taken by the defendants in the Trial Court, namely, that the house in question was not liable to sale under section 60, clause (*c*) of the Code of Civil Procedure. No issue was framed on that point by the Trial Court or finding recorded. There is some evidence to show that the defendants are agriculturists or *ex-zemindars* but it is not open to them at this stage to go behind the sale proceeding to which they were parties and set up a plea which they had omitted to raise at the time of the judgment or prior to the sale. As held in *Umed* v. *Jas Ram* (2), and *Pandurang Balaji* v. *Krishnaji Govind* (3), a judgment-debtor, who might have raised objections to a sale in execution of a decree against him but who has refrained from doing so or who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. In *Dwarkanath Pal* v. *Tarini Sankar Ray* (4), and *Lala Ram* v. *Thakur Prasad* (5), a similar view was taken.

On behalf of the defendants-appellants reliance is placed on a decision in *Katwari* v. *Sita Ram Tewari* (6), but in that case an objection was taken prior to the sale and no sale had, in fact, taken place. So far as the parties to the sale and execution proceedings are concerned, a person who is a stranger to the suit is justified in believing that the Court had authority to attach and sell the property, or, to use the language of Lord Hobhouse in *Malkarjun* v. *Narhari* (7), that the Court had done that which by the directions of the Code it ought to do. The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 29 A. 612 ; A. W. N (1901) 198 ; 4 A. L. J. 519.
(3) 28 B 125 ; 5 Bom. L R. 799.
(4) 34 C. 199 ; 5 C. L. J. 294; 11 C. W. N. 513.
(5) 47 Ind. Cas. 947 ; 40 A. 680 ; 16 A. L J. 691.
(6) 63 Ind. Cas. 264 ; 19 A. L. J. 473 ; 3 U. P. L. R. (A.) 99 ; 43 A. 547.
(7) 25 B. 337 at p. 347 ; 5 C. W. N. 10 ; 2 Bom. L. R. 927 ; 27 I. A. 216 ; 10 M. L. J. 368 ; 7 Sar. P. C. J. 739 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2391 OF 1922.

January 25, 1924.

Present :—Mr. Justice Moti Sagar.

NAGINA SINGH—PLAINTIFF—APPELLANT

versus

JIWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Evidence not considered—Finding not deducible from evidence—Custom—Ancestral property—Property acquired by purchase.

Where an Appellate Court has arrived at a finding of fact without taking into consideration the whole of the evidence on the record ; or where the finding is such that it cannot reasonably be deduced from the evidence, it is liable to be set aside in second appeal.

Gobind Ram v. *Kakim*, 24 Ind. Cas. 880 ; 76 P. W. R. 1914 ; 174 P. L. R. 1914 ; *Ramchancha* v. *Dattatraya*, 48 Ind. Cas. 742, followed.

Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor, for instance, by purchase from a collateral.

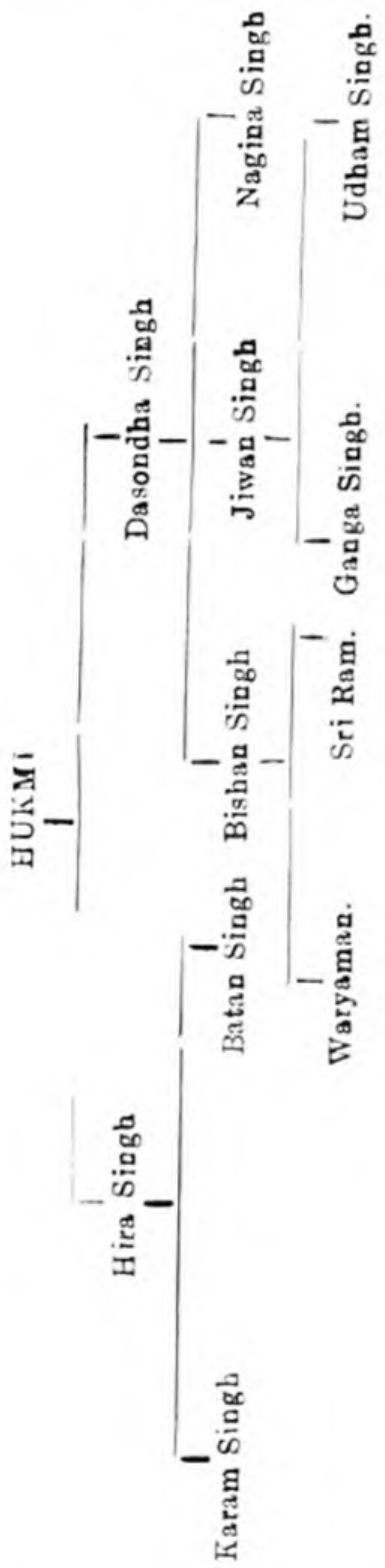
Second appeal from the decree of the District Judge, Jullundur, dated the 25th May 1922, reversing that of the Munsif, 1st Class, Nawanshahr District Jullundur, dated the 5th December 1921, and dismissing the plaintiff's claim.

NAGINA SINGH *v.* JIWAN SINGH

Lala *Jagan Nath*, for the Appellant :—

Lala *Badri Das*, *R. B.*, for *Bhagat Singh Vendee*, for the Respondents.

JUDGMENT :—The following pedigree table will be found useful in understanding the facts of this case :—



The dispute relates to 8 *kanals* 14 *marlas* of land in *Mauza* Jhangran in the Nawanshahr *Tahsil* of the Jullundur District sold by Karam Singh and Jiwan Singh to one Bhagat Singh on the 30th of June 1920 for a sum of Rs. 500. The land originally belonged to Batan Singh who is alleged to have sold it along with some other land to the present vendors on the 7th of December 1915. On the 18th of October 1920 Nagina Singh brought this suit for a declaration that the sale made by Jiwan Singh and Karam Singh on the 30th of June 1920 was without consideration and legal necessity and that it will not be binding upon his reversionary interests. Batan Singh, Waryamau, Sri Ram, Udham Singh and Ganga Singh were also impleaded as defendants to the suit on the allegations that they were reversionary heirs but they had declined to join with the plaintiff in contesting the alienation. The suit was resisted by the defendants on the ground that the land was salf-acquired and not ancestral *qua* the plaintiff and that the sale was for consideration and legal necessity. The Trial Court decreed the suit holding that the land was ancestral and that necessity for the sale had not been established. On appeal the learned Distriot Judge agreed with the finding of the Court of first instance as to the ancestral character of the land but came to a contrary finding on the question of necessity. In the opinion of the learned District Judge the land having been sold for the purpose of acquiring other land, the alienation was an act of good management on the part of the vendors and was not liable to attack at the instance of the reversionary heirs. The suit having been dismissed the plaintiff has preferred a second appeal to this Court.

A preliminary objection has been taken that the appeal cannot be proceeded with, inasmuch as Batan Singh, who was a necessary party and who had been impleaded as a defendant in the Court of first instance, has not been joined as a respondent to this appeal. In my opinion there is no force in the preliminary objection and it must be disallowed. Batan Singh was only a formal defendant and his non-impleadment cannot possibly have any effect on the decision of this case.

The important point to be considered is whether the property, which is the subject-matter of dispute in this case, is ancestral or self-acquired. Mr. Badri Das's contention is that Jiwan Singh acquired this land otherwise than by descent and that it consequently lost its ancestral character even though it may at one

time have belonged to Hukmi, the common ancestor of the parties. He relies in support of this contention on *Sri Ram* v. *Ramjidas* (1) and *Gurdit Singh* v. *Isher Kaur* (2). It is contended that Jiwan Singh purchased the land from Batan Singh and that this fact was admitted even by the plaintiff's own witnesses. On the other hand, it is strenuously urged by Mr. Jagan Nath that the finding of the Courts below on the question of the ancestral character of the land is one of fact and that it cannot be examined in second appeal. He argues that there is at least some evidence on the record on which the finding of the learned Judge of the Court below is based and that in coming to this finding he must have fully taken into consideration the evidence produced by the parties in respect of the alleged sale by Batan Singh in favour of Jiwan Singh. It is contended that this evidence was very probably rejected bythe learned Judge and that his finding really is that Jiwan Singh acquired the land by descent and not by purchase from Batan Singh. I am unable to agree with this contention. There is nothing on the record to show that the evidence relating to the sale by Batan Singh to Jiwan Singh was considered by the learned District Judge or that he applied his mind, even in the slightest degree, to the consideration of the question as to what the effect of such a sale really was. There is ample authority for holding that where a lower Appellate Court has arrived at a finding of fact without taking into consideration the whole of the evidence in the case or where the fiding is such that it cannot reasonably be deduced from the evidence, it is liable to be set aside in second appeal: *Govind Ram* v. *Kakim* (3). and *Ramachandra* v. *Dattatraya*, (4). I have carefully read the judgment of the learned District Judge and am unable to find any indication therein that the evidence relating to the sale by Batan Singh in favour of Jiwan Singh has been considered. I must, therefore, overrule the contention of Mr. Jagan Nath and hold that the finding can be interfered with in second appeal, inasmuch as it is not based on a consideration of the whole of the evidence on the record.

That Jiwan Singh acquired the land by purchase and not by inheritance cannot for a moment be doubted. There is not only the registered sale-deed in his favour on the record but there is also the evidence of the plaintiff's own witnesses who have stated that the land in suit originally belonged to Batan Singh and that he subsequently transferred it by sale to Jiwan Singh. Mr. Jagan Nath does not dispute the proposition of law that land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor. In the present case it having been conclusively proved that Jiwan Singh acquired the land otherwise than by descent, it must be held that it is not ancestral and that the plaintiff is consequently not entitled to challenge the alienation.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 2 Ind. Cas. 949 ; 59 P. R. 1909 ; 86 P. L. R. 1909 ; 94 P. W. R. 1909.
(2) 68 Ind. Cas. 551 ; 3 L. 257 ; (1922) A. I. R. (L) 392.
(3) 24 Ind. Cas. 880 ; 174 P. L. R. 1914 ; 76 P. W. R. 1914.
(4) 48 Ind. Cas. 742.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 20 OF 1923 AND CIVIL MISCELLANEOUS PETITION NO. 3343 of 1923.

November 16, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Waller.

SONACHALAM PILLAI AND OTHERS—APPELLANTS AND PETITIONERS

versus.

KUMARAVELU CHETTIAR AND OTHERS—RESPONDENTS IN BOTH

Letters Patent (Mad.) clause 15—Judgment, definition of—Test—Order refusing stay of execution pending appeal, whether appealable—Decree for injunction, stay of—Decree declaratory in part, effect of.

SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR

In order to decide whether any particular order amounts to a judgment or not within the meaning of the Letters Patent, the test is not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding the adjudication is a judgment within the meaning of the clause. [p. 111, cols. 1 and 2.]

Tuljaram Row v. *Alagappa Chettiar*, 8 Ind. Cas. 340 ; 35 M. 1 ; 8 M. L J. 453 ; (1910) M. W. N. 697 ; 21 M. L. J. 1, followed.

The order of a Single Judge of the High Court refusing stay of execution of a decree pending disposal of an appeal in the High Court is a "judgment" within the meaning of cl. 15 of the Letters Patent and is appealable. [p. 112, col. 2.]

Srimanthi Raja Yarlagadda Durga Prasada Nayudu v. *Srimathi Raja Yarlagadda Mullikarjuna Prasada Nayudu*, 24 M. 358; *Vairavan Chettiar* v. *Ramanathan Chettiar*, 14 L. W. 701, dissented from.

It is no bar to the stay of execution of a decree for an injunction pending the disposal of an appeal, that a part of the decree appealed from is declaratory in character. [p. 112, col. 2.]

Per *Krishnan, J.* :—An order refusing an interim injunction is a judgment but an order refusing stay of proceedings is not. [p. 112, col. 2.]

Letters Patent Appeal against the order, dated 17th October 1923 of the Honourable Mr. Justice Wallace, in C.M.P. No. 1963 of 1923, in Appeal No. 232 of 1923, preferred to the High Court against the decree of the Court of the Subordinate Judge of Tuticorin in O. S. No. 2 of 1920.

and

Petition praying that, in the circumstances stated in the affidavit attached therewith, the High Court will be pleased to issue an order directing the stay of the execution of the decree in O. S. No. 2 of 1920 on the file of the Court of Subordinate Judge of Tuticorin pending disposal of the Letters Patent Appeal No. 20 of 1923 on the file of the High Court preferred against the order dated 17th October 1923 in C. M. P. No. 1963 of 1923 on the file of the High Court.

Messrs. *C. Madhava Nair*, *T. Nallasivam Pillai* and *K. S Sankara Aiyar*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar*, *T. L. Venkatarama Iyar* and *V. Sambandam Chetty*, for the Respondents.

ORDER.

Krishnan, J.—This is an appeal under cl. 16 of the Letters Patent against the order of Wallace, J., Sitting as a Single Judge in the Admission Court, refusing to stay execution of the decree in O. S. No. 2 of 1920 on the file of the Subordinate Judge's Court of Tuticorin pending disposal of Appeal No. 232 of 1923 which has been filed against that decree and which has been admitted and is now pending in this Court. The suit was brought by certain Vaniyars of Tiruchendur in the Tinnevelly District for a declaration that they were entitled to enter the well-known temple there and go up to the figure of the Nandi in front of the inner shrine and for an injunction to restrain the trustees and others from preventing them from doing so. The suit was decreed by the Subordinate Judge in their favour, and against that decree Appeal No. 232 of 1923 has, as already stated, been filed in this Court by the trustees and others.

An application was made to Wallace, J., for stay of execution of the decree pending the disposal of the appeal, and that having been refused, this present appeal is filed against the order.

A preliminary objection is taken to the appeal on the ground that no appeal lies under cl. 15 of the Letters Patent against an order refusing to stay the execution of a decree. The decision of this question turns on the meaning to be given to the word "judgment" in cl. 15 of the Letters Patent There is nothing in the Letters Patent itself to enable one to say what the exact meaning of the term "judgment" is, and what orders would be covered by that term. The word "judgment" is defined in section 2 of the Code of Civil Procedure as meaning " the statement given by the Judge on the grounds of a decree or orders " passed by him. As this definition is intended for the construction of the word " judgment " as used in the Code of Civil Procedure only, it obviously cannot be applied to the word as used in the Letters Patent. The meaning of the word " judgment" in the Letters Patent has been, however, the subject-

matter of consideration in several reported cases. The earliest one which has been brought to our notice is the case of *DeSouza* v. *Coles* (1) where, at p. 387, Bittleston, J., laid down that "it must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suit or an applicant." It was again defined by Couch, C. J., in the leading judgment on the point in Calcutta in *The Justices of the Peace* v. *The Oriental Gas Company* (2), as being "a decision, whether final, or preliminary or interlocutory, which affects the merits of the question between the parties by determining some right or liability" and this definition was approved by Markby, J. Since then, the meaning of the term has again been considered by a Full Bench of the Madras High Court in *Tuljaram Row* v. *Alagappa Chettiar* (3). There the then learned Chief Justice, Sir Arnold White, was of opinion that the definition given by Bittleston, J., went too far and that the one given by the Calcutta High Court was too narrow, and he himself laid down the test to be applied to decide whether any particular order amounted to a judgment or not within the meaning of the Letters Patent as follows at p. 7: "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a 'judgment' within the meaning of the clause." And, he added: "An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent." Following this latter part of the definition as to what is not a judgment he held in the particular case before him, which was one of an appeal against an order refusing to frame an issue, that no appeal lay, and that view was adopted by the Full Bench.

(1) 3 M. H. C. R. 384.
(2) 8 B. L. R. 433 ; 17 W. R. 364.
(3) 8 Ind. Cas. 340 ; 35 M. 1 ; 8 M. L. T. 453 ; (1910) M. W. N. 697 ; 21 M. L. J. 1.

Krishnaswamy Aiyar, J., who sat with the learned Chief Justice also agreed with the view taken by him as to the meaning of the word 'judgment' and with the order proposed by him. Ayling, J., the third Judge in the Full Bench merely contented himself by saying that he agreed that the answer to the question referred for disposal should be in the negative. He did not discuss the question as to what amounted to a judgment at all. This ruling has been since accepted by this Court as correctly laying down the meaning of the word "judgment" and has been cited and followed in several subsequent decisions, see, for example, the case in *Srinivasa Aiyangar* v. *Ramaswamy Chettiar* (4), *Kulasekara Naickar* v. *Jagadambal Ammal* (5), *Kanalal* v. *Paramasukdoss* (6), and *Krishnareddy* v. *Thanickachela Mudali* (7). It has been brought to our notice that the same view has been accepted and followed by the Lahore High Court in *Gokal Chand* v. *Sanwal Das* (8), which, it may be noted, was an appeal against a refusal to stay the execution of a decree, and also in *Ruldu Singh* v. *Sawal Singh* (9), where the learned Chief Justice of the Lahore High Court has considered the authorities and has adopted the view of the Madras High Court as to the meaning of the word "judgment." In *Tuljaram Row* v. *Alagappa Chettiar* (3), the learned Chief Justice elaborately discussed all the cases on the point and, as his judgment has been followed, as stated above, by this High Court since then, I think it only right that we should adopt the same definition. In explaining his meaning, the learned Chief Justice has referred to a number of instances in which he thought an appeal would lie, and one of the instances he mentions in his judgment is an order refusing a stay of execution. He says, at p. 8, "I should be prepared to hold that an appeal lay from an order refusing a stay of execution," and he

(4) 29 Ind. Cas. 846 ; 29 M. L. J. 12 ; 18 M. L. T. 46 ; 89 M. 285.
(5) 50 Ind. Cas. 14 ; 42 M. 352 ; 9 L. W. 322 ; 36 M. L. J. 351; 25 M. L. T. 292.
(6) 68 Ind. Cas. 921 ; 16 L. W. 608; 31 M. L. T. 284 ; 43 M. L. J. 480 ; (1923) A. I. R. (M.) 44.
(7) 73 Ind. Cas. 1054 ; 45 M. L. J. 153 ; (1923) M. W. N. 681 ; (1924) A. I. R. (M.) 90.
(8) 55 Ind. Cas. 933; 1 L. 348; 12 P. W. R. 1920 ; 79 P. L. R. 1920; 2 L. L. J. 32.
(9) 67 Ind. Cas. 388; 3 L. 18 8; (1922) A. I. R. (L). 380.

has resided from his view to the contrary in *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Nayudu* (10), to which he was a party. No doubt, when the learned Chief Justice said that an appeal lay from an order refusing a stay of execution in the Full Bench case, his observation was in a sense in the nature of an *obiter dictum*, nevertheless we are bound to follow it and we cannot treat the case in *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Nayudu* (10), as good law. *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Nayudu* (10). The case in *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Nayulu* (10), as pointed out to us, has been followed in *Vairavan Chettiar* v. *Ramanathan Chettiar* (11), by another Bench of this Court, but in that case there is no discussion whatever on the point in issue as that case merely follows *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Nayudu* (10), and, if I am right in thinking that *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Naydu* (10), is no longer good law, *Vairavan Chettiar* v. *Ramanathan Chettiar* (11), cannot be accepted as good law.

On the respondents' side, besides the two cases in *Srimanthi Raja Yarlagadda Durga Prasada Nayudu* v. *Srimathu Raja Yarlagadda Mullikarjuna Prasada Nayudu* (10), and *Vairavan Chettiar* v. *Ramanathan Chettiar* (11), above referred to, our attention was drawn to a number of unreported Letters Patent Appeals, namely, Nos. 24 of 1918, 15 of 1922, 38 of 1921 and 7 of 1923 and it was contended that it was the practice of this Court not to allow Letters Patent Appeals against orders such as the one before us. But all those cases, on a reference to them, will be found to be cases where stay of proceedings in the Lower Court was refused, they did not deal with stay of execution at all. Those cases stand on a different footing altogether, for they fall under the second part of the definition of the Chief Justice quoted above, namely, that "an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent." In L. P. A. No. 7 of 1923 the appeal was against an order refusing an *interim* injunction. The learned Judges held an appeal lay. I have, therefore, come to the conclusion that the preliminary objection cannot stand and must be overruled, as an appeal lies under the Letters Patent against the order of a Single Judge refusing stay of execution pending the disposal of an appeal or Second Appeal in this Court.

On the merits, I quite recognise that the learned Judge of this Court having exercised his discretion in refusing to stay execution, we should not interfere with such exercise of discretion unless there are strong grounds for it But in this particular case, unfortunately, the learned Judge seems to have been led to the passing of the order that he made, by his view that there being a declaration of the rights of the Vaniyars in the judgment of the lower Court, he could not interfere with the injunction which formed part of the decree. I am unable to adopt this view, for, if it is adopted in all cases in which a consequential relief is granted along with the declaration, it would be impossible to stay execution. It seems to me that the issue of the injunction ordered by the lower Court in the decree could be stayed by itself and whatever rights the decree might have declared, it would not enable the parties to enter the temple and go to the place where they want to go I am, therefore, of opinion that the fact of there being a declaration is no bar to this Court staying the execution of the decree.

On the merits, I think that this is a case in which we should grant a stay with some modification of the order of the lower Court pending the disposal of the appeal here. On the one hand, the Vaniyars are anxious to enter the temple, see the deity, and perform their worship, and it will be a great hardship to prevent them altogether from doing so pending the appeal which may last for some time in this Court. On the other hand, there may be a good deal of truth in what the appellants say, *viz.*, that, if the respondents are allowed

(10) 24 M. 358.
(11) 14 L. W. 701.

to enter the temple and go up to the *Nandi*, the temple will be desecrated and they will have to perform the ceremony of purification at considerable expense if they succeed in the appeal. I have, therefore, come to the conclusion that the respondents may be allowed to go up from the east to the *dhwaasthambam* in the temple just inside the *gopuram* wherefrom they may have a view of the idol and perform their religious worship there but that they should not be allowed to go further, pending the disposal of the appeal.

I would, therefore, order a modified stay of execution by directing the appellants not to prevent the respondents from going up to the *dhwaasthambam* at times of worship and also directing them to let the respondents have a view of the idol when such worship takes place. The order of the lower Court will be stayed with that reservation.

In the circumstances, I think the proper order as to costs is to direct each party to bear their own costs in the Letters Patent Appeal and of the petition for stay.

Waller, J.:—I agree that we should follow the ruling reported in *Tuljaram Row* v. *Alagappa Chettiar* (3). Were the question still open to argument, I should myself be inclined to adopt the view of Bittleston, J., in *De Souza* v. *Coles*, (1) that this is "impossible to prescribe any limits to the right of appeal founded on the nature of the order or decree appealed against." The word "judgment" in section 15 of the Letters Patent includes decrees and orders. Judgment is defined in Halsbury as "any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court." In the Civil Procedure Code, an order is described as the formal expression of any decision of a Civil Court which is not a decree. This description is wide enough to cover all decisions of any kind *inter partes* and so the Code has provided that only certain orders can be appealed against.

The word 'judgment' as employed in section 15 of the Letters Patent is a very general term. The Statute does not define it or limit its operation in any way. I venture to doubt whether we are entitled to define it or limit its operation by judicial interpretation. What has been achieved by that process is an *a priori* classification of interlocutory orders into interlocutory orders proper and interlocutory orders which amount to judgments. I think that all orders passed after contest *inter partes* are judgments within the meaning of section 15 of the Letters Patent and that, if it be desired to limit the right of appeal against certain orders, the proper method of achieving that end is by providing, as has been done in the Civil Procedure Code, that only certain orders can be appealed against.

I agree with my learned brother that the fact that part of the decree is declaratory is no bar to stay of execution being granted. I understand that the parties are willing to accept a stay on the terms indicated. I, therefore, concur in the order of my learned brother.

V. N. V.
S. D.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 187 OF 1923.

February 28, 1924.

Present:—Mr. Prideaux, A. J. C.

Lala KALICHARAN LAL AND OTHERS—DEFENDANTS—APPLICANTS
versus
SHIVSHANKAR SAHAI—PLAINTIFF—NON-APPLICANT.

Court-Fees Act (VII of 1870), s. 7 (IV) (c)—Declaration with consequential relief, suit for—Valuation, mode of—Court-fee payable.

Where a plaintiff sues for a declaratory decree and asks for consequential relief, the valuation of the suit by him under section 7 (IV) (c) of the Court-Fees Act, must not be arbitrary but must accord with the value of the subject-matter of the suit, and in case of dispute, must be determined by the Court [p. 115, col. 1.]

Case-law dismissed.

Revision against the order, dated the 27th June 1923, of Additional District Judge, Bilaspur, in Miscellaneous Appeal No. 18 of 1922.

KALICHARAN LAL *v.* SHIVSHANKAR SAHAI

Mr. *J. Sen*, for the Applicant.

Mr. *M. R. Bobde*, for the non-Applicant.

ORDER.—Plaintiff in this case sues for a declaration that the deed of gift dated 8th February 1922 does not affect his eight-annas proprietary rights if Karan Kapa and sixteen-annas of Barampur in the Mungeli *Tahsil*, and prays that the deed dated 8th February 1922 be cancelled and costs be awarded. Paragraph 20 of the plaint runs :—

> " That the value of the suit for Court-fees and jurisdiction is Rs. 2,000, that is to say, Rs. 130 for declaration and Rs. 1,870 for cancellation, total Rs. 2,000 on which Court-fee of Rs. 125 is paid."

The plea was raised that the plaint was not sufficiently stamped, and as the Court in which the plaint had been filed only heard cases of Rs. 2,000 in value, the Court was incompetent to try the suit. The defendants contended that the value of the property was Rs. 7,000. Plaintiff stated that the value of the property is over Rs. 2,000, but how much over he could not state.

The first Court framed the following preliminary issue :—

> " Is the suit within jurisdiction and is the plaint properly stamped ? "

It came to the conclusion that the plaint was not properly stamped and that the suit was not within its jurisdiction. On appeal the Additional District Judge, Bilaspur, held that in these cases falling under section 7, clause, (IV)(*c*), of the Court-Fees Act, the has no power to question the valuation placed by the plaintiff in his plaint.

The question is not free from difficulty, for there are conflicting rulings on the point. For the applicants it is argued that in these cases it is open to the Court, if a question is raised as to the truth of the valuation, to determine this question, and it is not only within the power of the Court but also it is its duty to take action under O. VII, r. 11, Civil Procedure Code, if it is established that the valuation is not proper. *Umatul Batul* v. *Nanji Kuar* (1), a case in which authorities are referred to at some length, is quoted in support of this proposition. Other cases relied on by the applicants are *Raj Krishna Dey* v. *Bipin Behari Dey* (2) and *Harihar Prasad Singh* v. *Shyam Lal Singh* (3). Also other cases upon which reliance is placed are *Boidya Nath Adya* v. *Makhan Lal Adya* (4), *Jageshara* v. *Durga Prasad Singh* (5), *Brij Krishna Das* v. *Murli Rai* (6), *Shama Pershad Sahi* v. *Sheopersan Singh* (7), *Krishna Das Laha* v. *Hari Charan Banerji* (8), *Ramshekhar Prasad Singh* v. *Sheonandan Dubey* (9), and the local case of *Devidas* v. *Ramlal* (10). In the last case it was distinctly held that a plaintiff cannot be allowed to state a lower and arbitrary value for the purposes of jurisdiction.

On the other hand, the Bombay and Madras High Courts hold a contrary view. In *Sunderbai* v. *Collector of Belgaum* (11), there appears in the judgment of their Lordships of the Privy Council the following :—

> " On objection taken on behalf of the defendants, the High Court on March 11, 1912, rightly decided that the appeal lay to the Court of the District Judge of Belgaum and not to the High Court, and affirmed a principle, which had been previously applied by the High Court at Bombay, that ' where a plaintiff sues for a declaratory decree and asks for consequential relief, and puts his own valuation upon that consequential relief, then for the purposes of Court-fee, and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both."

But that question itself does not appear to have been before their Lordships, and no specific finding on the correctness of the principle referred to is to be found in the judgment of the case.

(1) 6 C. L. J. 427 ; 11 C. W. N. 705.

(2) 17 Ind. Cas. 162; 40 C. 245 ; 16 C. L. J. 194; 17 C. W. N. 591.
(3) 21 Ind. Cas. 404; 615.
(4) 17 C. 680; 8 Ind. Dec. (N. S.) 994.
(5) 24 Ind. Cas. 679; 36 A. 500 ; 12 A. L. J. 844.
(6) 56 Ind. Cas. 316; 4 P. L. J. 703.
(7) 41 Ind. Cas. 95; 5 P. L. J. 394; 2 P. L. J. 173.
(8) 10 Ind. Cas. 865 ; 14 C. L. J. 47 ; 15 C. W. N. 823.
(9) 68 Ind. Cas. 316 ; 2 Pat. 198 ; (1922) Pat. 337.
(10) 13 Ind. Cas. 864 ; 7 N. L. R. 190.
(11) 52 Ind. Cas. 897 ; 46 I. A. 15 ; 23 C. W. N. 753 ; (1919) M. W. N. 254 ; 43 B. 376 ; 21 Bom. L. R. 148.

In *Sardarsingji* v. *Ganpatsingji* (12) it was held by the Bombay High Court that a plaintiff in a suit like the present had a right to put his own valuation of the relief sought. In *Balkrishna Narayan* v. *Jankibai* (13) the learned Judges write that there can be no doubt that it is open to plaintiff to put his own valuation on the claim for the purposes of Court-fees under section 7, clause (IV), (c). The Madras High Court on this question agrees with that of Bombay : see *Arunachalam Chetty* v. *Rangaswami Pillai* (14), *Chinnammal* v. *Madarsa Rowther* (15), *Samiya Mavali* v. *Minammal* (16) and *Chelasami Ramiah* v. *Chelasami Ramasami* (17).

It seems to me that, following the case in *Devidas* v. *Ramlal* (10), I must hold that for the purposes of Court-fees, the valuation put by the plaintiff in a suit under section 7, clause (IV), (c), is not to be an arbitrary valuation, but is to accord with the value of the subject-matter of the suit, and, in case of dispute, is to be determined by the Court. To hold otherwise is to allow the plaintiff in the suit to choose his own forum. It cannot have been the intention of the Legislature that this should be the case, or that the presiding Judge was not to see that the Government revenue was adequately protected.

The next question is: What is the value of the property with reference to which the declaration is sought. The deed of gift states: That Rs. 7,000 is the value of the property. The plaintiff, while admitting that it is over Rs. 2,000, pretends that he did not know what the right value is. For the purposes of the suit, the value will be taken to be Rs. 7,000.

Disagreeing with the lower Appellate Court and agreeing with the Court of first instance, I set aside the order and decree of the Additional District Judge, and restore that of the Subordinate Judge. The non-applicant here will pay his own and the applicants' costs. I fix Rs. 25 as pleader's fees.

Z. K. *Order set aside.*

(12) 17 B. 56 ; 9 Ind. Dec. (N.S.) 38.
(13) 56 Ind. Cas. 340 ; 44 B. 38 ; 22 Bom. L. R. 289.
(14) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 151.
(15) 27 M. 480; 14 M. L. J. 343.
(16) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.
(17) 18 Ind. Cas. 363; 24 M. L. J. 223; 13 M. L. T. 88.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 697 OF 1919.

November 14, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

NATHAL—PLAINTIFF—APPELLANT
versus.
Musammat DHAN KAUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Succession to adopted son—Daughter of adopted son, whether takes in preference to collaterals of adoptor.

The adoption of a son or the appointment of an heir under the Customary Law of the Punjab is usually intended to make provision for succession to the adoptive father's property after his death, and does not operate as a gift of the property in favour of the adopted son.

In each case a deed of adoption must be construed according to "its language and in the light of attendant circumstances and no hard and fast rule can be laid down on the subject. In some cases a deed of adoption may well be construed as a deed of gift while in others a gift *inter vivos* may not be contemplated, and the adoptive father's intention may simply be confined to the appointment of the adopted son as his heir, who would, as such heir, succeed to his property after his death.

Sant Singh v. *Saddu*, 14 Ind. Cas. 23 ; 63 P. R. 1912 ; 222 P. W. R. 1912, followed.

In the case of an appointment of an heir pure and simple, on the death of the appointed heir his male issue succeeds to the adoptive father's property and in default of such issue his widow takes his estate on the usual life-interest, and if he leaves no widow the property goes to the male collaterals of the appointor if the estate consists of property over which the latter had only a restricted power.

A female descendant of an appointed heir is in no better position than a female descendant of a natural son.

Second appeal from the decree of the District Judge, Ludhiana, dated the 30th November 1918, affirming that of the Junior Subordinate Judge, Ludhiana, dated the 31st July 1918, dismissing the claim with costs.

Lala *Badri Das*, R. B. for Lala *Fakir Chand*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

NATHAL *v.* DHAN KAUR

JUDGMENT.—The pedigree table of the parties to the suit out of which the present Second Appeal arises will be found in the judgment of the learned District Judge at page 6 of the printed paper-book. Plaintiff and his brother Bhana and the widow and daughter of Gajjan are entered in the revenue papers as co-sharers in a joint holding. *Musammat* Dhan Kaur and *Musammat* Har Kaur having got partition of their shares from the Revenue authorities, the plaintiff brought the suit for a declaration that they were not entitled to partition but only to maintenance. Charta was the adopted son of Saddu, and the Courts below have held that *Musammat* Har Kaur is an heir to the exclusion of the plaintiff and his brother and that, therefore, the plaintiff has no *locus standi* to bring the suit. The Trial Court further held that the plaintiff had forfeited his right to object to the partition by his own conduct.

Plaintiff has filed a Second Appeal to this Court. The *ratio decidendi* of the leared District Judge's decision is that the adoption of Charta is equivalent to a gift in his favour by his adoptive father. He, therefore, cited *Gurdit Singh* v. *Prem* (1) *Lachhman* v. *Bhagwan Sahai* (2) and *Tani* v. *Tara Chand Kuer* (3) as authorities for the proposition that *Musammat* Har Kaur, the direct descendant of Charta, is an heir in preference to the collaterals of Saddu who appointed Charta his heir. In our opinion, there is no authority for the proposition that adoption in such cases is equivalent to a gift. The adoption of a son or the appointment of an heir under the Customary Law of the Punjab is usually intended to make provision for succession to the adoptive father's property after his death. In some cases no doubt the adoptive father makes a gift of his property at the same time to the appointed heir but this is not always the case. This was pointed out in *Sant Singh* v. *Saldu* (4), where at page 237 the learned Judges say :—" It is " clear that in each case a deed of adoption " must be construed according to its language " and in the light of attendant circumstances " and no hard and fast rule can be laid down " on the subject. In some cases a deed of adop- " tion may well be construed as a deed of gift " while in others a gift *inter vivos* may not be " contemplated, and the adoptive father's " intention may simply be confined to the " appointment of the adopted son as his heir, " who would, as such heir, succeed to his " property after his death." In the present case there is no suggestion that Saddu made a gift to Charta in his life-time and we fail to see how his appointment of Charta as an heir can be considered as a gift of his property to the latter. We may also point out an instance where an adoption would not have the same effect as a gift. Suppose after the appointment of an heir the appointor begets a son who survives him that son will inherit equally with the appointed heir who would only get half the property left by the appointor ; while in the case of a gift he would get the whole of the property at once.

We see no reason for holding that the daughter or the grand-daughter of an appointed heir would be in a better position than the daughter or the graund-daughter of a natural son. Ordinarily, a daughter is excluded by near collaterals. Articles 54 and 55 of Rattigan's Digest of Customary Law lay down that on the death of an appointed heir his male issue succeeds, and in default of such issue his widow takes his estate on the usual life-interest, and if he leaves no widow the property goes to the male collaterals of the appointor if the estate consists of property over which the latter had only a restricted power. In the present case the property was ancestral property and the appointor had only a restricted power to alienate it. And, therefore, Gajjan's male collaterals are superior heirs to his daughters.

The other points that had arisen in the case have not been disposed of by the learned District Judge. We, therefore, accept the appeal, and, setting aside his order and decree, remand the appeal for re-decision. Stamp in this Court will be refunded and other costs will be in the cause.

Z. K. *Case remanded.*

(1) 3 Ind. Cas. 604 ; 84 P. R. 1909 ; 76 P. L. R. 1909 ; 118 P. W. R. 1909.

(2) 10 Ind. Cas. 277 ; 68 P. R. 1911 ; 160 P. L. R. 1911; 208 P. W. R. 1911.

(3) 47 Ind. Cas. 373 ; 82 P. R. 1918 ; 160 P. W. R. 1918 ; 109 P. L R. 1918.

(4) 14 Ind. Cas 28 ; 63 P. R. 1912 ; 222 P. W. R. 1912.

KASTURI *v.* BALIRAM

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 522 OF 1922.

December 19, 1923.

Present:—Mr. Baker, J. C.

Mt. KASTURI—DEFENDANT—APPELLANT

versus

BALIRAM AND DEOKISAN—PLAINTIFFS—RESPONDENTS.

Adverse possession—Possession taken under void transfer, nature of—Limited interest whether can be acquired—Transfer, power of, restriction on, effect of—Sale in execution, whether restrained.

Where an intended conveyance is void from the commencement, for whatever cause, but possession is taken by the transferee under the intended conveyance, such possession is adverse to the transferror and ripens into a good title after the expiry of the statutory period. [P. 118, Col. 2]

Narasingdas **v.** *Ratanlal*, **34 Ind. Cas. 471 ; 12 N. L. R. 75 at p. 79, distinguished.**

Magdalen Hospital **v.** *Alfred Knotts*, **4 A. C. 324 ; 48 L. J. Ch. 579 ; 40 L. T. 446 ; 27 W. R. 602 ; *Adem Umar Sale* v. *Bapu Bawaji*, 1 Ind. Cas. 663; 33 B. 116 ; 10 Bom. L. R. 1128 ; *Thakore Fatehsingji Dipsangji* v. *Bamanji Ardeshar Dalal*, 27 B 515 ; 5 Bom. L. R. 274 ; *Bonamali Roy* v. *Jagat Chundra* 32 C. 669 ; 1 C. L. J. 319 ; 9 C. W. N. 673 ; 15 M. L. J. 267 ; 2 A. L. J. 794 ; 32 I. A. 80 ; 8 Sar. P. C. J. 784 (P. C.) *Varada Pillai* v. *Jeevarathnammal*, 53 Ind. Cas. 901 ; 43 M. 244 ; (1919) M. W. N. 724 ; 10 L.W. 679 ; 24 C. W. N. 346 ; 38 M. L. J. 313 ; 18 A. L. J. 274 ; U. P. L. R. (P. C) 64 ; 22 Bom. L. R. 444 ; 46 I. A. 285 (P.C.), relied on.**

Defendant purported to make a gift of certain property in favour of her daughter, but no registered instrument was executed. Mutation of names was, however, effected by the donor and assented to by the donee, who went into possession and remained in possession for over twelve years ;

Held, **that the donee had acquired a title to the property by adverse possession.** [P. 119, Col. 2]

There can be adverse possession of a limited interest in property as well of the full title as owner. [P. 119, Col. 2]

Thakore Fatehsingji Dipsangji **v.** *Bamanji Ardeshar Dabal*, **27 B. 515 ; 5 Bom L. R. 274, relied on.**

A general restriction against assignment placed on the powers of an owner does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. [P. 120, Col. 1]

Tamaya v. *Timapa Gampaya*, 7 B. 262; 4 Ind Dec. (N.S.) 177; *Golak Nath Roy Chowdhry* v. *Mathura Nath Roy Chowdhry*, 20 C. 273 ; 10 Ind. Dec. (N.S.) 185; *Promode Narain Ghosh* v. *Aswini Kumar Nag*, 26 Ind. Cas. 23; 18 C. W. N. 1138, relied on.

Diwali v *Apaji Ganesh*, 10 B. 342 ; 5 Ind. Dec. (N S.) 615, distinguished.

Appeal against the decree of the District Judge, Hoshangabad, in Civil Suit No. 72 of 1922 dated the 23rd August 1922.

Mr. *M. Gupta*, for the Appellant.

Messrs. *P. C. Dutt* and *J. Sen*, for the Respondents.

JUDGMENT.—This case raises several difficult points of law. The facts are that the defendant, *Mt.* Kasturi, a Hindu widow, owned two entire villages of Kalmesra and Barangi. She had three daughters, of whom one *Mt.* Bhoga was the eldest. She was married to one Devisingh. *Mt.* Kasturi was anxious that her son-in-law should live with her and manage her property, and in order to induce him to do so she orally gifted 5-annas 4-pies share of *mauza* Kalmesra to her daughter *Mt.* Bhoga in 1905 and applied in 1906 to the Revenue authorities to have the share mutated in the name of the donee. This was done, and since then *Mt.* Bhoga has been in possession of the share and resided in the village with her husband. She and her husband incurred debts, for which the plaintiffs obtained a decree ; they endeavoured to attach her share in the village but this was resisted by *Mt.* Kasturi in whose favour an order was passed, and the plaintiffs bring the present suit for a declaration that the 5-annas 4-pies share in Kalmesra is liable to be attached and sold in execution of their decree.

The defendant replied that no such gift was made : that *Mt.* Bhoga was never in fact in possession of the share ; that she merely wished to make it appear that her daughter had a share in the village : that her son-in-law and his wife only occasinally visited her, and that she was in possession. She got a deed of relinquishment of any rights *Mt.* Bhoga may have had in the property on 6th December 1919.

KASTURI *v.* BALIRAM

The first Court, Subordinate Judge of Hoshangabad, found that there was no deed of gift but that Bhoga had been in possession of the share till the end of 1919 and thus acquired a title by adverse possession, and the share was, therefore, liable to attachment in execution of the plaintiff's decree.

On appeal the judgment was confirmed by the District Judge, Hoshangabad, on the ground that as *Mt.* Bhoga's title was based on possession for over 12 years and not on any valid deed of gift, her title to the property was unrestricted and was not affected by any intention on the part of *Mt.* Kasturi that the share should not be alienable.

The defendant makes this second appeal.

It is contended that the possession of Bhoga is not proved, that her possession was not adverse to the defendant, and that, even if adverse, it only conferred a title which could not be transferred in execution of a decree.

So far as the question of possession is concerned, I am of opinion that it is a question of fact which cannot be reopened in second appeal. Both the Courts below have found that there was transfer of possession of one-third share of the village by *Mt.* Kasturi to *Mt.* Bhoga and that Devisinhg remained in possession of the village, two thirds of it on behalf of his mother-in-law (the defendant) and one-third on behalf of his wife. It must be held, therefore, that the possession of Bhoga of the one-third share has continued from 1906 to 1919, in which year she passed a deed of transfer to her mother, this deed being found by the lower Court to be collusive in order to avoid the attachment of her share for her debts.

Admittedly, no deed of gift was executed, as is required by the Transfer of Property Act, and, therefore, the title of Bhoga cannot be based on the gift. The question in this case really depends on whether Kasturi could herself have recovered the share of the village from her daughter.

It is contended on behalf of the appellant that as there is no valid gift, possession must be permissive, not being taken against her monther's will or behind her back. There can be no question of adverse possession and reference is made to *Narsingdas* v. *Ratanlal* (1), which lays down that where the transfer is void, for want of writing or registration, the license remains a mere license and is revocable. That, however, is a case of a lease.

It is contended that the mutation of names does not confer any title. There is no evidence that Bhoga ever exercised any possession adverse to her mother. The village was managed by Devisingh and, unless he appropriated part of profits to his wife, there can be no adverse possession. The question is of some difficulty, but I am of opinion that the view of the lower Appellate Court that Bhoga has acquired a title by prescription is correct. In this case the alienation was void because no deed of gift was executed as required by law. The law is that where the intended conveyance is void from the commencement and for whatever cause, and possession is taken on the intended conveyance, the possession is adverse and after twelve years ripens into a good title. This has been held by the House of Lords in the President and Governors of the *Magdalen Hospital* v. *Alfred Knotts* (2). In that case a lease was executed which was void under the provisions of the Statute 13 Eliz. c. 10.

In *Adam Umar Sale* v. *Bapu Bawaji* (3), it was held that possession acquired under an alienation made in contravention of section 3, of Bombay Act, V of 1862, can become adverse so as to bar a suit for recovery by the individual alienor or his representative in interest. It was held in that case that the possession obtained by the defendant's predecessor was possession obtained through a transaction which the law both prohibits and declares to be null and void, and that such possession would be adverse to the rightful owner. It is just such possession as this, that is, possession originating without colour of title, which is contemplated by the Law of Limitation. This case follows the House of Lords' case quoted above.

There are a large number of cases on this point : cf. *Thakore Fatesingji* v. *Bamanji*

(1) 34 Ind. Cas. 471 : 12 N. L. R. 75 at p. 79.
(2) 4 A. C. 324 ; 48 L. J. Ch. 579 ; 40 L. T. 446 ; 27 W. R. 602.
(3) 1 Ind. Cas. 663 ; 33 B. 116 ; 10 Bom. L. R. 1128.

KASTURI *v.* BALIRAM

Ardeshir (4), *Banomali Roy* v. *Jagat Chandra* (5), and *Varada* v. *Jeevaratnammal* (6). This last case is some what similar to the present case. The registered owners of the two moieties in the estate presented to the Collector a petition, which, after receiting that they had on 8th October given the two villages of which the consisted, to D, who was the niece of one of them, prayed that an order be made for transfer of the villages. On the same date D presented a similar petition, reciting the gift of the village to her and asked for the transfer of them to her on the register, and they were thereupon registered in her name and she retainted possession until her death after which the estate descended to the respondent as her successor. It was held that the gift was invalid as not being made by a registered deed as required by section 123 of the Transfer of Property Act; that the recitals in the petitions could not be used as evidence of a gift, but might be referred to as explaining the nature and character of the possession thenceforth held by D; and that the evidence proved that she in fact took possession of the *mitta* in her own right when it was transferred into her name, and retained such possession till her death, when the plaintiffs' claim was barred by more than 12 years' adverse possession. It was held, therefore, that during the life of R the possession of D was adverse to both the co owners R and A, and so on.

The facts of this case are very similar to the present one. In this case also we have a gift, which was not made by a registered instrument. We have the mutation of names effected by the donor and assented to by the donee, and we have evidence that the donee was in possession. In the Privy Council it was contended that, assuming B was in actual possession of the land, she held such possession not in her own right but as trustee and co-owner on behalf of her mother and aunt. But the Privy Council held that the possession of D was adverse as against both co-owners, her mother and aunt; and, on the authority of the decision, I hold that the possession of Bhoga has become adverse to her mother and she has, therefore, acquired title by prescription.

The next point taken is that by her statement in the mutation proceedings Bhoga has admitted that she had no right to alienate the property and, therefore, it is not liable to be attached in execution of the plaintiff's decree. The learned Council for the appellant has relied on *Ramchandra Venkaji* v. *Kallo Devji* (7), in which it was held that the mortgagee who had been in possession for more than 12 years since the death of the original mortgagor, could not acquire by adverse possession an absolute title unless there was some definite indication on his part that he on a certain date would claim as absolute owner and not as mortgagee. He also relies on *Annasami Pillay* v. *Ramakrishna Mudaliar* (8), and *Sheolal* v. *Sheorajia*, (9). It was held in *Thakore Fatesingji* v. *Bamanji Ardeshir* (4), that it is well established that there can be adverse possession of a limited interest in property as well as of the full title as owner. As it appeared that the defendant in that case agreed to go into possession under rules which would give him a permanent tenancy and that he had, ever since he went into possession, claimed to be in as permanant tenant, he had, therefore, been in adverse possession as a permanent tenant.

The question, however, is whether third parties would be bound by this. In this connection I may refer to the case of *Tamaya* v. *Timapa* (10). In that case, a lease was granted, containing a clause against alienation by the lessee. It was held that the restriction against alienation was valid, but went no further than to prohibit alienation by the act of the parties themselves and had no application to the case of an alienation by act of law, as by attachment and sale in execution of a decree. The present is not a case in which *Mt.* Bhoga has herself mortgaged, sold, or otherwise transferred her 5-annas 4-pies share of the village. She has incurred debts from a third party who has

(4) 27 B. 515 ; 5 Bom, L. R. 270.
(5) 32 C. 669 ; 1 C. L. J. 319 ; 9 C. W. N. 679 ; 15 M. L. J. 267 ; 2 A. L. J. 794 ; 32 I. A. 80 ; 8 Sar. P. C. J. 784 (P. C.)
(6) 53 Ind. Cas. 901 ; 43 M. 244 ; (1519) M. W. N. 724 ; 10 L. W. 579 ; 24 C. W .N. 346 ; 38 M. L. J. 313 ; 18 A. L. J. 274 ; 24 P. L. R. (P. C.) 64 ; 22 Bom. L. R. 444 ; 46 I. A. 285 ; (P. C.)
(7) 30 Ind. Cas. 396; 39 B. 587; 17 Bom. L.R. 630
(8) 24 M 219 ; 11 M. L. T. 1.
(9) 23 Ind. Cas. 719 ; 10 N. L. R. 35.
(10) 7 B. 262 ; 4 Ind. Dec. (N. S.) 17.

obtained a decree against her, and any covenant between her and the donor (her mother) restricting alienation will not, in my opinion, bind third parties. The present is a case of alienation *in invitum*, and the proposed alienation is by act of law and not by act of the donee. It is clear law in India that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. The Bombay case referred to above has been followed in *Golak Nath Roy* v. *Mathura Nath Roy* (11). It follows, therefore, that Bhoga has acquired the title by prescription against the present defendant (her mother) and the restriction against alienation can only prevent alienation by Bhoga herself and has no application to an alienation by operation of law taking effect *in invitum*, such as a sale in execution.

The decision in *Diwali* v. *Apaji Ganesh* (12), might perhaps lead to a contrary conclusion, but their Lordships of the Calcutta High Court in *Golak Nath Roy* v. *Mathura Nath Roy* (11), quoted above, have held that the decision in that case turned on the very special nature of the limited usufructuary interest there in question. This case has been followed in *Promade Narain Ghosh* v. *Aswini Kumar Nag* (13), which proceeded on the view that there was no covenant against an involuntary alienation and that where land had been sold against the will of the lessee by the act of a Court, the lessee could not be said to have voluntarily transferred his interest and thereby committed breach of a covenant not as assign.

I am, therefore, of opinion that the judgment of the lower Appellate Court is correct and that the property is liable to attachment and sale in execution of the plaintiffs' decree. The appeal consequently fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(11) 20 C. 273 ; 10 Ind. Dec. (N. S.) 185.
(12) 10 B. 342 ; 5 Ind. Dec. (N. S.) 715.
(13) 26 Ind. Cas. 23 ; 18 C. W. N. 118.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 659 OF 1920.

December 4, 1923.

Present :—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

TAFAZZAL BEG *alias* BADSHAH MIRZA—DEFENDANT—APPELLANT

versus

MAJID ULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Wakf—Wakif, *whether can be* mutwa lli—Wakf *property in possession of* wakif *as* mutwalli, *effect of*—*Income, major portion of, devoted to purposes of* wakf—Wakf, *whether illusory*—*Dedication to mosque, whether public wakf*—*Civil Procedure Code* (*Act V of* 1908) *s.* 92, *applicability of.*

Under the Hanafi Law a *wakif* can appoint himself the *mutwalli* of the *wakf* created by him. [p. 122, col. 2].

Where a *wakif* appoints himself the *mutwalli* of the *wakf* and remains in possession of the *wakf* property as such *mutwalli* and carries out the objects of the *waqf*, the *wakf* is validly constituted.

Muhammad Aziz-ud-Din Ahmad Khan v. *The Legal Remembrancer to Government*, N. W. P. and Oudh, 15 A. 321 ; A. W. N. (1893) 109 ; 7 Ind. Dec. (N. S.) 922, distinguished.

Where the major portion of the income of the *wakf* property is directed to be devoted to the purposes of the *wakf*, cannot be described as illusory. [p. 123, col. 1]

Pathukutti v. *Avathalakutti*, 18 M. 66 ; 4 Ind. Dec. (N. S.) 756, distinguished.

A dedication in favour of a mosque is a public *wakf*, and falls within the purview of section 92 of the Civil Procedure Code. [p. 123, col. 2]

Mahomed Ismail Ariff v. *Hajee Ahmed Moolla Dawood*, 35 Ind. Cas. 30 ; 43 C. 1085 ; 14 A. L. J. 741 ; (1916) 1 M. W. N. 460 ; 20 C. W. N. 1118 ; 20 M. L. T. 110 ; 18 Bom. L. R. 611 ; 31 M. L. J. 290 ; 24 C. L. J. 198 ; 4 L. W. 269 ; 9 Bur. L. T. 141 ; 8 L. B. R. 517 ; 43 I. A. 127 (P. C.), followed.

First appeal from the decree of the District Judge, Delhi, dated the 21st January 1920, decreeing the plaintiffs' claim.

Mr. *B. D. Kureshi*, for the Appellant.

Lala *Tirath Ram*, for the Respondents.

TAFAZZAL BEG *v.* MAJID ULLAH

JUDGMENT.—This was a suit brought under section 92 of the Civil Procedure Code by three members of the Muhammadan community of the City of Delhi for the removal of the present *mutwalli* of a public *wakf*; for the appointment of a new *mutwalli*; for accounts from the present *mutwalli* and, generally, for the settling of a scheme for the management of the trust. One Kadir Bakhsh, a resident of Delhi, Kashmiri Gate, made a *wakf* of certain house property for the support and maintenance of a mosque. He appointed himself the first *mutwalli* for his life and after his death he appointed Badshah Mirza, *alias* Tafazzal Beg, his great-grand-son, under the guardianship of his grand-mother *Musammat* Ashraf-ul-Nisa, as the boy was a minor. He also appointed 6 *naib mutwallis* to assist the *mutwalli* in the management and upkeep of the mosque. The dedicated house property yielded an income of Rs. 22-4-0 per month. Out of this Rs. 2 *per mensem* were provided under the deed to be paid to *Musammat* Barkat-ul-Nisa, daughter-in-law of the *wakif*, for her life. The rest of the income was directed to be utilised for the following purposes :—

(*a*) Remuneration of one of the six *mutwallis* who would undertake to collect the rents.

(*b*) Purchase of matting for the mosque.

(*c*) Providing *dols* (buckets), rope, etc., for the mosque and well, earthen pots and fuel.

(*d*) Appoinment of a *hafiz* to teach the Quran.

(*e*) Appoinment of a *moazzan*.

(*f*) Feeding the poor during the Ashra Muharram ; and

(*g*) If any balance remained in the hands of the *mutwalli* after remunerating himself it was to be utilised for the purchase of property to be added to the endowed property.

Kadir Bakhsh acted as the first *mutwalli* and utilised the income for the objects mentioned in the deed. After his death the properties came under the management of the *mutwalli* and his assistants ; but it is stated iu the plaint that they did not manage the *wakf* as directed in the *wakfnama* by the *wakif*. It is further stated in the plaint that after the death of the *naib mutwallis* Badshah Mirza alone continued to realise the rents, but he did not spend a single farthing on the mosque and in connection with the management of the mosque and in carrying out other instructions contained in the *wakfnama*, but that he had all along been spending the entire money for private purposes. The plaintiffs called upon him to render accounts of the income of the endowed property but he refused to do so. Thereupon, the plaintiffs made an application under section 92 of the Civil Procedure Code to the Deputy Commissioner for sanction to institute a suit against the *mutwalli*. Such permission having been granted a suit was instituted on the 23rd of July 1919 but owing to non-payment of process-fee it was dismissed on the 21st of August 1919 with permission to bring a fresh suit. Hence this suit was filed on the 30th of August 1919.

The defendant Tafazzal Beg resisted the suit and put forward some contradictory pleas. In paragraph 1 of the written statement he totally denied the *wakf* of the property in favour of the mosque. In paragraph 3 he, however, alleged that the income of the *wakf* was not misappropriated but that he had been discharging his duties very honestly and in good faith. In paragraph 1 of the additional pleas he denied the public character of the *wakf* and alleged that it was not enforceable under the Muhammadan Law owing to its being uncertain and vague. In paragraph 2 he further attacked the *wakf* on the ground of its being illusory because only a very small amount of the income was provided to be spent on the mosque. Section 92 of the Civil Procedure Code was alleged to be inapplicable owing to the private character of the *wakf*. In paragraphs 5 and 6 of the written statement he, however, admitted that he had been appointed the permanent *mutwalli* by the *wakif* on account of his near relationship and in paragraph 7, he pleaded that the property was managed properly and that there was nothing to justify the institution of the suit. The statement of the defendant was taken on oath before the framing of the issues in which he completely admitted the existence of the *wakf* but denied its public character. The substance

of that statement is to be found in the following passage :—

"The property is not mine, it is *wakf* but not a public *wakf*. The deed provides for certain expenditure connected with the mosque. This is not a public matter. I now spend money according to the *wakfnama* or rather more upon the mosque."

Of the assistant *mutwallis* only Muhammad Ishak has survived. He has been examined on behalf of the plaintiffs in the case as a witness. The significant passage is to be found in his deposition :—

"I am a *Naib Mutwalli*. Four other *mutwallis* are dead. I worked as *mutwalli* until about 12 years ago. The mosque had an income of Rs. 24 *per mensem* then. About Rs. 15 or 16 *per mensem* was spent on the mosque. We saved enough money to buy two shops and a *kotha* with balcony for Rs. 600 and added them to the mosque."

As to the present condition of the mosque he stated that the walls were broken down ; that the mosque was badly in need of repair ; that the property bought was in need of repair ; and that *Musammat* Ashraf-ul-Nisa herself had complained of the conduct of the defendant. In addition to this witness there were other witnesses called to prove the mismanagement of the affairs of the *wakf* by the *mutwalli*. The Court found against the defendant on all the points urged by him. It, however, refused to remove him from *towaliat* for the present. The gist of the findings of the Court below is contained in the following passage to be found in the judgment :—

"My conclusions are that this is a public trust of a religious nature, that the property described in the deed is wholly devoted to the trust with the exception of Rs. 2 *per mensem* ; that the trust is explicit and not so vague as to be incapable of execution ; that its instructions can readily be understood and followed by the *mutwalli* ; that the *mutwalli* is bound to account for the whole of the income when called upon by an interested person ; that the defendant has not faithfully executed the trust in the past, and that plaintiffs are entitled to ask for accounts."

The Court directed the defendant to hand over the accounts of the income from the *wakf* property and expenditure on the mosque and connected with it from the date he took over the trust to the plaintiffs within one month, and the plaintiffs were directed to submit a scheme within two months for the future management of the *wakf*. The Court further laid down that Muhammad Ishak would act assistant *mutwalli* along with two other assistant *mutwallis* to be appointed hereafter. Against the decision of the Court below the present appeal has been preferred and Mr. B. D. Kureshi has appeared on behalf of the defendant. The first argument put forward by him is that, as the *wakif* remained in possession of the *wakf* property in spite of the execution of the document, the dedication never took effect and the property continued to be his private property. In support of this contention he has cited the case of *Muhammad Aziz-ud-Din Ahmad Khan* v. *The Legal Remembrancer to Government N. W. P. & Oudh* (1). That case has no manner of application to the facts of the present case. In that case the *wakf* was never acted upon and the *wakif* continued to retain possession until his death of the property dealt with by the deed. In the present case the *wakif* constituted himself the first *mutwalli* and retained the property in his possession as such. The evidence tendered in this case clearly shows that he acted upon the deed and carried out the objects of the *wakf* in his lifetime and that the subsequent *mutwalli* also carried out the objects of the *wakf*. According to the Hanafi Law a *wakif* can appoint himself the *mutwalli* of the *wakf* created by him, see Ameer Ali's Muhammadan Law, Volume I, IV Edition, page 441. The rule is thus stated there :—

"The *wakif* may lawfully reserve the *wilayet* (the management of the trust) for himself ; this is according to Abu Yusaf; and Hillal also has said the same. And the Sahib-ul-Hedaya (the author of the Hedaya) states this is the approved doctrine."

There is a slight difference of opinion between Abu Yusaf and Imam Muhammad, the two celebrated disciples of Imam Abu Hanifa,

(1) N. W. P. & Oudh 15 A. 321; A. W. N. (1893) 109; 7 Ind. Dec. (N.S.) 922.

with respect to the *towaliat* of the *wakif*. According to Imam Muhammad "a *wakif* will not be the trustee unless he has reserved the trusteeship for himself at the time of consecration; but according to Abu Yusaf consignment is not necessary in the case of the *wakif*, so even when he does not (expressly) reserve the trusteeship for himself, he will still be the trustee." In this case, however, the trustee has reserved the trusteeship for himself in the deed of *wakf*. Thus, according to both the Imams, the *wakif* was entitled to manage the *wakf* property as its *mutwalli*. The contention, therefore, has no force and must be overruled.

The next contention put forward before us by the learned Counsel is that, as only a small portion of the income of the *wakf* property has been directed to be utilised for the purposes of the mosque, the *wakf* must be treated as illusory and ineffectual. In support of this contention the learned Counsel has cited the case of *Pathukutti* v. *Avathalakutti* (2). The facts of the reported case clearly show that it was designed by the so-called creator of the *wakf* to keep the property for the aggrandizement of his family. In the present case, as already shown, with the exception of Rs. 2 *per mensem* directed to be given to *Musammat* Barkat-ul-Nisa, the entire income had been directed to be devoted to the purposes of the mosque. It is impossible to hold in this case that the *wakf* was an illusory one. The statement of the defendant himself clearly shows that the entire income had been spent on the mosque. The surviving assistant *mutwalli*, namely Muhammad Ishak, (P. W. (2, has also stated that after the death of the *wakif* he worked as *mutwalli* until about 12 years ago and that the major portion of the income derived from the dedicated property was spent on the mosque. The balance that remained in the hands of the *mutwallis* was utilised for the purpose of purchasing property to be added to the *wakf* property. There is other evidence also which shows that the *wakf* had been acted upon by Kadir Bakhsh, the first *mutwalli*, during his lifetime and afterwards by the *mutwalli* and the assistant *mutwallis*.

(2) 18 M. 66; 4 Ind. Dec. (N.S.) 756.

The argument that the dedication in favour of a mosque is a private *wakf* and not public is futile as no one ever alleged that the mosque was a private mosque and that the public had no right to congregate therein without special permission. The following remark of their Lordships of the Privy Council in the case of *Muhammad Ismail Ariff* v. *Ahmad Moolla Dawood* (3), to be found at page 1100 disposes of this plea:—

> " With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well known example, the *kazi's* discretion is very wide."

From this it is clear that the *wakf* in question comes within the rule laid down in section 92 of the Civil Procedure Code.

In our opinion the view taken by the learned District Judge is correct and no valid exception can be taken to the decree passed by him. We, therefore, affirm his decision, uphold his decree, and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(3) 35 Ind. Cas. 80; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 200; 21 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517; 43 I. A. 121 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 202 OF 1923.

February 16, 1924.

Present :—Mr. Kinkhede, A. J. C.

AYODHYAPRASAD—PLAINTIFF —APPLICANT
versus
THE SECRETARY OF STATE—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908) s. 115, O. IX, r. 2, O. XVII, rr. 2, 3, O. XLVIII, r. 1—Process-fees, date for payment of—Court, duty of to fix date—Default—Discretion of Court—Revision, interference in.

The Civil Procedure Code contemplates that the Court shall fix a time whithin which process-fees for

summoning a defendant shall be paid, and that the suit *may* be dismissed if payment is not made accordingly. There is, therefore, a duty cast on the Court to fix the time within which process-fees must be paid, and if default in payment of process-fees is due to the omission of the Court to fix a time for payment, the suit should not be dismissed for non-payment of process-fees.

The provisions of O. XVII of the Civil Procedure Code should be liberally construed, particularly as there is a latitude given to the Trial Court to make any such order as it thinks fit, in lieu of an order of dismissal.

There are cases in which justice requires interference in revision even when another remedy is open to the aggrieved party; much more is such interference necessary and justifiable when another remedy is barred

Revision against the order of the Additional District Judge, Jubbulpore in M. J. C. No. 55 of 1921, dated 22nd June 1923.

Mr. *G. L. Subhedar*, for the Plaintiff.

Mr. *G. P. Dick*, for the Defendant.

ORDER.—This Civil Revision arises out of a suit brought by the present applicant against the non-applicant for the recovery of Rs. 2,055-2-10. It was instituted on 18th November 1921 as an application for permission to sue *in forma pauperis*. The application was granted on 25th September 1922 and was ordered to be registered as a plaint in a suit. Defendant's written statement was filed on 3rd November 1922 with some documents. From time to time adjournments were granted to the defendant for producing other relevant documents, but there was no proper compliance with the orders of the Court. The case ultimately stood adjourned to 14th April 1923 for the same purpose. On that day, however, the suit was dismissed for want of prosecution, Mr. P. C. Bose, who appeared for the plaintiff all along, having intimated to the Court that he had no instructions for that day, although the plaintiff had sent a telegram to the Court stating his inability to attend and requesting for an adjournment. An application was subsequently made for restoring the case to file. Upon this petition the Court passed an order directing a notice to issue to the non-applicant and fixed the case for 22nd June 1923, but did not fix the time for payment of process-fee. On 22nd June 1923 the Court passed the following order :—

"Applicant with Mr. P. C. Bose. Process fee not paid. Petition dismissed for want of prosecution."

It is against this order that the present application for revision has been made. I think the application must succeed. As pointed out in *Sadanand* v. *Nathia* (1), the new Civil Procedure Code contemplates that the Court *shall* fix a time within which a process-fee for summons to a defendant *shall be* paid, and that the suit *may* be dismissed if payment is not made accordingly. In O. XLVIII, r. 1 (2), Civil Procedure Code, it is expressly laid down that the Court-fee chargeable for the service of any process issued under the Code shall be paid within the time to be *fixed* before the process is issued. It is thus clear that there is a duty cast on the Court to fix the time, but that the Court had failed to fix the time within which the Court-fee on account of process was to be paid. The result of this failure was that no process was issued for want of process-fee to the non-applicant. There is nothing to show that at the time when the application came on for hearing on 22nd June 1923 the plaintiff was questioned as to the cause which led to the default in payment of the process-fee, and I am, therefore, entitled to presume that the Court summarily rejected the application without any investigation. The Court ought to have called upon the plaintiff to explain the default, and if it thought that the default was such as could be condoned, it ought to have given the applicant an opportunity to pay *talbana* and ordered issue of fresh notice to the non-applicant.

It is contended before me with reference to the provisions of section 141 read with O. XVII, r. 1, Civil Procedure Code, that this was a fit case for excusing the default and for granting an adjournment for the hearing of the petition. That the Court could have done so is clear. The provisions of O. XVII should be liberally construed, particularly as there is latitude given to the Trial Court to make any such order as it thinks fit, in lieu of an order of dismissal. The plaintiff has filed an affidavit in my Court stating that he had paid Re. 1 to his pleader's clerk for issue of a process to the non-applicant. Had the Court below just

(1) 11 Ind. Cas. 906; 7 N. L. R. 114.

enquired about this, it would certainly have got the explanation then and there, and in all probability it would have given plaintiff a chance to pay the process-fee necessary for the issue of a fresh notice to the opposite party. In summarily rejecting the application I consider the Court below has taken an unduly restricted view of its authority to grant adjournments and to excuse defaults. Taking into consideration the magnitude of the claim, as also the fact that the suit had been dismissed in the presence of the defendant's pleader and consequently plaintiff's second suit was barred, the lower Court ought to have thought that this case was pre-eminently a fit case for granting an adjournment. It is contended before me on behalf of the non-applicant that I should not interfere under section 115 of the Civil Procedure Code. But, as observed in *Nilkant* v. *Kasubai* (2), there are cases in which justice requires interference in revision even where another remedy is open to the aggrieved party; much more so would interference be necessary and justifiable where another remedy is barred. I, therefore, overrule the contention and set aside the order dated 22nd July 1923 and direct that the application for restoring the suit to file be enquired into and disposed of according to law. I allow Counsel's fee Rs. 30 and direct that the non-applicant shall pay the costs of this revision to the applicant. Costs in the Court below will abide the result.

Z. K. *Order set aside.*

(2) 63 Ind. Cas. 46.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 957 OF 1923.

January 4, 1924.

Present:—Mr. Justice Moti Sagar.

BISHEN SINGH—PLAINTIFF—APPELLANT
versus
MAHINDAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2—Execution of decree—Adjustment not certified—Suit for declaration that decree has been satisfied, maintainability of.

A suit for a declaration that a decree has been satisfied and should not consequently be executed against the judgment-debtor is maintainable, and section 47 of the Civil Procedure Code does not operate as a bar to such a suit.

Jaman Ram v. *Kishen Ram*, 25 Ind. Cas. 642; 79 P. W. R. 1914; 234 P. L. R. 1914; 42 P. R. 1914, followed.

Although O. XXI, r. 2 of the Civil Procedure Code specifically enacts that an uncertified adjustment of a decree cannot be recognised by any Court executing the decree, it is implied that it may be recognised as such by a Court trying the matter as a regular suit.

Diwan Singh v. *Amir Singh*, 5 Ind. Cas. 814; 16 P. R. 1910; 18 P. W. R. 1910; 62 P. L. R. 1910, followed.

Second appeal from the decree of the District Judge, Amritsar, dated the 23rd January 1923, affirming that of the Munsif, 1st Class, Amritsar, dated the 30th June 1921 dismising the claim with costs.

Mr. *G. S. Salariya*, for the Appellant.

JUDGMENT.—The facts are fully stated in the judgments of the Courts below, and it is not necessary to repeat them here at length. Briefly stated, they are as follows:—

On the 4th of July 1919 one Mahindar Singh obtained a decree for Rs. 92-8-0 against one Bishen Das from the Court of Small Causes at Amritsar. The decree was put into execution, and a warrant for the arrest of the judgment-debtor was issued by the executing Court. It is alleged that on the 12th of May 1920 the judgment-debtor paid off the decretal amount, and obtained a receipt from the decree-holder. On the date fixed for the hearing of the application for execution of the decree the decree-holder was absent, and the application was accordingly consigned to the record-room. After the expiry of three months from this date the decree-holder again put in an application for execution. The judgment-debtor objected that the decree had been satisfied and that the decree-holder was not entitled to apply for execution. As the payment had not been certified under O. XXI, r. 2 of the Code of Civil Procedure, the executing Court

refused to recognise the payment and directed execution to issue. Thereupon the judgment-debtor brought this suit for a declaration that the decree had been adjusted, and for an injunction that the defendant-decree-holder should be restrained from executing the decree. The Trial Court dismissed the suit on the merits. On appeal the learned District Judge, without going into the mertits, held that the suit was not maintainable under section 47 of the Code of Civil Procedure, and that the question being one relating to execution could not be tried in a separate suit.

Against this decision the judgment-debtor has preferred a second appeal, and it has been urged on his behalf that the judgment of the Court below is opposed to the authorities of this Court, and that it must consequently be set aside. In my opinion this contention is well-founded and must prevail. It has been held in *Diwan Singh* v. *Amir Singh* (1) that "although section 258 of the Civil Procedure Code specifically enacts that an uncertified adjustment cannot be recognised as an adjustment of the decree by any Court executing the decree, it is implied that it may be recognised as such by Court trying the matter as a regular suit, and that a suit for a declaration that the decree had been satisfied is maintainable notwithstanding that its object is to restrain the decree-holder from executing the decree."

This judgment was followed in a later case reported as *Jaman Ram* v. *Kishen Ram*, (2) where it was held that a suit for a declaration that a decree had been satisfied and should not consequently be executed against the judgment-debtor was competent, and that section 47 of the Code of Civil Procedure did not operate as a bar to such a suit. Following these authorities, I hold that the suit was clearly maintainable and that the learned District Judge was wrong in holding otherwise.

I accordingly set aside the judgment of the learned District Judge and return the appeal for a decision on the merits. Stamp on appeal to be refunded and other costs to be costs in the cause.

Z. K. *Case remanded.*

(1) 5 Ind. Cas. 814 ; 16 P. R. 1910 ; 13 P. W. R. 1910 ; 62 P. L. R. 1910.

(2) 25 Ind. Cas. 642 ; 42 P. R. 1914 ; 79 P. W. R. 1914 ; 234 P. L. R. 1914

CALCUTTA HIGH COURT.

CIVIL RULE NO. 448 OF 1923.

February 1, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Page.

THE EAST INDIA RAILWAY COMPANY —PETITIONER

versus

JAGPAT SINGH—OPPOSITE-PARTY.

Railways Act (IX of 1890) s. 72, scope of—Risk Note, Form B—"Loss", meaning of—Onus of proving loss, onus on whom lies.

The object and effect of s. 72 of the Railways Act is to limit the liability of the Railway Companies during the transit of goods consigned to them for carriage and to substitute the obligations of a bailee for the obligations of an insurer of such goods. The section was enacted to confer a benefit upon Railway Companies and, except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred. [p. 128, col. 2.]

The object and effect of section 72 is not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to a Railway Company, but to lessen the burden of the obligation which, prior to the passing of section 72, had lain on Railway Companies as insurers of such goods. [p. 129, col. 2.]

The term "loss," as used in the Risk Note and in Chapter VII of the Railways Act, does not mean pecuniary or other loss suffered by the owner of goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit and such "loss" occurs whenever the Railway Company involuntarily or through inadvertence loses possession of the goods and, for the time being, is unable to trace them. The term "loss" denotes a fact, not a cause of action. [p. 130, col. 2.]

A valid cause of action against a Railway Company in India for damages for the non-delivery of goods consigned to it for carriage must be based either on contract or on tort, and must arise from the breach of some duty owed to the plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occurred may sometimes found, sometimes defeat, such a cause of action : but a cause of action for loss without more is not known to the law. Non-delivery of goods consigned to a Railway Company for conveyance may be due to the fact that the goods are being deliberately detained by the Railway Company or that they have been misdelivered to

THE EAST INDIAN RAILWAY CO. JAGPAT SINGH

some person other than the consignee, or that they are "lost". It does not, therefore, necessarily follow that by proving the non-delivery of such goods the "loss" of the goods is also proved, for non-delivery or misdelivery of goods may be due to "loss" or may be due to other causes. [p. 130, col. 2, p. 131, col. 1.]

G. I. P. Railway v. *Jitan Ram-Nirmal Ram*, 72 Ind. Cas. 440 ; (1923) Pat. 82 ; 4 P. L. T. 178 ; 1 P. L. R. 169 ; (1923) A. I. R. (Pat. 285 ; 2 Pat. 442 and *Madras and Southern Maharatta Ry. Co. Ltd.* v. *Mattai Subba Rao*, 55 Ind. Cas. 754 ; 43 M. 617 ; (1920) M. W. N. 198 ; 11 L. W. 358 ; 38 M. L. J. 360 ; 28 M. L. T. 49, referred to.

Proof of non-delivery or misdelivery is by no means conclusive evidence as to whether or not a loss has incurred.

Rule against an order of the Subordinate Judge, 3rd Court, Hooghly, in S. C. C. Suit No. 115 of 1922.

Babu *Mahendra Nath Roy*, with Babu *Ambicapada Chaudhry*, for the Petitioner.

Babu *Santivery Mazumdar*, for Babu *Hemanta Kumar Mitter*, for the Opposite Party.

JUDGMENT.

Page, J.—In this case some important and interesting questions are raised in respect of the obligations of a Railway Company towards the owner of goods consigned to it for transportation. On the 24th January 1922, twelve tins of *ghee* were consigned to the E. I. Railway at Arrah to be carried to Chandernagore, and there to be delivered to the plaintiff, the Opposite Party. On the 21st August 1922, seven of the tins were delivered to the plaintiff at Chandernagore, but the Railway Company failed to deliver five of the tins. The issue in this case is, whether the plaintiff is entitled to recover damages for the non-delivery of the said goods. The Railway Company undertook to carry the goods on the terms of a Risk Note which was signed by the consignor. The Risk Note was in the Form (B) which has been approved by the Governor-General in Council pursuant to section 72 (2) (*b*) of the Indian Railways Act (Act IX of 1890). It ran as follows:—

Risk Note, Form B.

(To be used when the sender elects to despatch at a 'special reduced' or 'owner's risk' rate articles or animals for which an alternative 'ordinary' or 'risk acceptance' rate is quoted in the tariff).

Whereas the consignment of twelve tins *ghee* tendered by me|us as per forwarding order No. 77194 of this date, for despatch by the E. I. Railway Administration or their transport agents or carriers to Chandernagore Station and for which I|we have received Railway Receipt No. 77194 of same date, is charged at a special reduced rate instead of the ordinary tariff rate chargeable for such consignment I|we the undersigned do in consideration of such lower charge, agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connection therewith, and also all transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals, may be carried from Arrah to Chandernagore *harmless and free from all responsibility for any loss, destruction, or deterioration of or damage to* the said consignment, from any cause whatever except for the loss of a complete consignment of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before during and after transit over the said Railway or other Railway lines working in connection thereto or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment : provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident."

By section 72 of the Railways Act it is provided that : "72 (1). The responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under sections 152 and 161 of the Indian Contract Act, 1872.

"(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—

(*a*) is in writing signed by on behalf of the person sending or delivering to the Railway Administration the animals or goods, and

(*b*) is otherwise in a form approved by the Governor-General-in-Council.

"(3) Nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a Railway Administration."

The learned trial Judge found, (1) that the Railway Company had not proved that the five tins had been lost, and (2) that the disappearance of the five tins was due to the wilful neglect of the servants of the Railway Company.

The first contention urged before us on behalf of the Railway Company, which is the petitioner, was that in order to obtain the benefit of the Risk Note it was not incumbent upon the Railway Company to prove that the goods were lost, inasmuch as the Railway Company admitted that the goods were and that the only issue in the case was whether such loss was due to the wilful neglect of the Railway Company or of its servants, the onus of proving wilful neglect lying on the plaintiff. In my opinion, this contention is unsound. In order to appreciate the object which the Legislature had in view in enacting Chapter VII of the Railways Act, "it is necessary to ascertain what has been the history of the law relating to carriers by rail in this country. The first legislation on the subject is that contained in Act XVIII of 1854, section 11 of which is as follows: 'The liability of such Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in any wise affected by any public notice given, or any private contract made by them: but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servant': This continued to be the case until the passing of the Carriers Act 1865 .....On the 10th September 1867 it was decided in the case of *E. I. R.* v. *Jordan* (1) by a Divisional Bench of this Court (Peacock, C. J., and Macpherson, J.) that Railway Companies in India were common carriers, and liable as such, that is to say, as insurers of goods delivered to them.....We now come to the Railways Act of 1879, section 2 of that Act contains the following provision: 'Nothing in the Carriers Act, 1865, shall apply to Carriers by Railway'. I cannot read these words in any other sense than as repealing all the provisions of the Carriers Act which relate exclusively to Carriers by Railway and confining the operation of the remaining provisions to Carriers other than Carriers by Railway, so that by the repeal of so much of the Carriers Act as related to Railways, and that of the whole of the Railways Act of 1854, the liability of carriers by Railway as it stood before the Acts of 1854 and 1865 was restored.....It follows that after the passing of the Act of 1879 the liability of Carriers in India, including Carriers by Railway, was not limited to a liability for negligence, but was a liability as insurers of the goods delivered to them" (Per Petharam, C. J., *Chogemul* v. *Commissioners for the Improvement of the Port of Calcutta* (2), see also *Changa Mal* v. *The Bengal North-Western Railway Co.* (3), and *Irrawaddy Flotilla Co.* v. *Bugwandas* (4). The object and effect of section 72 of the Railway Act of 1890 was, in my opinion, to limit the liability Railway Companies during the transit of of goods consigned to them for carriage, and to substitute the obligations of a bailee for the obligations of an insurer of such goods which, prior to the passing of that Act, were imposed upon them under the Common Law. Section 72 of the Railway Act 1890 was enacted to confer a benefit upon Railway Companies, and, in my opinion, except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability, unless and until evidence has been adduced which satisfies the Court that a loss has occurred (see *Ghela Bhoi Punsi* v. *E. I. R.* (5), *E. I. R.* v. *Nilkanta Roy* (6), and *G. I. P. Railway Company* v. *Jitan Ram* (7). In the last case Mullick, J., observed:—"It is clear that upon

(1) 4 B. L. R. O. C. 97; 14 W. R. O. C. 11.

(2) 18 C. 427 at p. 440 9; Ind. Dec. (N. S.) 285

(3) 6 P. R. 1897.

(4) 18 I. A. 121; 18 C. 620 (P. C.). 6 Sar. P. C. J. 40; 15 Ind. Jur. 403 & 542; 9 Ind. Dec. (N. S.) 413 (P. C.).

(5) 63 Ind. Cas. 241; 45 B 1201; 23 Bom. L. R. 525.

(6) 22 Ind. Cas. 679; 41 C 576; 19 C. L. J. 142; 19 C. W. N. 95.

(7) 72 Ind. Cas. 440; (1923) Pat. 82; 4 P. L. T. 173; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442.

this special contract the burden of proof lies in the first instance upon the defendants, that is to say, they must first prove that there was such loss as is contemplated by the first part of the Risk Note, and when have doneso the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendants or their servants as provided in the latter part."

(See also *E. I. R.* v. *Kanak Behari Haldar* (8).)

It was further contended that, if it was incumbent upon the Railway Company to prove that the goods were "lost" within the meaning of that term as used in the Risk Note, the Railway Company had discharged the onus which lay upon it by proving that the goods in question had not been delivered to the consignee. It was urged that "loss" as contemplated in the Risk Note meant loss to the owner, and that such loss accrued whenever the person entitled to possession of the goods was wrongfully deprived of such possession by reason of the non-delivery, or the mis-delivery of the goods or otherwise.

It was admitted and urged by both parties, —in my opinion, rightly—that the same construction must be put upon the term loss in the Risk Note and in the sections which comprse Chapter VII of the Railways Act, 1890.

Now, a distinction is drawn between suits for non-delivery of goods consigned to a carrier, and suits for compensation for the loss of such goods in Articles 30 and 31 of the first Schedule to the Limitation Act (Act IX of 1908), and, if the proper meaning to be attributed to the term "loss" is, that for which the Railway Company contends, the learned Vakil who appeared for the Railway Company was constrained to admit, not only that the word 'destruction' in the Risk Note and in section 72 is mere surplusage, but also that it would follow that where goods consigned for carriage were not duly delivered because, for example, such goods were being deliberately detained by the Railway Company, or had been misdelivered to a person other than the consignee, or had been converted by the Railway Company to its own use, in each of such cases the Railway Company would be entitled to pray in aid the provisions of section 72 which limits its liability in respect of "loss" to that of a bailee.

In my opinion, the meaning for which the Railway Company contends cannot reasonably be attributed to the term "loss" either in the Risk Note or in section 72 and the kindred sections of the Railway Act 1890.

In the course of the argument in *Hearn* v. *L. & S. W. Ry.* (9), in which case the question arose whether goods the delivery of which had been delayed were lost within the meaning of that term used in the analogous provisions of the Carriers Act, 1830, S. I. Baron Martin put this question to Counsel, "Suppose a person delivered to a porter at a railway station a casket of jewels, and in consequence of his refusal to forward it the casket remained for some time at the station, would that be a "loss" within the Act ?" and Baron Alderson asked, "Suppose the goods were known by the carrier to exist, but were not delivered by him for a month, would that be a "loss" within the Act ?" An affirmation that, in such circumstances, the goods have been "lost" surely involves a distortion of the meaning of the word so extravagant as to approach an abuse of the English language. That judicial authority is not wanting in support of the construction of the term "lost" for which the Railway Company contends would appear to be due, if I may say so with great respect, to the fact that the intention of the legislature in enacting Chapter VII of the Railway Act of 1890 has not always sufficiently been borne in mind. The object, and, in my opinion, the effect of section 72 was not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to a Railway Company, but to lessen the burden of the obligation which, prior to the passing of section 72, had lain on Railway Companies as insurers of such goods.

In my opinion, the construction which Baron Parke put upon the term "loss" in *Hearn* v. *L. & S. W. Ry. Co.* (9) (*supra*) is correct, and the same interpretation should be given to the term in the Risk Note and in section 72 of the Railways Act. Baron Parke, in giving the judgment of the Court, which was to the effect that "where goods

(8) 44 Ind. Cas. 691; 22 C. W. N. 622 at p. 624.

(9) (1855) 10 Ex. 793 at p. 799; 3 C. L. R. 597; 24 L. J. Ex. 1800; 1 Jur. (N. S.) 236; 159 E. R. 660; 102 R. R. 833.

which ought to be declared and are not declared are detained by a carrier without being lost by him, he is liable for such detention," observed : "the Statute then proceeds to enact that no carrier shall be liable for the loss of, or any injury to, any of the enumerated articles. This does not mean the loss of the monies of the carrier, but the loss of the article itself, or injury to it. In ordinary parlance, this appears to mean the loss by the carrier of the articles committed to him, or injury to them, whilst in his care, not the loss sustained by the owner by non-delivery of the article in due time or altogether, or the loss of the use of the article by him. By the term "the injury" is clearly meiant the injury to the article itself .....and the reason of the law must be considered as being to protect the carrier, not in all cases where the owner of the articles sustained a damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel was either abstracted altogether, or taken from the place where it ought to be, and was incapable of being delivered at the time it ought to be by reason of that sort of loss. We think this is the true construction of the clause and the carrier is exempted only from being responsible for a loss by him of the particular articles named." The same interpretation was given to the term "loss" in *Mullan* v. *Brasch* (10). The facts in that case were that on 13th November 1879 the plaintiff delivered to the defendants, who were carriers, for hire from London to Rome, a trunk to be sent from London to Liverpool by rail, and thence to be shipped to Italy. Through the negligence of the defendants' servants the trunk was placed in a vessel bound for America and was shipped to New York. The mistake was not discovered until 15th December 1879. The issue in the case was whether the trunk had been "lost," and Lindley, L. J., in giving the judgment of the Court observed : "The result comes to this; if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liablity for their loss and its consequences. But whether goods not permanently lost are are lost within the meaning of the Carriers Act, must depend upon whether they have been lost by the carrier as distinguished from lost to the owner : See *Hearn* v *L. & S. W. Ry. Co.* (9) (supra) ; and this, again, must depend on the facts of each particular case. If the carrier temporarily loses the goods, and delivers them within a reasonable time after he discovers them, he will not be liable ; but if he keeps them after he has recovered them, the Carriers Act will not protect him from such consequent breach of the duty. The obligation on the part of the carrier to deliver the goods will remain or revive, and he will be responsible for future breaches of that obligation.....As we understand the facts, the plaintiff's trunk was shipped and sent to New York as Hamburge's case, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered ; and the carriers had lost possession of the trunk, and did not in fact know where it was nor what had become of it. This was, in our opinion, a "loss" of the trunk by the Carriers."

In my opinion, the term "loss" as used in the Risk Note and in Chapter VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and such "loss" occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily, or through inadvertence, loses possession of the goods, and for the time being is unable to trace them. The term "loss" denotes a fact, not a cause of action. A valid cause of action against a Railway Company in India for damages for the non-delivery of goods consigned to it for carriage must be based either on contract or on tort, and must arise from the breach of some duty owed to the plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occured may sometimes found, sometimes defeat, such a cause of action: But a cause of action for loss without more is not known to the law. Non-delivery of goods consigned to a Railway Company for conveyance may be due to the fact that the goods are being deliberately detained by the Railway Company or that they have been misdelivered to some

(10) (1883) 10 Q. B. D. 142; 52 W. J. Q. P. 127 ; 47 L. T. 685 ; 31 R. 190 ; 47 J. P. 180.

person other than the consignee, or that they are "lost", It does not, therefore, necessarily follow that by proving the non-delivery of such goods the "loss" of the goods is also proved, for non-delivery or misdelivery of goods may be due to "loss," or may be due to other causes.

The question as to what is the meaning of the term "loss" in Risk Note (B) and in section 72 of the Railway Act does not appear up till now to have arisen in the Calcutta High Court. In Civil Rule No. 972 of 1922 my brothers Rischardson and B. B. Ghose, in a case where damages were claimed against the Assam Bengal Railway Company for non-delivery of goods consigned to it for transportation, held that it was incumbent upon the plaintiff to prefer a written notice of his claim to the Railway Company in accordance with the provisions of section 77 of the Railway Act. In the course of his judgment, Richardson, J., observed: "I have indicated that in my view a claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. If that be so, it seems to follow that the statutory notice is a condition precedent to a verdict being taken on that alternative footing, because on that footing the goods may have been lost. If it be conceded, though I do not decide, that where goods are wrongfully detained by a Railway Company no notice is necessary under section 77, a plea by the Company of want of notice must at least be met on that ground, and the Court must be asked to find that the goods were being detained, and were not lost when they ought to have been delivered. Where detention is not pleaded or put in issue, a claim *simpliciter* for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of section 77."

The *ratio decidendi* of that case is consistent with the construction which I have placed upon the term "loss" in the Risk Note, although the interpretation to be given to the term did not directly arise for determination in that case.

The view which I have expressed as to the meaning of the term "lose" in the Risk Note and in section 72 is supported by three recent decisions of the Allahabad High Court *Secretary of State for India* v. *Jiwan* (11), *E.I. R.* v. *Kishan Lal* (12), *E. I. R.* v. *Makhan Lal* (13). The same meaning has been attributed to the term "loss" by the Patna High Court in *E. I. R.* v. *Kali Charan Ram* (14), by the Chief Court of the Punjab in *Changa Mal's case* (3), (*supra*); in the Bombay High Court by Kajiji, J., in *G. I. P. Ry.* v. *Ram Chunder Jagannath* (15), and in the Lahore High Court by Abdul Raoof, J., in *Hill Sawyers & Co.*, v. *Secretary of State* (16). In each of the last two cases, and in *G. I. P. Ry.* v. *Jitan Ram* (7), however, a Division Bench has held that "loss" means loss to the owner or consignor of the goods. It is to be observed that, whereas Jwala Prosad, J., in *E. I. R.* v. *Kali Charan Ram* (14), (*supra*) held that when goods are not delivered by the Railway Company they are not "lost," Mullick, and Bucknill, JJ., in *G. I. P. Ry.* v. *Jitan Ram* (7), (*supra*) held that goods which are not delivered or are misdelivered are "lost" within the meaning of that term as used in Risk Note (B) and in sections 72 and 80 of the Railways Act. As I construe the term loss, with great respect to these learned Judges, I am unable to accept either of these propositions as being correct. It appears to me that it is equally inaccurate to affirm that goods which are not duly delivered, or have been misdelivered, are lost, as to assert that they are not lost. The true view would seem to be that in either case the goods may or may not be lost, and that proof of non-delivery or misdelivery is by no means conclusive evidence as to whether or not a loss has occurred. Indeed, I go further, and beg leave to state that, in my opinion, from such evidence alone an inference could not reasonably be drawn that the goods had been lost. It was, moreover, conceded by the learned Judges who decided the case of *G. I. P. Ry.* v. *Jitan Ram* (7) (*supra*) "that if loss to the owner was meant, then there was no necessity for any reference to liability for destruction of the goods."

(11) 71 Ind. Cas. 609; 45 A. 380; 21 A. L. J. 220; (1923) A. I. R. (A.) 426.
(12) 73 Ind. Cas. 986; 45 A. 580; 21 A. L. J. 438; 9 O. and A. L. R. (A.) 531; (1924) A. I. R. (A.) 7.
(13) 74 Ind. Cas. 814; 45 A. 575; 21 A. L. J. 515; (1923) A. I. R. (A.) 605.
(14) 69 Ind. Cas. 103; (1922) Pat. 145; 3 P. L. T. 215; (1922) A. I. R. (Pat.) 106.
(15) 49 Ind. Cas. 396; 43 B. 386; 21 Bom. L. R. 6.
(16) 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 297.

On the other hand, the Madras High Court in the case of *Madras Southern Mahratta Railway Company* v. *Subba Rao* (17) finding itself unable to accept the view that the term "loss" in the Risk Note (B) includes "destruction, deterioration and damage", held that "if goods entrusted to the care of the Company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to us that the Company should be held to have lost the goods." Seshagiri Ayar, J., was of opinion that the term "loss" bore the same meaning in section 72 as that attributed to "total loss" in a policy of insurance. But, with great respect, the obligations undertaken by an insurer under a policy of insurance differ *toto coelo* from those undertaken by a Railway Company under a contract of carriage, such as that contained in Risk Note (B). The Railway Company undertook to carry the goods as a bailee on the terms of the Risk Note, but the insurer under a policy of insurance is not in any sense a bailee of the goods covered by the policy, his undertaking being that he will indemnify the assured in respect of the pecuniary loss which the assured may suffer by reason of the happening of any or every specific peril set out in the contract of insurance.

For the reasons which I have given, I have been unable to persuade myself that the construction which was put upon the term "loss" in the last mentioned cases is correct, and I am unable to adopt it. The question then arises, were the five tins which the Railway Company failed to deliver in this case "lost" in the sense which I have indicated? In my opinion, the only inference which can reasonably be drawn from the evidence adduced at the trial is that the goods in question were lost, and there was no evidence which would justify the finding of the learned Judge that the five tins were not lost.

In these circumstances, the only issue which remains is whether the loss of these five tins was due to the wilful neglect of the Railway Company, or of its servants, as provided in the Risk Note. The learned Judge has decided that issue in a manner adverse to the Railway Company. Was there evidence from which the learned Judge could reasonably have arrived at that conclusion? Having regard to the following facts, namely, that *ghee* is a perishable article; that there was no satisfactory evidence adduced to prove that the five tins were put into wagon No. 34395 at Dinapur; or that they arrived at Asansole; and that no attempt was made by the Railway Company's servants between 11th February, when the wagon arrived at Asansole and the 28th April to ascertain whether the goods loaded in the wagon were safe and sound, I am unable to hold that there was not evidence adduced before the learned trial Judge which would justify him in finding that the loss of the goods was due to the wilful neglect of the Railway Company's servants. The other findings of the learned trial Judge are not callenged. In these circumstances, the rule, in my opinion, should be discharged with costs.

Suhrawardy, J. :—I agree. The rule is discharged with costs. We assess the hearing fee at two gold mohurs.

S. D. *Rule discharged.*

(17) 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198, 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 227 OF 1918.

June 9, 1923.

Present :—Mr. Justice Harrison and Mr. Justice Zafar Ali.

BHAGAT RAM—PLAINTIFF—APPELLANT
versus
RAGHBAR DIAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Pre-emption—Acquiescence — Person taking active part in registration of sale deed, whether barred from suing.

The mere presence of a person at the time of registration of a sale-deed is not sufficient to prove his acquiescence in the sale so as to debar him from suing to pre-empt the bargain.

But a person who is not a merely a silent spectator of the registration but takes an active part in collecting the purchase-money and in getting the sale-deed registered must be deemed to have acquiesced in the sale and is precluded from pre-empting it.

BHAGAT RAM *v.* RAGHBAR DIAL

First appeal from the decree of the Subordinate Judge, Ferozepore, dated the 29th of November 1917, decreeing the claim.

Mr. *Manohar Lal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Certain property was sold by one Raghbar Dial ostensibly for Rs. 55,000. the deed was executed on the 8th of September 1913, and registered on the following day, the two rival pre-emptors, Bhagat Ram and Ghasi Ram, brought two suits to pre-empt the property, Bhagat Ram urging that Rs. 22,000 only had been paid and Ghasi Ram that Rs. 22,500 was the price which actually passed. Both sued on the ground of relationship and Bhagat Ram being the nearer relation was given a decree conditional on payment of Rs. 55,000 the full amount. In this decree no mention whatever was made of Ghasi Ram although he had been impleaded during the course of the suit. A separate decree was passed in his favour that if Bhagat Ram did not pay the money within time and his suit was dismissed, he was entitled to pre-emption payment of the same sum. Bhagat Ram has paid the money, and at present we are only concerned with two cross-appeals by Bhagat Ram and the vendee of the three grounds in Bhagat Ram's appeal only one has been pressed, namely, that the order as to costs is inequitable, this being that the plaintiff is to pay the vendee's costs. The vendee has put in lengthy grounds relying on the fact that a review application had been put in to save limitation, and, claiming anyhow that his appeal should be treated as a cross-objection to which he is certainly entitled as explained in *Bawa Singh* v. *Thakur Singh* (1). We take this appeal of the vendee first.

He has dropped the ground that one Chanan Mal, son of Daulat Ram, a co-parcener in the vendee's family, should have been impleaded, and has confined himself to three points, the first being that the pre-emptor Bhagat Ram acquiesced in the sale and is, therefore, debarred from bringing this suit. This point has been found against the vendee by the Trial Court. The important evidence is that of five witnesses, Nanak Chand and Ram Pal, scribes of the sale-deed, Bhoja Ram, Suraj Mal and Raghbar Dial, the vendor. There are other witnesses whose evidence has been rejected on the ground of their relationship and of their being interested in the result of the litigation. Taking the evidence of these five men, Nanak Chand merely says that he and Ram Pal wrote the deed, that he did not see Bhagat Ram or Ghasi Ram when the deed was written and, although he attended at the time of registration, he does not remember who were present. Ram Pal, on the other hand, says that Bhagat Ram fetched him to write the deed and was present when the deed was written. He also says that Bhagat Ram was present before the Sub-Registrar and that he consented to the sale at the time. In order to explain the evidence of Nanak Chand not being in his favour, Counsel points out that the plaint of Ghasi Ram, the rival pre-emptor, was written by a petition-writer named Nanak Chand and he urges that this must be the same man though no question was put on the subject. Bhoja Ram says that he was present at the time the money was paid, that Bhagat Ram fetched him and was present at the time of registration and at the time the money was paid and that Bhagat Ram helped to put the money in the cart and to take it away to the City. Surajmal gives similar evidence.

He says that Bhagat Ram was there when the money was being counted and that he did not see him with the vendor when the money was taken from the Registration Office to the *bazar*. Raghbar Dial who, in our opinion, is by for the most important witness says that Bhagat Ram helped him to collect the money and was present at the time of registration. It is alleged that he is on bad terms with the pre-emptor Bhagat Ram but so far from there being any enmity he says himself that he still does business for his cousin Bhagat Ram and we see no reason to assume that there is any such enmity, especially as he also says that he is on friendly terms with him.

The learned Senior Subordinate Judge in considering this evidence dealt with it in the first instance in the case of Ghasi Ram and has come to the conclusion that it proves nothing more than the mere presence of Ghasi Ram and that this is not sufficient to establish acquiescence. He has not dealt with it at any length so far as it relates to

(1) 67 Ind. Cas. 479 ; 4 U. P. L. R. (N.) 80.

Bhagat Ram. As a matter of fact, it is very much stronger with regard to Bhagat Ram than it is with regard to Ghasi Ram. In addition to what has been quoted above, there is the additional fact, noticed by the Subordinate Judge, that Ganeshi Lal, father of Bhagat Ram, had acquiesced in the sale. This fact comes from the evidence of Raghbar Dial, the vendor, who states positively that at the time the sale was negotiated and the deed was written both the uncles, Ganeshi Lal and Jagan Nath, were present. The position, therefore, so far as Bhagat Ram is concerned, is that his father had assisted in the negotiations and, even if the evidence of Ram Pal regarding his presence at the time the deed was written be ignored as it is not borne out by the evidence of his brother petition-writer, it is established by evidence, which we consider disinterested and reliable, that he was not only present at the time of the registration but that he actively assisted in fetching and taking away the money and in counting it at the Sub-Registrar's office. The evidence in contradiction has not been relied upon by Counsel for the respondent and we are of opinion that it is of no value whatever.

Both sides have quoted *Mahmud Bakhsh* v. *Hassan Bakhsh* (2), and both urge that it is in favour of their respective cases. It is quite clear that mere presence at the time of registration is not sufficient to prove acquiescence. But whereas here we have the fact that the father of the pre-emptor had taken an active part in the negotiations, that the pre-emptor himself assisted in collecting the money and was not merely a silent spectator of the actual registration but took an active part there also and where he has delayed as here in bringing his suit up to the last possible moment, we are of opinion that all these facts taken together point conclusively to such acquiescence throughout as must have influenced the vendee in concluding the transaction. It is, of course, urged that the bargain was concluded in the sense that the sale-deed had been written and it is no doubt a very different matter to negotiate the bargain and to take an active part in the concluding stage of registration. But taking everything together and considering the relationship of the parties, the fact that Raghbar Dial's evidence clearly supports the contention of the vendees and that he is not only a mere relation but also is on friendly terms with the pre-emptor and the nephew of the pre-emptor's father who assisted in arranging the sale, we find that Bhagat Ram did acquiesce and is, therefore, debarred from bringing this suit.

We, therefore, accept the appeal and dismiss the plaintiff's suit with costs.

We also dismiss the appeal dealing with the costs awarded by the Trial Court and direct that the costs of the defendants-vendees will be paid throughout by Bhagat Ram, plaintiff.

Z. K. *Appeal dismissed.*

(2) 11 Ind Cas. 708 ; 7 P. R. (1912) ; 239 P. L. R. 1911 ; 155 P. W. R. 1911.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 1246-48 OF 1922.

February 18, 1924.

Present :—Mr. Justice Mukerji.

ALI HUSAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SYED MAZAHIR HUSAIN—PLAINTIFF—RESPONDENT.

Custom—Abadi—*Ryots, right of, to transfer site of house—Mauza Datiana, Muzaffarnagar District*—Laches *of some co-sharers, effect of*—*Civil Procedure Code (Act V of 1908), s. 100—Appeal, second*—*Custom question of*—*High Court, power of.*

It is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced by the lower Courts was or was not based on sufficient evidence

Muhammad Kamil v. *Imtiaz Fatima*, 4 Ind. Cas. 457 ; 8 A. 557 ; 10 C. L. J. 297 ; 11 Bom. L. R. 1210 14 C. W. N. 59 ; 19 M. L. J. 697 ; 13 O. C. 183 ; 36 I. A. 210 (P. C.), distinguished.

Ram Bilas v. *Lal Bahadur*, 30 A. 311 ; A. W. N. (1908) 112 ; 5 A. L. J. 456 ; 4 M. L. T. 169 : *Faiyaz Ali* v. *Rekhab Das*, 61 Ind Cas; 24 ; 19 A. L. J. 104, followed.

A custom which permits a *ryot* in a village to transfer not only the materials of his house but also the site on which the house stands can be recog-

nised only when there is absolutely clear evidence to that effect.

No such custom prevails in *mauza* Datiana in the Muzaffarnagar District.

Where some of the co-shares have neglected to take steps to avoid transfers made by people who are nothing but *ryots* in the village, their *laches* cannot affect the rights of the other co-sharers in the village.

Ram Bilas v. *Lal Bahadur*, 30 A. 311 ; A. W. N. (1908) 112 ; 5 A. L. J. 456 ; 4 M. L. T. 169, followed.

Second appeal from the decree of the Subordinate Judge of Muzaffarnagar, dated the 10th of May 1922.

Messrs. *E. A. Howard* and *M. A. Aziz*, for the Appellants.

Messrs. *S. A. Haidar* and *Iqbal Ahmad*, for the Respondent.

JUDGMENT :—This appeal and the connected appeals Nos. 1247 and 1248 of 1922, are concerned with only one question, namely, whether the evidence that was adduced in the Court of first instance by the appellants should have been held to be sufficient to prove the custom set up by the appellants, namely, one in the village of Datiana, by which a *ryot* could transfer not only the materials of his house but also the site over which the house stood.

The case has been ably argued on both sides. Mr. Agha Haidar, has taken a preliminary objection to the hearing of the appeal. He argued, on the authority of a sentence to be found in the case of *Muarmmad Kamil* v. *Imtiaz Fatima* (1), that a question of custom was a question of fact and this Court could not go into it in second appeal. It appears that in the case before their Lordships of the Privy Council a custom had been set up and had been negatived by both the Courts in India. It is a parctice with the Privy Council not to allow a question of fact to be re-opened on which the Courts in India have agreed to pronounce the same opinion. It was with respect to such a matter that their Lordships remarked that they would not go into the question of custom. The question did not arise with reference to section 100 of the Civil Procedure Code with which I have to deal in this case. A regular string of authorities in this Court has held that it is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced was based or not on sufficient evidence. The case of *Ram Bilas* v. *Lal Bahadur* (2) distinctly held this. There are subsequent cases too and one of them is that of *Faiyaz Ali* v. *Rekhab Das* (3). I, therefore, overrule the preliminary objection and allow the appeals to be argued on the merits.

To begin with, the village in question has been found by the lower Appellate Court to be a purely agricultural village. On this point nothing has been addressed to me to indicate that this was not a correct finding. Indeed, this finding has not been challenged in the memorandum of appeal. I have ascertained with reference to the Census statistics of the last Census of 1921 that Datiana has a population of 2,499 souls. Evidently there is a very large population of *ryots* in the village as all these 2,500 souls could not be the proprietors. When a question of custom arises, one in the first instance likes to look into the *wajib-ul-arz* to see whether it has anything to say or not on it. The *wajib-ul-arzes* in the present case are two in number, namely, one prepared in 1873 and the other in 1863. The *wajib-ul-arz* of 1863 in para. 14 clearly lays down that the *adadi* or the village site is the property of the *zemindars* alone. It shows that when a *ryot* comes to live in the village he has to pay a present (*Rasum*). When he goes away he can take away the materials provided these have not been supplied to him by the landlord. The *wajib-ul-arz* of 1873 does not specifically say anything on the position of the *ryots* but it declares that they render such service as their caste would permit.

It has been urged that these *wajib-ul-arzes* are really the handiwork of the *zemindars* and that there is no binding authority on the *ryots*. This is, however, not a correct view of the matter. They are supposed to have been prepared by authorities who are anxious to note down all the customs prevailing in the village.

(1) 4 Ind. Cas. 457 ; 31 A. 557 : 10 C. L. J. 29 ; 11 Bom. L. R. 1210 ; 14 C. W. N. 59 ; 19 M. L. J. 697 ; 18 O. C. 183 ; 36 I. A. 210 (P. C.).

(2) 30 A. 311 ; A. W. N. (1908) 112 ; 5 A. L. J. 456 ; 4 M. L. T. 169.

(3) 61 Ind. Cas. 24 ; 19 A. L. J. 104.

ALI HUSAIN *v.* SYED MAHAZIR HUSAIN

It is conceded that the names of the *ryots* are not to be found in the *khewats*. The *ryots* are certainly not proprietors of an inch of the soil of the village. There was a partition in the village in 1895, and, as would be expected, the *ryots* were no party to that partition. The question then is whether, in the circumstances of this particular case, the appellants have succeeded in proving that there is such a custom in the village by which they are entitled to sell the property of another set of persons, namely, the *zemindars*. There can be no doubt that there have been cases in which the existence of such a custom has been recognised ; but such a custom can be recognised only when there is absolutely clear evidence to that effect.

As I have said, there was a partition in the village in 1895 and the village was divided up. All co-sharers would not be as careful to guard their rights as some of them. Some may be neglectful and others may be on their guard. If some of the co-sharers have neglected to take steps to avoid transfers made by people who are nothing but *ryots* in the village, their laches cannot affect the rights of the other co-sharers in the village. These are matters which must be borne in mind before we examine the evidence in this connection. The remarks of Stanley, C. J., in the Full Bench case of *Ram Bilas* v. *Lal Bahadur* are very very instructive. A man may say, "well in such and such cases I have been neglectful of my rights but why should I not keep an eye over my rights in future." That is exactly an attitude which may be lawfully taken by the co-sharers of the village

In this case there are 36 sale deeds. Forty-six were produced but 10 of these were not proved. Twenty out of these 46 related to transfers which took place within 12 years of the suit. Thus, they were transfers of recent times and transfers which could yet be impeached and the transferees ejected by the landlords. Who knows but the present three cases may be only test cases brought before suits should be brought in respect of the other cases ? Out of the 46 cases of sale, 15 were made by persons who were either *zemindars* or *muafidars* in the village. Thus, we are left with only, as the learned Subordinate Judge has remarked, 11 sales, which are more than 12 years' old. I have already remarked that the village is a very large one. It has a population of about 2,500 souls. Which among these *ryots* have been transferring their house, is a matter, which would not always come to the knowledge of the landlords. The learned Munsif got prepared a statement in a tabulated form as to how these sale-deeds stood. He found that in 10 cases the sale-deeds affected the property of absentee landlords. This may account for some of the sales. Now, the question remains whether these 11 sale-deeds which undoubtedly relate to transfers made more than 12 years before the institution of the present suits should be taken as sufficient evidence to establish a custom in the village in question. Having regard to the largeness of numbers of the *ryots*, I am clearly of opinion that these instances are wholly inadequate. Mr. Aziz who has taken great pains over these cases has pointed out to me that in several of the cases some of the co-sharers attested the sale-deeds. Now this attestation does not necessarily signify that the attestating co-sharers believed that the *ryots* had, under a custom, the authority to transfer *zemindars'* property, namely, the sites of the house. On the other hand, that attestation may show and probably does show that, the purchaser was anxious to have the consent of the landlord so that in future trouble might be avoided. If the village had been small and if there had been 11 ancient sales something might be said as to the sufficiency of this evidence. But where there are about 2,500 *ryots*, 11 ancient sales will not eslablish a custom, which is supposed to take away another man's property. As I have already said, if a man has been neglectful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property. There are two judgments but none of these judgments show that any custom of transfer of the sites of the houses by *ryots* was recognised by them. The sale certificate and the *Dakhalnama* only prove that a *ryot* made a mortgage and his property was sold.

Two learned Judges of the Courts below in thoroughly painstaking judgments have discredited the custom and my reading of the evidence leads me only to support their opinion.

I hold that the evidence adduced in the circumstances was not sufficient to establish the custom contended for.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 855 OF 1922.

October 24, 1923.

Present :—Mr. Justice Odgers.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LTD.—DEFENDANT—PETITIONER.

versus

B. KRISHNASWAMI CHETTY—PLAINTIFF—RESPONDENT

Railways Act (IX of 1890) ss. 72, 76—Risk Note Form B—Loss of goods—Damages, suit for—Burden of proof.

In a suit to recover damages from a Railway Company for loss or deterioration of goods consigned to the Company for carriage under Risk Note Form B, the *onus* is upon the plaintiff to establish how the loss or deterioration was caused. He must prove wilful neglect of or theft by Railway servants, before any question of robbery from a running train is reached, this being an exception to wilful neglect. the mere fact that the Railway sets out to prove robbery from a running train and fails will not relieve the plaintiff of the initial *onus*.

B. B. & C. I. Railway Co. v. *Ranchodlal Chotalal & Co.*, 52 Ind. Cas 516 ; 48 B. 769 ; 21 Bom. L. R. 779 ; *Narayana Aiyar* v. *South Indian Ry Co , Ltd.*, 75 Ind. Cas. 260 ; 18 L. W. 322 ; (1923) M. W. N. 731 ; *Madras & Southern Maharatta Ry. Co., Ltd.* v. *Mattai Subba Rao*, 55 Ind Cas. 754 ; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358 ; 38 M. L. J. 360; 28 M. L. T. 49, relied on.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Bezwada, in S. C. suit No. 45 of 1922.

Messrs. *Brightwell* and *Morseby*, for the Petitioner.

Mr. *Narayana Aiyar*, for the Respondent.

JUDGMENT.—This is a revision petition to revise the judgment of the Subordinate Judge of Bezwada in a suit wherein the plaintiff sued the Madras and Southern Mahratta Railway Company for damages for the loss of a bale of towels which was consigned to him by one Ayyalu Naidu of Madras for carriage to Bezwada. The bale was lost or rather was not delivered to the consignee. The value of the article conveyed is claimed as Rs. 261-5-7 plus Rs. 1-8-0. The plaintiff also claimed the estimated profit on the sale of this bale in Bezwada Rs. 37-8-0. The latter item, I think, he is not entitled to recover as there is no evidence that he put the Railway on notice that this amount would be claimed. The consignor unfortunately consigned these goods under the Risk Note Form B under which he undertakes to hold the Railway Company free from all responsibility for loss except for loss due to the wilful neglect of the Railway Administration or to the theft by or to the wilful neglect of its servants. Wilful neglect is whittled down not to include fire or robbery from a running train. The Risk Note, it is obvious, throws all the *onus* on the plaintiff. But the defendants in the lower Court assumed the *onus* of proving that the loss had been caused by robbery from a running train. The learned Subordinate Judge held that the defendant Company had failed in this attempt, and Mr. Srinivasagopalachari who appears for them does not make any effort to say that this finding is wrong. One would have thought that the Railway would have been content to let the plaintiff try to discharge the extremely heavy onus that lies upon him under this contract. The learned Subordinate Judge says:

> "The special plea raised by the defendant has not been proved. I am inclined to hold that the bale was lost by the negligence, etc., of the defendant."

It was obviously practically impossible for the plaintiff to prove wilful negligence by the Railway Company. I have exaimned the evidence and all that was proved was that when the train was stopped at Ongole and the Guard, D. W. 2, went to check the seals he found the doors of one of the covered vans open and 4 articles missing and the plaintiff's bale was one of them. One is very much tempted to think that where the Railway Company has 5

or 6 of its servants travelling in the train it is not necessary to look to any outside agency to found a case of theft. But I cannot say that that has been established by evidence. In a similar case in *B. B. & C. I. Railway Company* v. *Ranchhodlal Chotalal & Co.* (1), which also arose on this Risk Note B the learned Judges point out that though the defendants have failed to prove theft from the running train, the onus is, of course, still on the plaintiff to prove neglect or theft by railway servants. This, they point out, should have been done before any question is reached of robbery from a running train as that, namely, robbery from a running train, is an exception to wilful neglect. It has also been established in *Narayana Aiyar* v. *The South Indian Railway Company, Ltd.* (2), that the onus is upon the plaintiff to establish how the loss or deterioration was caused though there the Risk Note was Form H. The case in *The Madras and Southern Mahratta Railway Co., Ltd.* v. *Mattai Subba Rao*, (3) cited by the learned Counsel for the defendant does not seem to me to touch the case. I am, therefore, with great reluctance constrained to come to the conclusion that the plaintiff has no remedy on this Risk Note B on the evidence as it stands. The suit must, therefore, be dismissed. The question is whether I should inflict costs on the plaintiff. The defendant, as stated, attempted to prove loss by robbery from a running train and assumed that onus at the trial and failed. This is, as I pointed out, wrong. I do not think that the plaintiff suffered any prejudice from that procedure, but, on the whole, I am inclined to dismiss the suit without costs.

Z. K. *Suit dismissed.*

(1) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L.R. 779.
(2) 75 Ind. Cas. 260 ; 18 L. W. 322 ; (1923) M. W. N. 731.
(3) 55 Ind. Cas. 754 ; 43 M. 617 ; (1920) M. W. N. 198 ; 11 L. W. 358 ; 38 M. L. J. 860 ; 28 M. L. T. 49.

LAHORE HIGH COURT.

CIVIL REVISION NO. 428 OF 1923.

December 14, 1923.

Present :—Mr. Justice Martineau.

SUNDAR MAL—PLAINTIFF—PETITIONER
versus
KAMAL DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art. 35 (ii)—Suit to recover value of tree cut and removed by defendant, nature of—Suit, whether cognisable by Small Cause Court.

A suit to recover to value of a tree alleged to have been cut and removed by the defendant from the plaintiff's field falls within the purview of Article 35 (ii) of Schedule II to the Provincial Small Cause Courts Act and is, therefore, not cognisable by a Small Cause Court.

Ram Prasad Pramanik v. *Sricharan Mandal*, 41 Ind. Cas. 276 ; 27 C. L. J. 594 ; 21 C. W. N. 1109, **relied on.**

Petition under section 25 of the Small Cause Courts Act, for revision of the decree of the Subordinate Judge, 3rd Grade, and Judge, Small Cause Court, Hoshiarpur, dated the 9th February 1923, dismissing the claim with costs.

Sheikh *Niaz Muhammad*, for the Petitioner.

JUDGMENT.—The plaintiff sued for Rs. 25 for the value of a tree alleged to have been cut and removed by the defendants from plaintiff's land. The suit appears to have been tried by the lower Court in its capacity as a Small Cause Court as there was an order by the Senior Subordinate Judge sending the case to the Small Cause Court. The suit has been dismissed, and the plaintiff has applied to this Court for revision.

The case is one falling under Article 35 the (ii) second Schedule to the Provincial Small Cause Courts Act, as the defendants' act, for which the plaintiff asks for compensation amounts to mischief or theft. See *Ramprosad Pramanik* v. *Sricharan Mandal* (1). The lower Court had, therefore, no pawer to try the case as a Small Cause Court.

Further, it seems that no evidence has been taken. No witnesses were produced in Court,

(1) 41 Ind. Cas. 276 ; 21 C. W. N. 1109 ; 27 C. L. J. 594.

and although a Commission for local investigation was issued there is no report of the Commissioner. The lower Court is wrong in thinking that the Commissioner made a report that the tree was outside the plaintiff's field. The report which the lower Court is referring to is a report made in a case brought by the plaintiff against another defendant, and is not one made in the present case.

I accordingly accept this application, set aside the decree, and direct the lower Court to re-try the case in its capacity as the Court of a Subordinate Judge. No order as to costs in this Court.

Z. K. *Decree set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 164 OF 1922.

December 8, 1923.

Present :—Mr. Baker, J. C.

VARDHMAN—DEFENDANT—APPELLANT

versus

Messrs. RADHAKISHAN and JAIKISHAN —PLAINTIFFS—RESPONDENTS.

Principal and agent—Fraud by agent—Principal, liability of, to third persons.

A principal is liable to third persons in a civil suit for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

Sherjan Khan v. *Almuddi*, 34 Ind. Cas. 598 ; 43 C. 511 ; 20 C. W. N. 268 ; 23 C. L. J. 225 ; *Lloyd* v. *Grace Smith & Co.*, (1912) A. C. 716 ; 81 L. J. K. B. 1140 ; 107 L. T 531 ; 56 S. J. 723 ; 28 T. L. R. 547, relied on.

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 84 of 1921, dated the 9th December 1921.

Mr. *V. V. Chitale*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT:—The facts of this case are simple. The plaintiff and defendant are firms. There were dealings between them. In the course of these dealings the plaintiff paid Rs. 3,000 to one Kesholal, an employee of the defendant's firm. Kesholal ran away with the money, and the only question is who is to suffer the loss.

Both the Courts below have found that Kesholal was acting as defendant's agent and defendant must, therefore, bear the loss. The defendant makes this second appeal.

The lower Appellate Court has found that Kesholal had express authority to receive the money, the plaintiff was, therefore, justified in making the payment to him and the defendant is liable for it.

It is admitted that Kesholal was in the employ of the defendant's firm and he used to go to the Railway Station to receive and despatch consignments, and that he was employed in weighment of cotton, etc. There is also evidence that it is customary at Khandwa to pay money to the known servants of firms without any special authority. In the present case it is admitted that Kesholal was sent along with one Bharmal, a boy, who was a relation of the manager of the defendant's firm, to take money from the plaintiff, and a letter was also sent with them. The money was not then paid and the letter was taken back. If this letter had been produced, it would have been shown whether the money was to be paid to Kesholal or to Bharmal, Kesholal returned on subsequent dates without the letter and asked for money. For various reasons the money was not paid for 2 or 3 days and ultimately it was paid to him by the plaintiff and he made away with it.

I do not think that sufficient grounds have been shown for differing from the view of the learned District Judge that Kesholal was the agent of the defendant. The learned Counsel for the appellant relies on the case of *Gopal Chandra Bhattacharjee* v. *Secretary of State for India* (1), which lays down that a master is liable for the fraud of his servant committed in the course of his service and for the master's benefit, though it is not necessary that the benefit should accrue to the master ; and that a master is not liable for misconduct of the servant committed for the servant's own private benefit. Although this case has not been expressly overruled, there is a later case of the same High Court, *Sherjan Khan* v. *Alimuddi* (2), in which it is held that the principal is liable

(1) 1 Ind. Cas. 735 ; 36 C. 647 ; 13 C. W. N. 619.
(2) 34 Ind. Cas. 598 ; 43 C. 511 ; 20 C. W. N. 268; 23 C. L. J. 225.

to third persons in a civil suit for the frauds and other malfeasances of his agent in the course of his employment although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them. The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit ; and the case in *Gopal Chandra Bhattacharjee* v. *Secretary of State for India* (1), is mentioned as one of those recognising the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not, in fact, authorise the Commission of the fraudulent act, and some of the *dicta* in *Gopal Chandra Bhattacharjee* v. *Secretary of State* (1) are stated to be based on a misapprehension of the expression " for the master's benefit". This case is based on the decision of the House of Lords in *Lloyd* v. *Grace Smith & Co.*, (3) which lays down that the principal is liable for the fraud of his agent acting within the scope of his authority, whether fraud is committed for the benefit of the principal or for the benefit of the agent.

The only question, therefore, is whether Kesholal was acting as the agent of the defendant when the payment was made to him. In view of the fact that he had been sent to collect the money before with a letter from the defendant and that nothing had occurred in the interval between that and the payment to the plaintiff, to show that his authority had been revoked, I am of opinion that the plaintiff was justified in regarding him as the agent of the defendant, in so far as the payment of the money was concerned.

It has been contended that the plaintiff ought to have been put on his guard by the fact that on his subsequent visits Kesholal had not brought the letter, but the letter having once been brought the plaintiff would naturally assume that Kesholal had authority to receive money unless the defendant gave the plaintiff a notice to the contrary. In these circumstances, I am of opinion that the view of the lower Courts is right and should be confirmed. In view of the remarks in *Sherjan Khan* v. *Alimuddi* (2), I do not think that it is necessary to discuss the ruling in *Gopal Chandra Battacharjee* v. *Secretary of State for India* (1), in which the facts are not the same as they are here and were of a samewhat peculiar nature.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) (1912) A. C. 716 ; 81 L. J. K. B. 1140 ; 107 L. T. 591 ; 56 S. J. 723 ; 28 T. L. R. 547.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 264 of 1922.

January 10, 1924.

Present :—Mr. Justice Broadway and Mr. Justice Zafar Ali.

VIR SINGH AND KEHR SINGH—PLAINTIFFS—APPELLANTS

versus

NIHAL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption, suit for—Acquiescence — Estoppel—Lease taken by pre-emptor from vendee—Partition proceedings, participation in.

The action of a pre-emptor in taking on lease from the vendee a portion of the land sold cannot be treated as acquiescence in the sale so as to debar him from suing to pre-empt the sale ; nor does his participation in partition proceedings instituted by the vendee operate to have that effect.

Thamman Singh v. *Jamal-ud-din*, 7 A. 442 ; A. W. N. (1885) 70 ; 4 Ind. Dec. (N.S.) 689, relied on.

Fateh Chand v. *Kirpa Singh*, 13 Ind. Cas. 561 ; 48 P. R. 1912; 76 P. W. R. 1912 ; 45 P. L. R. 1912; *Idris* v. *Skinner*, 56 Ind. Cas. 723; 82 P. R. 1919 ; 45 P. W. R. 1919 ; 126 P. L. R. 1920 (P.C.) *Kishan Lal* v. *Ishri*, 28 A. 237 ; A. W. N. (1905) 260, distinguished.

Second appeal form the decree of the Additional Judge, Lahore, dated the 20th December 1921, reversing that of the Senior Subordinate Judge, Lahore, dated the 6th May 1921, and dismissing the plaintiffs' suit.

Sardar *Kharak Singh*, for the Appellants.

Diwan *Mehr Chand*, for the Respondents.

VIR SINGH *v.* NIHAL CHAND

JUDGMENT.—This appeal has arisen out of a suit for pre-emption brought by two brothers, Kehr Singh and Vir Singh, in respect of a transfer of land under a deed of sale dated the 24th January 1919. The suit was brought three days before the expiry of the period of limitation fixed by the Statute. The consideration was Rs. 10,500 as entered in the deed of sale.

The Trial Court granted the plaintiffs a decree on payment of Rs. 10,500 but this decree was set aside on appeal by the vendees, by the Additional District Judge. It was held that the plaintiffs were estopped from bringing a suit on the following grounds:—

(1) That subsequent to the sale one of the pre-emptors Kehr Singh, had taken a portion of the land sold from the vendee under a lease.

(2) The said Kehr Singh was present throughout certain partition proceedings initiated by the vendees; and

(3) He actually received possession of the land which fell to his share and the share of his brother, Vir Singh.

For these reasons the learned Additional District Judge held that Kehr Singh himself was estopped from bringing the suit and further that Vir Singh was also estopped inasmuch as Kehr Singh had been acting throughout on his behalf.

Against this decision the pre-emptors have come up to this Court in second appeal through Mr. Kherak Singh.

Reference had been made to *Kripa Ram* v. *Gur Bakhsh* (1), but the learned Vakil did not think it necessary to lay the case before us. He relied mainly on *Thamman Singh* v. *Jamal-ud-Din* (2), which to some extent is in his favour. Mr. Mehr Chand on behalf of the respondents rested his case on *Fatch Chand* v. *Kirpa Singh* (3), *Idris* v. *Skinner* (4), and *Kishan Lal* v. *Ishri* (5). *Fateh Chand* v. *Kirpa Singh* (3), does not assist the learned Vakil. The facts there were entirely different from the facts of the present case. There it was held that the pre-emptors had taken part in the sale negotiations. *Idris* v. *Skinner* (4) has really no bearing on the case before us. Their Lordships of the Privy Council were dealing with a defence set up by persons who were practically vendees. In the present case the situation is quite different. In *Kishanlal* v. *Ishri* (5), it was held by Banerji, J., that in a suit for pre-emption based on custom, when it was found that the pre-emptor had knowledge of his right and was also aware of the sale, but notwithstanding this accepted a lease of the land, the acceptance of the lease amounted to such an acquiescence in the sale as would bar his right to sue. No reason was given for the conclusions therein arrived at and in the present case we are unable to see that Kehr Singh's action in taking on lease a portion only of the land sold can be treated as acquiescence in the sale itself either on his own account or on behalf of his brother. Similarly, Kehr Singh's presence throughout the partition proceedings in the present case did not, in our opinion, estop him from bringing the present suit. In any event, we cannot see how it could possibly act as an estoppel against Vir Singh. In this view of the case the appeal must succeed.

Mr. Kharak Singh attempted to go behind the finding as to the consideration-money but was compelled to concede that the finding was one of fact.

The appeal is, therefore, accepted and the plaintiffs' suit decreed with costs throughout. The sum of Rs. 10,500 should be deposited in the Court of first instance on or before the 10th of February 1924. We have fixed this period as it was the same period that was fixed by the Trial Court within which the money was paid according to the learned Vakil. In the event of the money not being paid within time the suit will stand dismissed with costs.

Z. K. *Appeal accepted.*

(1) 2 P. R. 1893.
(2) 7 A. 442; A. W. N. (1885) 70; 4 Ind. Cas. (N.S.) 689.
(3) 18 Ind. Cas. 561; 48 P. R. 1912; 76 P. W. R. 1912; 45 P. L. R. 1912.
(4) 56 Ind. Cas. 728; 82 P. R. 1919; 45 P. W. R. 1919; 126 P. L. R. 1920 (P. C.).
(5) 28 A. 287; A. W. N. (1905) 260.

SHEOKABAI *v.* GANPAT

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 150-B OF 1922.

December 5, 1923.

Present :—Mr. Baker, J. C., Mr. Kotval, A. J. C. and Mr. Prideaux, A. J. C.

Mt. SHEOKABAI—PLAINTIFF—APPELLANT

versus

GANPAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Widow re-married, whether can give son in adoption.

The Hindu Law does not provide for the re-marriage of a Hindu widow; on re-marriage, therefore, a widow's connection with the family of her husband ceases and she has no power, after re-marriage, to give in adoption her son by her first husband, unless the latter had expressly authorised her to do so.

Case law discussed.

Second appeal against the decree of the Additional District Judge, Akola, dated the 13th October 1921, in Civil Appeal No. 19 of 1921.

Mr. *A. V. Khare*, for the Appellant.

Messrs. *P. C. Dutt* and *R. B. N. G. Bose*, for the Respondents.

JUDGMENT.—Plaintiff No. 3, the present appellant, states that she is the owner of field Survey No. 85 of *Mouza* Nandura, that she leased this out to plaintiffs Nos. 1 and 2 for five years at Rs. 250 per year, and that the lessees were put in possession, but some three months before the suit the defendants obstructed their cultivation and dispossessed them of the field.

The suit was, therefore, originally filed for a permanent injunction, and subsequently a prayer for possession of the field was added. Defendants Nos. 1 and 3 are lessees of defendant No. 2. They contend that plaintiff No. 3 is the widow of the original owner Mahadu. She took defendant No. 2 in adoption on 22nd January 1917 at Nandura. The adoption deed was written on the same date but it could not be registered owing to Sheokabai's refusal. The plaintiffs then filed an application amending the plaint, wherein they stated that even if the adoption took place, it is invalid as the defendant No. 2's natural mother had re-married before it took place, and that defendant No. 2 was in law an orphan and had neither parent to give him in adoption. The fact of the re-marriage was admitted, but it was pleaded that this did not invalidate the adoption.

The findings of the Trial Court may be summarised as follows. In spite of the 2nd defendant's mother's re-marriage, she was competent to give him in adoption and the adoption was not invalid on that account. In Berar, for a widow to adopt after her husband's demise the husband's authority is not necessary. A widow can also adopt unless her husband had prohibited her from doing so. As regards the factum of adoption, the Trial Court held against it. It further held that there was nothing to show the defendant No. 2 was enjoying the property after the adoption. The plaintiffs' were given a decree for possession of the field.

On appeal the lower Appellate Court found the adoption proved. It, therefore, reversed the decree of the Trial Court and dismissed the plaintiffs' suit. Against this decision the present appeal has been filed.

It is here contended *inter alia* that defendant No. 2's mother having re-married before the adoption, such adoption is invalid. It is also argued for the appellant that the power of adoption is derived from the Hindu Law texts, collected by Mayne in his Hindu Law, at page 137, and that a widow in giving her son exercises not an independent but a delegated authority. The authority to give or take comes from the husband and a wife cannot give a son away without her husband's consent when he is alive: see *Rangubai* v. *Bhagirathibai* (1), It has been held by the Bombay High Court in *Panchappa* v. *Sanganbasawa* (2), that a Hindu widow has no power, after her re-marriage, to give in adoption her son by her first husband, unless he has expressly authorised her to do so. This case was considered by the same High Court in *Putlabai* v.

(1) 2 B. 377; 1 Ind. Dec. (N. S.) 674.
(2) 24 B. 89; 1 Bom. L. R. 543; 12 Ind. Dec. (N.S.) 596.

v. *Mahadu* (3) which lays down: " Assuming that the mother has by Hindu Law a right to give her son in adoption the Hindu Widows Re-marriage Act (XV of 1856) does not afford any indication that the Legislature intended to deprive her of it." In a recent case *Fakirappa Veerbhadrappa* v. *Savitrewa Sangappa* (4), the case of *Panchappa* v. *Sanganbasawa* (2) was followed, and that of *Putlabai* v. *Mahadu* (3) was overruled. This sase was heard by a Full Bench.

For the respondents *Basorey* v. *Ballabhdass* (5), *Sitaram* v. *Laxman* (6), and *Appa* v. *Damdia* (7) are quoted. But these cases do not deal with the question before us but deal with the effects of the Hindu Widows Re-marriage Act and the widow's right on the re-marriage to her husband's property or to the property left by her son born of her first marriage, the son having died after the re-marriage.

The reasoning to be found in the judgment in the case of *Fakirappa Veerbhadrappa* v. *Savitrewa Sangappa* (4) has our concurrence. The Hindu Law did not provide for the re-marriage of a Hindu widow. On re-marriage a widow's connection with the family of her husband, connection necessary in the act of adoption, ceases, and we agree with the latest ruling of the Bombay High Court that such an adoption as is found to have taken place in the present case is opposed to the fundamental principles of Hindu Law. The result is that the adoption of the second defendant by the present appellant is invalid. We allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Trial Court. The respondents will pay the appellant's costs in all three Courts.

Z. K. *Appeal allowed.*

(3) 1 Ind. Cas. 659 ; 33 B. 107 ; 10 Bom. L. R. 1134.
(4) 62 Ind. Cas. 318; 23 Bom. L. R. 482.
(5) 8 Ind. Cas. 1156; 6 U. L. R. 171.
(6) 17 Ind. Cas. 133; 8 N. L. R. 128.
(7) 47 Ind. Cas. 647; 14 N. L. R. 149.

LAHORE HIGH COURT.

CIVIL REVISION NO. 539 OF 1923.

January 8, 1924.

Present :—Mr. Justice Moti Sagar.

SARDARI LAL AND ANOTHER—PLAINTIFFS —PETITIONERS
versus
MOHAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1—Summonses to witnesses, party, right of to—Application made at late stage—Court, whether can refuse application—Procedure.

A party to a suit is entitled as of right to summonses for his witnesses. So long as an application is made after the institution of the suit, the Court is bound to issue the summonses. If the application is made at such a late stage of the proceedings that the witnesses cannot be served, the Court may refuse to adjourn the case for their attendance, but, it has no power to refuse to issue summonses.

Bhagwat Das v. *Debi Dei*, 16 A. 218 ; A. W. N. (1894) 45 ; 8 Ind. Dec. (N. S.) ; *Kaji Ahmad* v. *Kaji Mahamad*, 9 B. 308 ; 5 Ind. Dec. (N. S.), 205, relied on.

Petition under section 44, Act VI of 1918, for revision of the orders of the Subordinate Judge, first class, Gujranwala, dated the 13th and 14th June 1923, refusing to grant further time for the summoning or production of any other witness and ordering that the plaintiffs' evidence be considered as closed.

Dr. *Khalifa Shuja-ud-Din*, for the Petitioners.

JUDGMENT.—On the 25th May 1923 the plaintiff paid *talbana* for summoning two witnesses, namely, *Babu* Labha Ram of Moga and *Lala* Amar Nath of Lahore. The Court declined to issue summonses as it was of opinion that the *talbana* was filed late and the witnesses could not be served in time. On the 13th June 1923, which was the date fixed for the hearing of the case, the witnesses were not present and the Court declined to grant plaintiff a further opportunity for the production of these witnesses. The case was then adjourned to the 14th June 1923. On that

date two more witnesses, namely, Pars Ram and Bhagat Ram, were examined and the plaintiff stated that he also wanted to examine *Musammat* Jawandi and *Musammat* Parbati, defendants, as witnesses on his behalf. The names of these two ladies were included in the first list of witnesses filed in Court on the 21st July 1922, but as no *talbana* or diet money had been paid for the 14th June 1923, the Court declined to accede to the plaintiff's prayer and to grant him time for the examination of these witnesses. The case was then adjourned to 9th July 1923 for arguments. Against this order the plaintiff has filed an application for revision to this Court and it has been urged on his behalf that the order of the learned Judge of the Court below was erroneous in that he did not exercise proper discretion in refusing to grant plaintiff time for the production of the four witnesses above named.

In my opinion this contention is well-founded and must prevail. It has been repeatedly held that a party is entitled as of right to summonses to witnesses. So long as an application is made after the institution of the suit, the Court is bound to issue the summons. If the application is made at such a late stage of the proceedings that the witnesses cannot be present, the Court may refuse to adjourn the case for their attendance but it has no power to refuse to issue summonses: *Bhagwat Das* v. *Debi Dev* (1), and *Kaji Ahmad* v. *Kaji Mahammad* (2). In this case the *talbana* was filed on the 9th May 1923 and there was ample time for the summonses to have been served on the witnesses. As to the two ladies, *Musammat* Jawandi and *Musammat* Parbati, the case was not disposed of on the 14th June 1923 and was adjourned for arguments to 9th July 1923. The names of the ladies were mentioned in the list of the witnesses which the plaintiff wanted to produce on his behalf and the ladies could very easily have been examined before the case finally came up for arguments.

In my opinion the order of the learned Judge of the Court below is clearly wrong and must be set aside. I accept the revision and return the case to the Senior Subordinate Judge with the direction that he should allow plaintiff an opportunity to examine the four witnesses above mentioned. No order as to costs.

Z. K. *Petition accepted.*

(1) 16 A. 218 ; A. W. N. (1894) 45 ; 8 Ind. Dec. (N.S.) 141.

(2) 9 B. 308 ; 5 Ind. Dec. (N.S.) 205.

MADRAS HIGH COURT.

FULL BENCH.

CIVIL REVISION PETITION No. 796 OF 1921.

December 17, 1923.

Present:—Sir Walter Salis Schwabe, K. C., Chief Justice, Mr. Justice Coutts-Trotter, Mr. Justice Ramesam, Mr. Justice Wallace, and Mr. Justice Waller.

MEYYAPPA CHETTIAR—COUNTER-PETITIONER—APPELLANT

versus

CHIDAMBARAM CHETTIAR—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908) O XXI, r. 57, O. XXXVIII, r. 11—Attachment before judgment, nature of—Execution of decree—Dismissal for decree-holder's default—Attachment before judgment, whether ceases.

Held by the majority (Schwabe, C.J., and Wallace, J. *contra*)—The words "property attached in execution" in O. XXI, r. 57 of the Civil Procedure Code, include "property attached before judgment," when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale, so that if the execution petition is dismissed for the decree-holder's default, the attachment before judgment comes to an end.

Case law discussed.

Per Chief Justice:—The principle applicable to the interpretation of a penal rule is that the matter in question must be brought within the operation of the rule in express terms or at least by necessary implication. [p. 148, col. 1.]

The words "property attached in execution" in O. XXI, r. 57 of the Civil Procedure Code do not include "property, attached before judgment" when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale. [p. 148, col. 1.]

'Attachment before judgment' and attachment in execution are essentially different. [p. 148, col. 1.]

MEYYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR

An attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of O. XXXVIII of the Civil Procedure Code but it cannot by implication be brought to an end by an order under O. XXI, r. 57 of the Code. [p. 149, col. 1.]

Per Coutts-Trotter, J. :—There is no difference in *rerum natura* between an attachment before judgment and an attachment in execution of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely, the obtaining of a decree, confers a priority in time. But an attachment before judgment is not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. [p. 151, col. 1.]

When a decree-holder having obtained his decree takes out an execution petition, he has, in effect elected to take the benefit of O. XXXVIII, r. 11 of the Civil Procedure Code and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election, his attachment thereupon becomes subject to those requirements of diligence laid down by O. XXI, r. 57 of the Code. [p. 152, col. 1.]

Per Ramesam, J. :—Attachment before judgment and after judgment are identical in their essential features. Each is affected by a prohibitory order, the purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. [p. 156, col. 1.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Ramnad, at Madura, dated 30th March 1921, in E. A. No. 285 of 1920 in E. P. No. 142 of 1920 (in O. S. No. 124 of 1914 on the file of the Temporary Subordinate Judge's Court, Ramnad.)

Messrs *K. V. Krishnaswami Ayyar* and *K. Balasubrahmanya Ayyar*, for the Petitioner.

Messrs. *C. S. Venkatachariar* and *A. Swaminatha Ayyar*, for the Respondent.

ORDER OF REFERENCE TO A DIVISION BENCH.

Ramesam, J. :—The facts are not fully stated by the Subordinate Judge. They are as follows :—

The respondent in the High Court (petitioner in the Court below) filed O. S. No. 154 of 1914 in the Subordinate Judge's Court of Ramnad, and in I. A. No. 592 of 1914 obtained an order for attachment before judgment of 16 items of properties belonging to the defendant. The properties were attached on 20th November 1914. The suit was then transferred to the Additional Subordinate Judge's Court and was numbered as O. S. No. 124 of 1914, A decree was passed on 22nd February 1915. By the order on E, A. No. 4 of 1916 the decree was transferred for execution to the Subordinate Judge's Court of Ramnad. The decree-holder then filed E. P. No. 183 of 1916 and notice was issued to the defendant. The petition was dismissed on 19th September 1916 as the petitioner did not file an encumbrance certificate. The filing and dismissal of E. P. No. 183 of 1916 is not mentioned by the Subordinate Judge. As, under O. XXXVIII, r. 11, Civil Procedure Code. a re-attachment is unnecessary, it must be taken that E. P. No, 183 of 1916 was filed on the basis of the attachment before judgment. If O. XXI r. 57, Civil Procedure Code, applies to such attachments, the effect of the dismissal of E. P. No. 183 of 1916 is that the attachment ceased. Then E. P. No. 129 of 1918 was filed on 19th July 1918 and the properties were again attached, but on 29th April 1919 the petition was dismissed as *batta* was not paid for items 13 to 16 and as there were no bidders for items 1 to 12. E.P. No. 136 of 1919 was then filed. The properties were again attached on 19th July 1920. As there were no bidders at the sale the petition was struck off and the attachment of 19th July 1920 was kept alive for 4 months. The next petition for execution was filed on 12th October 1920 within the four months allowed.

The petitioner in the High Court first obtained a decree against the same defendant *ex parte*. The defendant applied to set aside the *ex parte* decree and it was set aside on condition of his giving security. The sixteen items in question were given as security on 15th March 1915. If the attachment before judgment made by the respondent is subsisting, and if the execution petition of 12th October 1920 is filed in pursuance of that attachment, the security will be subject to that attachment and cannot prevail against the rights worked out in that execution. In this view, the lower Court's order would be right.

But it seems to me (1) that the attachment before judgment is not subsisting. The lower Court relied on *Venkatasubbiah* v. *Venkata Seshaiya* (1), where it was held that O. XXI, r. 57, Civil Procedure Code, does not apply to attachments before judgment. But it seems to me that the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1), requires reconsideration after the Full Bench decision in *Arunachalam Chetty* v. *Periasami Servai* (2) According to the reasoning of the latter case, when an application for execution is filed on the basis of attachment before judgment, the attachment before judgment must be deemed to be an attachment in execution of a decree. If so, O. XXI, r. 57, applies. This conclusion seems to be reasonable. This is the view taken by the respondent himself when he obtained re-attachments in 1918 and 1920. Secondly, it is true that the security cannot prevail against all rights pursuable under the old attachment. The last execution petition was based on the attachment of 1920. If so, the security is not subject to any rights. (See my judgment referring the case to a Full Bench in Appeal No. 36 of 1920.)

I, therefore, refer this Revision Petition, to a Division Bench for disposal.

Messrs. *K. V. Krishnaswami Ayyar* and *Balasubramaniya Ayyar*, for the Petitioner.

Messrs. *C. V. Anantakrishna Ayyar* and *A. Swaminatha Ayyar*, for the Respondent.

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.:—The question for decision is, how the provisions of O. XXI, r. 57, are to be reconciled with those of O. XXXVIII, r. 11, Civil Procedure Code.

One method is to understand O. XXXVIII, r. 11, as applying only to the first execution taken against property attached before judgment. Another is, to treat the attachment mentioned in O. XXI, r. 57 as not including attachments before judgment, which will then continue until the decree is satisfied. Consistently with my judgment in *Arunachalam Chetty* v. *Periasami Servai* (2), I perfer the former view, and this seems to be the opinion of RAMESAM, J., as he observes in his reference to the Divisional Bench that the conclusion that an attachment before judgment should be deemed to be an attachment in execution of a decree is reasonable, and he further adds that the security in this case was not subject to any rights arising out of the attachment of 1920, thus implying that the attachment before judgment was not kept alive for the purpose of subsequent attachments after the first attachment after the passing of the decree had ceased owing to the dismissal of the execution petition.

I think that the words "the attachment" in O. XXI, r. 57, mean the attachment in execution in which the attachment before judgment became merged by virtue of O. XXXVIII, r. 11, *i.e.*, the first attachment after the passing of the decree.

But it has been held by a Bench of this Court in *Venkatasubbiah* v. *Venkata Seshaiya* (1), that an attachment before judgment does not cease to have effect because of the dismissal of subsequent applications for execution for default of prosecution, and this decision is not consistent with the above view.

The question, however, is not an easy one for decision and it is important that it should be decided finally as it is likely to arise in other execution petitions. We refer the question whether the attachment before judgment in this case was subsisting after the dismissal of E. P. No. 183 of 1916 on 19th September 1916 to a Full Bench.

Devadoss, J.—I agree to the reference as the question is not one free from difficulty, though I am of opinion that *Venkatasubbiah* v. *Venkata Seshaiya* (1) has been rightly decided.

ORDER:—We propose to call on the Court of the Subordinate Judge of Ramnad at Madura to produce to this Court the execution records in O. S. No. 124 of 1914. Further consideration of this reference will be adjourned pending receipt of those papers.

This petition coming on for hearing on Tuesday, the 6th November 1923, after receipt of the records in O. S. No. 124 of 1914 from the Court of the Subordinate Judge of Ramnad

(1) 48 Ind. Cas. 232 ; 42 M. 1 ; 24 M. L. T. 346 ; (1918) M. W. N. 606 ; 35 M. L. J. 387 ; 8 L. W. 369.
(2) 70 Ind. Cas. 439 ; 44 M. 902 ; (1921) M. W. N. 569; 41 M. L. J. 252 ; 14 L. W. 645 (F.B.).

at Madura in pursuance of the order of this Court, dated 24th October 1923, upon perusing the records, and upon hearing the arguments of the said vakils on both sides, and the case having stood over for consideration till this day, the Court expressed the following

OPINION.

Chief Justice.—The respondent obtained an order for attachment before judgment of certain immoveable property of the judgment-debtor. The petitioner having obtained a decree *ex parte* against the same judgment-debtor, it was set aside on the latter's application on security being given to the petitioner, and as security, a charge was given over the property attached by the respondent. In due course the respondent obtained a decree as also did the petitioner, and there were other decrees against the same judgment-debtor by other persons. The respondent took out an execution petition in 1916, which came before the Court on several occasions, being adjourned from time to time for the respondent to file the necessary papers, which included an encumbrance certificate. These papers not having been produced, the petition was, on the 29th of August 1916, adjourned to the 19th September next for filing the papers, and on that date, the papers not having been filed the petition was dismissed. Subsequently, the respondent attempted again to bring the property to sale, but this was objected to by the petitioner on the ground that the dismissal of the execution petition in September 1916 put an end to the attachment before judgment, and that, therefore, the petitioner's security over the property prevailed over the claim of the respondent and the other judgment-creditors, who would but for this security given to the petitioner be entitled to rateable distribution under the rules. The Subordinate Judge has decided against this view and has ordered rateable distribution. The petitioner has brought this Civil Revision Petition, which was ultimately referred to this Full Bench.

The question to be decided is whether the words "property attached in execution" in O. XXI, r. 57, include "property attached before judgment," when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale; for, if so, by the words of that rule, upon the dismissal of the application for execution by reason of the decree-holder's default rendering the Court unable to proceed further with the application for execution, the attachment ceases. It was argued before us that there has been no default within the meaning of the rule. But it would seem clear that the Court required papers to enable it to proceed further with the application for execution, and the hearing was adjourned to enable the respondent to file the necessary papers, and it was dismissed because he failed to do so, and I think that that amounts to a dismissal by reason of the decree-holder's default within the meaning of the rule.

But there remains the important question whether, when the attachment is an attachment before judgment, the effect of the dismissal is to put an end to that attachment. The penalty imposed by r. 57 is very serious indeed, and, if it applies to an attachment before judgment, the effect of the dismissal of the application would be to give the petitioner who took his security after the attachment, precedence over the respondent and all the other decree-holders who would otherwise be entitled to rateable distribution; and I cannot believe that so serious a penalty would have been imposed for what may have been the negligence of a Vakil or delay caused by some difficulty in obtaining the necessary papers; and I have little doubt that the Court dismissing the petition had not the least idea that the effect of such a dismissal would be to impose such penalty. Indeed, the law had by that time been declared in *Venkatasubbiah* v. *Venkata Seshaiya* (1) to be, that the dismissal of an application for execution for default had no effect upon attachments before judgment. Although the obvious injustice in this particular case of holding that the attachment before judgment ceases is not a proper matter for consideration, yet the serious injustice that may follow generally on deciding in one way, and the fact that third parties' interests may be affected without their having an opportunity to intervene, are legitimate considerations in arriving at the true interpretation of the rule, if the rule is open to alternative constructions. The rule is a penal one and the principle that is applicable is that the

matter in question must be brought within the operation of the rule in express terms, or at least by necessary implication. Now, in terms, the rule applies to property attached in execution, and that expression does not include property attached before judgment. But it is argued that property which has been attached before judgment becomes property attached in execution, and ceases to be property attached before judgment, once proceedings are taken to bring that property to sale in execution. But I can find nothing in the Code to justify that view. It is true that, where property has been attached before judgment under O. XXXVIII, r. 11, no fresh attachment is necessary after decree for the purpose of selling the property. But that, in my judgment, does no more than provide that in such a case there need be no attachment in execution, and that the Court having, by reason of the attachment before judgment, got control over the property can proceed with the sale. In other words, what the Code permits is that the attachment before judgment can be used, in order to enable the Court to hand over possession of the property to the purchaser at Court auction. Attachment before judgment and attachment in execution are essentially different.

There is nothing remarkable in there being a penalty imposed for failure to proceed expeditiously in the case of property attached since decree, without a similar penalty being imposed when the property is attached before judgment, because the penalty would be much more serious in the latter case. It would involve the letting in of all alienations subsequent to the attachment to the exclusion of all other decree-holders, and there is nothing unusual in such alienation by way of security for some other claimant as in this case or otherwise, the alienee taking only the risk of the particular creditor who has attached before judgment, subsequently obtaining a decree which is not otherwise satisfied; whereas in the case of attachment after decree an alienation between the attachment and dismissal of the execution petition is most improbable, and, at the worst, such dismissal enables the judgment-debtor to alienate before the decree-holder can re-attach, and, although there have been cases where that has been attempted, such as *Pelda Venkatasubbiah* v. *Tangatoor Subbiah* (3), and *Venkiteswarayyan* v. *Aswatha Narayanan* (4), it is not unaccompained by risk as was demonstrated in those two cases. It is clear from a comparison of O. XXXVIII with O. XXI that the framers of the Code considered what provisions of O. XXI should be applied be attachment before judgment, and I see no reason at all to suppose that it was intended to impose this penalty in cases of attachment before judgment. If it had been intended, it could have been done quite simply by adding the words "or attachment before judgment" in O. XXI, r. 57. Attachment before judgment is one of the headings of O. XXXVIII, which contains a Code dealing with that form of attachment, which differs in many features from attachment in execution dealt with under O. XXI. For instance, the provisions of rr. 7 and 9 of O. XXXVIII have no application to attachments in execution; and r. 12, dealing with agricultural produce, differs materially from r. 74 of O. XXI dealing with the same subject; r. 7 provides that the manner of attachment in the two cases shall be the same and r. 8 applies the rules of O. XXI relating to the investigation of claims to cases of attachment before judgment, and thereby clearly indicates that the Code looks upon the two attachments as being different things. Much reliance is placed by the petitioner on r. 11; but, as I have pointed out, all that the rule says is that, where property has been attached before judgment, and it is desired to execute the decree upon it, it will not be necessary to go through the formality of re-attaching the property, and it does not say that the original attachment before judgment shall become or be deemed to be an attachment in execution, which words, in my judgment, would be necessary to make it an attachment in execution within the meaning of O. XXI, r. 57, or to make one form of attachment merge inextricably in the other. Further, it is worth noticing that the statutory forms in the Appendix for the two forms of attachment are quite different, for, by Form No. 7 of Appendix F, the order made for attachment before judgment is addressed to the

(3) 28 Ind. Cas. 62; (1915) M. W. N. 159.
(4) 75 Ind. Cas. 491; 45 M. L. J. 315; (1923) M.W. N. 529; (1923) A. I. R. (M.) 708.

Bailiff and directs him to hold the property until the further order of the Court, while the form of the order for attachment in execution in Appendix E, 24, is addressed to the party, and is in the nature of a prohibition to him from transferring or charging the property until the further order of the Court.

If the matter were *res integra*, I should without hesitation be prepared to hold that the attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of O. XXXVIII, but it cannot by implication be brought to an end by an order under O. XXI, r. 57.

Turning to the authorities, the point came directly for decision in *Venkatasubbiah* v. *Venkata Seshaiya*, (1) and in *Ganesh Chandra* v. *Banwari Lal*, (5). Both in Calcutta and Madras it has been held, under precisely similar circumstances to those of this case, that the attachment before judgment is not affected by the dismissal of an application under O. XXI, r. 57. The Madras case purported to follow the Calcutta case and also two other decisions in *Bavuddin Sahib* v. *Arunachela Mudali* (6), and *Suraparaju* v. *Narasimham* (7). Neither of the two latter cases are authorities directly in point although they contain weighty *dicta* in favour of the view expressed in *Rudravaram Venkatasubbiah* v. *Rudravaram Venkata Seshaya* (1) being correct. The principle has now been accepted by all the text books, and I think it correct to say that, since the passing of the Code of 1908, which for the first time introduced the provisions of O. XXI, r. 57, this has been the accepted view. I do not, however, think that the time has been long enough or the number of decisions sufficient—though probably the ruling has been followed in many unreported cases in the *mufassal* and here—to constitute a *curses curiae*, and so relieve us from having to decide the point, though the fact of its having been accepted as correct fortifies my conviction as to the true meaning of the rule. On the other hand, there is a Full Bench decision in *Arunachelam Chetty* v. *Periasami Servai*, (2), which is relied upon by the petitioner, and is no doubt responsible for this attempt to upset the existing practice. That case requires careful examination. The question actually before the Court was as to which Article of the Limitation Act applied to suits by a person against whom an order had been made on a claim preferred to property attached before judgment—such claim being made after an order for sale made in execution. Article 11 of the Limitation Act imposes a limitation of one year from the date of the order for suits by a person againt whom an order has been made on a claim preferred to property attached in execution. The Court held that that Article applied to cases where the claim was preferred to property attached before judgment if the claim was preferred after an order for sale in execution.

WALLIS, C. J., with whom OLDFIELD, KUMARASWAMI SASTRI and RAMESAM, JJ., agreed, stated that the property attached before judgment does not become property attached in execution upon the passing of a decree for the plaintiff either within the meaning of Article 11 or under O. XXI, r. 57, and that O. XXXVIII, r. 11, merely emables the decree-holder to apply for execution without a fresh attachment. But he held that where an order for sale was obtained, that order proceeds on the footing that the property is to be considered as attached in execution by virtue of O. XXXVIII, r. 11, and that a claim put in after the order may properly be regarded as a claim to property attached in execution of the decree and, therefore, within Article 11 of the Limitation Act. It is to be observed that this change which the Court held occurs in the nature of the attachment only comes into operation according to this judgment when an order for sale is obtained. It does not hold that this change occurs either on obtaining a decree or on making an attempt to obtain an order for sale by issuing an execution petition. The case is, therefore, not any authority in favour of the present contention, because in this case there has not been any order for sale. It may be, if there had been such an order, that the position would be different. This judgment points out the anomalous result that if a claim is made to property attached

(5) 14 Ind. Cas. 845 ; 16 C. L. J. 86 ; 16 C. W. N. 1097.
(6) 22 Ind. Cas. 851 ; 26 M. L. J. 215
(7) 26 Ind. Cas. 81 ; 19 L. W. 93.

before judgment up to the order of sale, a suit by the party affected is barred in six years, whereas, if it is made after the order for sale, it is barred in one year, and suggests that the anomaly should be put right by legislation. Emphasis was placed in the judgment on the fact that, before the limitation provisions in such cases were removed from the Code of Civil Procedure and put into the Limitation Act in 1908, there was express provision that the limitation period of one year should apply both in the case of claims to property attached in execution and to property attached before judgment, and it was thought that the Legislature could not have intended in the process of removing a section from the Code of Civil Procedure to the Limitation Act to extend the limitation period. The Court, however, was driven to the conclusion that it had done so, but confined the extension within the narrowest possible limits. No such consideration applies to this case, as the penal provision of O. XXI, r. 57, in question was, when enacted, entirely new. It is not without interest that the Court treated the meaning of O. XXI, r. 57, as not germane to the matter then in issue and that *Rudravaram Venkatasubbiah* v. *Rudravaram Venkata Seshaiya* (1) and the cases there quoted were not even mentioned in argument. SPENCER, J., delivered a separate judgment in which he says that, if a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree, because O. XXXVIII, r. 11, declares that no re-attachment is necessary and, later on, he says he finds no difficulty in classing a claim put in after the properties were brought to sale in execution proceedings under the heading of "Claims preferred to property attached in execution of a decree," and he declined to express an opinion on the hypothetical case of a claim put in to property attached before judgment before the decree and the commencement of the execution proceedings. I doubt if he meant by his judgment to go further than the rest of the Court, and to extend the principle enunciated by them to claims made where there was a decree but no execution proceedings, or to claims made after execution proceedings had been commenced. If he did so intend, his observations were *obiter* and I prefer the judgment of the rest of the Court, which, in my judgment, strained the language of the Article in question in going even as far as it did. However this may be, I find nothing in that judgment when carefully examined which militates again the view expressed in *Rudravaram Venkataswbbiah* v. *Rudravaram Venkata Seshaiya* (1), which I think was rightly decided. As there has been no order for sale in this case, and nothing but an abortive attempt to obtain one, and for that purpose to make use of an existing attachment, it is not necessary here to decide what the position would be after an order for sale had been obtained. I can find nothing in the rule to make the failure to proceed expeditiously with the execution petition involve the loss of all rights acquired by the attachment before judgment. I would answer the question in the affirmative.

Coutts-Trotter, J.—I regret that I am unable to agree. In matters of procedure it is obviously desirable that this Court, indeed, all the Courts of the country, should, as far as possible, speak with one voice. But in this matter we start with the situation that there are conflicting decisions of the various Courts of India and, as my Lord has said, it is not possible to contend that there is such a course of decisions either of this Court or of other Courts which would justify the attitude that, for the sake of uniformity, a result should be acquiesced in even although one thought it logically unjustifiable. I conceive that our business is to say, without reference to previous decisions, what we think to be the true intention of the provisions of the Code relating to the subject-matter of this reference.

The point for our decision is a very short one, namely, whether a party who has obtained an atttachment before judgment and has subscquently had his execution petition dismissed for want of due diligence in presenting the necessary papers to the Court loses the priority that he had enjoyed by reason of his attachment before judgment. If he has lost it, he has lost it by reason of the provisions of O. XXI, r. 57, which run as follows:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execu-

tion, it shall" (among other powers) "dismiss the application."

The Court in fact dismissed the application in this case. Then follow the words, "Upon the dismissal of such application the attachment shall cease." By O. XXXVIII, r. 11, it is provided as follows :—

"Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

The whole point here is whether O. XXI, r. 57, operates on an attachment which had been obtained before judgment or is to be confined to an attachment first sought and obtained after decree and in execution of that decree. It is well settled that attachment creates no title in the decree-holder or the prospective decree-holder, as the case may be. It is merely a process whereby the Court puts its hand on the property attached and keeps it *in custodia legis* until something else happens. It appears to me that O. XXXVIII, r. 11 provides that, when property has been attached before judgment, it remains attached when in due course after judgment the decree-holder applies for execution of his decree. It has re-solved doubts alluded to in *Ramakrishna Das Surrowji* v. *Surfunnissa Begum* (8), as to whether after decree it might not be necessary for the attaching creditor to re-attach the property and it provides in terms that the property shall remain attached upon an application for execution of the decree. I am unable to see that there is any difference in *rerum natura* between an attachment before judgment and an attachment in execution of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely, the obtaining of a decree, confers a priority in time. But an attachment before judgment is not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. Language is used in some of the cases which might suggest that the mere passing of a decree converts an attachment before judgment into an attachment in execution. I do not adopt that view for the reasons pointed out by WALLIS, C. J., in *Arunachalam Chetti* v. *Periasami Servai* (2). The reasoning appears to be this—and I respectfully regard it as perfectly sound—that a decree-holder need not proceed in execution unless he chooses to do so, and it would, therefore, be absurd to say that an attachment is an attachment in execution when there is no execution. The turning point comes, in my opinion, when the decree-holder by filing an execution petition has shown that he means to execute his decree ; and I am myself unable to escape from what seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution. That seems to me to underlie the reasoning of the Judges in the Full Bench case to which I have referred, particularly of SPENCER, J., with whom I find myself in complete accord. I think it is also implied in the reasoning of the judgment in *Bavuddin Sahib* v. *Arunachala Mudali* (6). I confess I am not impressed by the argument hat O. XXI, r. 57, is a penal enact ment which takes away rights which would otherwise exist and must, therefore be constrted *verbatim et liberatim*. No Common Law rights are here involved. The whole position of the decree-holder and all his rights are alike the creatures of a bundle of Statute-made provision. The Statute punishes lack of diligence on the part of the decree-holder. I am unable to see any logical reason why his lack of diligence should be punished only if he has attached the property after decree but excused if he attached it before decree. Nor do I think that the grammatical construction of O. XXI, r. 57, can really bear the construction sought to be put on it. The words are "where any property has been attached in execution of a decree." That I construe as meaning "where any property has been in a state of attachment in execution of a decree" and not confined to cases where the first act of attachment was made subsequently to the decree. To put it in the technical language of grammar, I regard "has been attached" as a perfect and not an aorist tense. In my opinion, when a decree-holder having obtained his decree takes

(8) 6 C. 129 (P. C.) ; 7 I. A. 157 ; 8 Suth. P. C. J. 755 ; 4 Ind. Jur. 314 ; 4 Sar. P. C. J. 151; 3 Ind. Dec. (N. S.) 85.

out an execution petition, he has, in effect, elected to take the benefit of O. XXXVIII, r. 11, and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute When he has made that election it seems to me that his attachment thereupon becomes subject to those requirements of deligence laid down by O. XXI, r. 57. I cannot assent to the view that attachment before judgment and attachment in execution are two such wholly different things as to make any provision applicable in express terms to the one in no event applicable to the other; because, in my view, as soon as a decree-holder applies for execution on the strength of the attachment that he has obtained before judgment and which he seeks after judgment to use as validating the sale for which he is applying, he thereby by his own act asks the Court to treat his attachment as being an attachment in execution. I would, therefore, answer the question propounded in the negative.

Ramesam, J.—The facts of the case were stated by me in the order referring the case to a Bench of two Judges and need not be repeated.

The question referred to the Full Bench is—"whether the attachment before judgment in this case was subsisting after the dismissal of E. P. No. 183 of 1916 on the 19th September 1916."

The decision turns upon (1) whether O. XXI, r. 57, ever applies to attachments before judgment? and (2) if it does, under what conditions? The two questions are connected and will be discussed together.

They turn on the construction of the words "attached in execution of a decree" in O. XXI, r. 57. If an attachment before judgment can ever become or be converted into an attachment in execution, the rule applies to an attachment before judgment after it is so converted into an attachment in execution. If such conversion is impossible, it does not.

In the Code of 1859 there was no provision corresponding to O. XXXVIII, r. 11, of the present Code. There was a conflict of opinion on the necessity of a re-attachment by a decree-holder who had obtained an attachment before judgment and who desired execution of his decree.

In Calcutta, it was held that attachment before judgment and attachment in execution were so entirely different in their nature that one cannot subserve the purposes of the other and it was necessary for such a decree-holder to re-attach the property for purposes of execution—*Sreeram Manick* v. *Tincowree Roy* (9). The High Court of North-West Provinces took a different view. PEARSON and TURNER, JJ., *Sarkises Agent of the Official Assignee of the Insolvent Court of Calcutta* v. *Mussumat Bundho Baee* (10), said "Furthermore, there is in our judgment no difference between the effect of attachment obtained before, and attachment obtained after decree. It is true that in the former case the plaintiff can only obtain an order for the attachment of specified property, whereas in the latter the decree-holder may obtain a general order for the attachment of the property of the judgment-debtor, wherever, it may be found but the reason for this difference is to be found in the grounds on which the Court is authorized to grant attachment before judgment, that is to say, the probability of the disposal of the property, or its removal out of the jurisdiction of the Court. In both processes the orders directing attachment are to be carried out under the provisions of section 233 and the following sections; in both, the claims of the third parties are to be similarly investigated under sections 246 and 247; and to both apply the prohibitions contained in section 240, which prohibitions we hold to embrace all the consequences resulting from attachment, whether the order be made before on after judgment. When property has been attached by actual seizure or written order, any private alienation thereof, whether by sale, gift or otherwise, is null and void. The Legislature differing from the Calcutta view, and adopting the Allahabad view, enacted a section in the Code of 1877 similar to O. XXXVIII, r. 11, making a re-attachment unnecessary and the attachment before judgment available for purposes of execution. It is true that, after the Code of 1877 was passed, the Privy Council held, on the Code of 1859, that the attachment before judgment continues and cannot be regarded as abandoned by the then practice of re-attachment (*Ramkrishna Das Surrowji* v.

(9) 13 W. R. F. B. 9; 4 B. L. R. F. B. 63 at p. 67.
(10) 1 N. W. P. H. C. R. 172.

Surfunnissa Begum, (8), but this is immaterial.

Now, O. XXI, r. 11, provides that one of the modes in which the assistance of the Court in execution is required is "by the attachment and sale, or by the sale without attachment, of any property." Sale without attachment is permissible only in a decree for sale. Therefore, in a decree for money, there must be an attachment in execution preceding the sale. In a case where there has been an attachment before judgment and no re-attachment (pursuant to the provision of O. XXXVIII, r. 11) where is the attachment in execution preceding the sale as required by O. XXI, r. 11? The answer is, that the attachment before judgment is such attachment in execution, having passed into the latter. In my opinion, the effect of O. XXXVIII, r. 11, is, though it does not say so in so many words, that the attachment before judgment becomes an attachment in execution when it is definitely sought to be made available for execution This is the view taken in the Indian Courts and by the text-writers up to 1911. In *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan* (11), SCOTT, J., referring to section 490 of the Code of 1882 (corresponding to O. XXXVIII, r. 11) said (at page 405): "The attachment before judgment enures and *becomes* an attachment in execution. That is the effect of the section." This was followed in *Sewdut Roy* v. *Sree Canto Maity* (12), (at page 643) (1906) by WOODROFFE, J., who said, "on such application for execution, the attachment before judgment enures and becomes, upon and by virtue of the application, an attachment in execution." In *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta*, (13) GHOSE and BRETT, JJ., held with reference to section 285 of the old Code (corresponding to section 63 of the present Code) which contains the words "under attachment in execution of a decree," that the section applies to attachments before judgments also. Messrs. Amir Ali and Woodroffe in their first edition of the Civil Procedure Code at page 1156 say: "He must apply for execution just like any other creditor." (In the footnote to this sentence, the decisions in *Pollanji Shapurji Mistry* v. *Edward Vaughan Jordan*, (11) and *Sewdut Roy* v. *Sree Canto Maity* (12) were cited without any disapproval.) "This is now made clear by the words 'upon an application for execution of such decree.' Where, however, an application for execution is made by the terms of this rule no application for attachment is necessary, the attachment before judgment *enuring and becoming upon and by virtue of the application for* execution, an attachment in execution." In the footnote they refer to *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13), (same as *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13), and add, "In this respect, the law is now settled, etc." In *Durpati Bibi* v. *Ramrach Pal* (14), BANERJI and TUDBALL, JJ., say, "so that, after the passing of the decree, the attachment already made was to be deemed to *be an attachment in execution of the decree.*" In *Ramasamy Udayar* v. *Chakrapani Chettiar*(15), there were two attachments before judgment in two Courts and section 285 was applied to them as in *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13). SUBRAHMANYA AYYAR, J., said, "the effect of section 490, Civil Procedure Code, is to put a person attaching before judgment *in the same position as if he had attached after decree*, if a decree is passed in his favour." In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*, (16) (a decision of three Judges), the learned Judges, after stating that section 490 of the Civil Procedure Code provides that no re-attachment is necessary, add: "The case, therefore, *stands upon the same footing* as if the creditor had obtained his decree and had afterwards obtained an order of attachment." Thus, it is clear that the construction contended for by the petitioner has always been accepted up to 1911.

The first note of dissent from this view was struck in *Ganesh Chandra* v. *Banwari Lal* (5). The learned Judges (one of whom was Sir CECIL BRETT) dissent from *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan* and *Sewdut Roy* v. *Sree Kanto Maity* (12). The decision in *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13) in which BRETT, J., was one

(11) 12 B. 400, 6 Ind. Dec. (N. S.) 752.
(12) 33 C. 639 at p. 643 ; 10 C. W. N. 634.
(13) 29 C. 773 ; 1 C. L. J. 97 ; 6 C. W. N. lxiiv.
(14) 3 Ind. Cas. 31 ; 31 A. 527 ; 6 A. L. J. 703.
(15) 17 M. L. J. 488.
(16) 26 M. 673.

of the Judge) was not referred to nor is the closely connected question,the possibility of the conversion of an attachment before judgment into one in execution, discussed. This decision was referred to in *Bavuddin Sahib* v. *Arunachala Mudali* (6), where their Lordships say: "The other contention of the appellant, namely, that . . . the present decree-holder converted the attachment before judgment into an attachment in execution is not sustainable. *Such conversion can take place only if the decree-holder applies for sale of all the properties in execution of his own decree.* Whether such conversion will take place even in such a case may be questioned on the authority of *Ganesh Chandra* v. *Banwari Lal* (5), but it is unnecessary to decide that question for the purposes of this case." This decision far from being an authority in favour of the respondent is, as the expression of an opinion, against him. It is true the last sentence above quoted leaves the point before us open. But the immediately preceding sentence indicates the view that the attachment before judgment will be converted into one in execution on the application of the decree-holder for sale. The next case supposed to be in favour of the respondent is *Suraparaju* v. *Narasimham* (7). It does not appear from the facts that any application for execution was dismissed for default. There was no reference either in the argument or in the judgment to O. XXI, r. 57, or to the cases above discussed. The next decision relied on by the respondent is *Venkatasubbiah* v. *Venkata Seshaiya* (1). It purports to be based on *Ganesh Chandra* v. *Banwari Lal*, (5) *Bavuddin Sahib* v. *Arunachalla Mudali* (6) and *Suraparaju* v. *Narasimham* (7). The last two decisions are scarcely authorities for it. So that, we have, as against the decisions and opinions that prevailed from 1869 up to 1911, two decisions in 1912 and 1918 in favour of the respondent.

In this state of the authorities we got the decision in *Arunachalam Chetti* v. *Periasami Servai* (2); here the question arose with reference to the words "attached in execution of a decree" in Article 11 of the Limitation Act. A Full Bench of five Judges held that, after an order for sale was passed after the decree, an attachment before judgment becomes an attachment in execution. WALLIS, C. J., said, referring to O. XXXVIII, r. 11: "This provision does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon *the mere passing of a decree for the plaintiff* either within the meaning of Article 11 of the Limitation Act or O. XXI, r. 57, already mentioned, as execution may never be applied for, but merely enables the decree-holder *to apply for execution by sale* of the attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that *the property is to be considered as attached in execution by virtue of r.* 11, *etc.*" This was concurred in by three other Judges (of whom I was one). SPENCER, J., though he may be regarded as going further than the others, certainly agreed with them to the extent that, at least after the order for sale, the attachment before judgment becomes one in execution. The judgment is, therefore, an unanimous judgment of five Judges laying down that an attachment before judgment may be converted into an attachment in execution of a decree and is binding on this Court ; and when we remember that the Limitation Act and Civil Procedure Code are allied General Acts (first passed together in 1859, again in 1877 and again in 1908)and ought to be construed consistently (See *Phoolbas Koonwar* v. *Lalla Jogeshur Sahoy* (17), *and Arunachalam Chetty* v. *Periasami Servai* (2) it is seen that it will be a great anomaly without any justification if the same expression is construed in one way in section 63 of the Civil Procedure Code and Article 11 of the Limitation Act, and in another way for O. XXI, r. 57, of the Civil Procedure Code. If the character of an attachment before judgment is such that is conversion into an attachment in execution is impossible, such impossibility exists equally for the purpose of section 63, Civil Procedure Code and Article 11 of the Limitation Act as for O. XXI, r. 57. Unless there is a clear indication to the contrary in one or more of these provisions, the possibility of such conversion equally applies to all and I see no reason to depart from *Arunachalam Chetty* v *Periasami Servai* (2) which definitely established the possibility of such conversion.

(17) 1 C. 226 at p. 242 (P. C.); 3 I. A. 7 ; 25 W. R. 285 ; 3 Sar. P. C. J. 573; 5 Suth. 236.

I do not feel it necessary to discuss the interpretation of O. XXXVIII, r. 9. I agree with the decisions in *Ram Chand* v. *Pitam* (18) and *Abdul Rahman* v. *Amin Sharif* (19), that when a suit is dismissed the attachment before judgment terminates without an order of the Court. But even if the opposite view is the correct view, I do not think this has any bearing on the construction of O. XXI, r. 57. While O. XXXVIII, r. 9, provides for one mode of terminating an attachment before judgment, it is not the only mode and it does not stand in the way of construing O. XXI, r. 57, as providing another.

Nor do I think any assistance can be derived from the Form 7 in Appendix F of the Code. Appendix E, Form 24, which also seems to imply that a further order of the Court is necessary to put an end to the custody of the Court in an attchment after judgment, may seem to be inconsistent with O. XXI, r. 57. I think the true view is that the Forms have nothing to do with the rights of parties but only deal with the relation of the Court to its subordinate officers who carry out its orders.

It is said that, if the petitioner's contention is correct, O. XXXVIII, r. 8, would be unnecessary in the face of O. XXI, r. 58, but the same may be said of O. XXXVIII, r. 11. It may be, some of those rules are not absolutely necessary but have been enacted as a matter of abundant caution.

It may be that, of the various opinions in the decisions, cited by me above and with which I agree, some are *obiter dicta* while others are necessary for the decision. It may be that in some of them the exact period of time when the attachment before judgment was converted into an attachment in execution had not to be and was not considered.

In the case before us, as soon as the application (Execution Petition No. 183 of 1916) mentioning an attachment before judgment and praying for sale, was filed, the Court passed the following order on 6th May 1916: "Copy of attachment warrant and the order making the said attachment absolute to be produced." These papers were produced on 11th July 1916. The Court, being satisfied that there was such an attachment as to justify the prayer for sale (as required by O. XXI, r. 11), passed the next order on the application on 11th July 1916. In this order the Court, apparently acting under O. XXI, r. 22, directed notice to the defendant as the decree was more than one year old. This is a definite acceptance by the Court of the application as a proper application for sale and a statement of its willingness to pass further orders on it unless the defendent can show cause. The defendant was served on 29th July 1916. On the 8th August, the Court passed an order directing the sale-papers to be filed. By "sale-papers" were meant drafts of the proclamation, encumbrance certificate, etc., as required by r. 148 of the Civil Rules of Practice. If the papers were filed, the sale would have been ordered; but, as they were not filed, the application was dismissed. In my opinion, after the Court was satisfied that there was such an attachment on the properties sought to be sold as to satisfy the requirements of O. XXI, r. 11, and when it passed the next order on the footing that there was an attachment which serves all the purposes of an attachment in execution, *i.e.*, on 11th July 1916, the attachment before judgment had become converted into one in execution.

I will now refer to certain general considerations apart from decisions, which are supposed to be against this view. First, it is said that an attachment before judgment is, in its nature, so essentially different from an attachment in execution, that it can never be converted into the latter. This was the view taken in *Sree Ram Manick* v. *Tincowri Rofi* (9), but, in my opinion, the Legislature abandoned it when the section in the Code of 1877, corresponding to O. XXXVIII, r. 11, was enacted.

It is true that there are some differences between an order for attachment before judgment and an order for attachment in execution, namely :—

(1) The former was made before judgment and the latter after judgment.

(2) An order for attachment before judgment is made only after giving the defendant notice to show cause why it should not be made. No

(18) 10 A. 506; A. W. N. 1888, 195; 6 Ind. Dec. (N. S.) 340.

(19) 44 Ind. Cas. 229 ; 45 C. 780 ; 22 C. W. N. 297.

such notice is given before an order of attachment after judgment. The reason for this difference is the absence of a decree in the former case.

As a corrollary following from this, if security is given by defendant the Court does not pass an order of attachment before judgment; an attachment already effected will be withdrawn. To the extent that these are considered as very important differences, I do not agree with *Basiram Malo* v. *Kattyayani Debi* (20) which relies on the obsolete decision of *Sreeram Manick* v. *Tincowree Roy* (9).

(3) O. XXXVIII, r. 12, is another difference due to the anticipating nature of an attachment before judgment.

But do these differences make the attachment before judgment so entirely different in character, from one after judgment that one can never pass into the other? I am of opinion it is not. In my view, the attachment before judgment and after judgment are identical in their essential features. Each is effected by a prohibitory order. The purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. It is thus seen that, so far as they vacate or affect rights, they are substantially identical in character (vide *Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta* v. *Musammat Bundho Bace* (10) page 172 already quoted). Just as the effect of two attachments of the same property in execution of the same decree (the second one being effected in forgetfulness of the first) is merely that the property is under attachment, the first attachment merging in the second, similarly, the effect of an attachment before judgment followed by a redundant re-attachment after judgment is merely that the property is under attachment. In such cases it is meaningless to say that the property is under two attachments. It is still more meaningless to say that one attachment is dropped but another subsists. All the earlier attachments, in all such cases, merge into the last. Where there are several attachments, it is not that every attachment has an individuality of its own but the property is under a state of attachment.

Secondly, it is said that other creditors who obtained no attachments of their own but who might share rateably in the amount that may be realized by the respondent, lose this chance if the respondent's attachment is held to have been extinguished under O. XXI, r. 57, and this is a great hardship. I do not see any hardship in this. Such creditors have no rights against the property—none, certainly that ought to prevail against the appellant and if they have a chance of sharing rateably with the respondent under section 73, it seems to me to be a piece of good luck which they little deserve to have, dependent on the diligence with which the respondent pursued his attachment. They are no more unlucky when the attachment terminates under O. XXI, r. 57 than in the case when the decree-holder pays off the attaching creditor or gives some other property as security for the debt of the attaching creditor and the attachment is withdrawn under O. XXXVIII, r. 9. The hardship is exactly the same as when we have, instead of first attachment before judgment, an attachment after judgment. I do not think that instances of creditors sharing rateably in the fruits of the attachment before judgment are more numerous than in cases of attachment after judgment. Finally, I do not think such remote considerations of hardships on other creditors can have any place in the constuction of O. XXI, r 57, especially as I am not able to conceive of any argument based on hardship which does not equally apply to attachments after judgment. I am not able to see any reason why the Legislature should create a smaller standard of diligence for judgment creditors who had obtained an attachment before judgment, than those who did not, in working out execution of the decree.

I would overrule *Rudhravaram Venkatasubbiah* v. *Rudhravaram Venkata Seshaiya* (1), agree with SPENCER, J., in the order of reference, and answer the question referred to us by saying that the attachment is not subsisting.

Wallace, J.—I agree with the decision of the learned Chief Justice and will, as there is a divergence of opinion in the Full Bench, give my own reasons.

(20) 10 Ind. Cas. 305 at p. 450 ; 38 C. 448 ; 15 C. W. N. 795.

MEYYAPPA CHETTIAR v. CHIDAMBARAM CHETTIAR

The respondent in this case obtained an attachment before judgment in O. S. No. 153 of 1914 on the file of the Court of the Subordinate Judge, Ramnad, his attachment being obtained on 20th November 1914. He obtained a decree in the Temporary Subordinate Judge's Court, Ramnad, to which his suit had been transferred on 22nd February 1915, which decree was sent for execution to the Court of the Subordinate Judge of Ramnad. He filed an execution petition, 183 of 1916, which was dismissed on 19th September 1916 apparently because he had committed default in failing to file an encumbrance certificate within time. The petitioner before us had, in O. S. No. 108 of 1914, obtained an *ex parte* decree against the same judgment-debtor but that *ex parte* decree was set aside on the judgment-debtor giving security on 15th March 1915, the security being given on the same property which the respondent had attached before judgment. The question for decision is whether, on the dismissal of the respondent's execution petition 183 of 1916, the attachment before judgment ceased or whether that attachment enured and thus takes precedence of the security given on the same property in favour of the petitioner.

Taking O. XXXVIII, Civil Procedure Code, as it stands, it seems to me clear from the wording of r. 9 that an attachment before judgment only comes to an end by a formal order of the Court withdrawing it. This is, in my opinion, the correct way of interpreting r. 9, which applies to cases where the security demanded has been furnished, or where the suit has been dismissed. Rule 6 (2) clinches this interpretation. It requires that, even in the case of a conditional attachment before judgment, a formal order of withdrawal is necessary to raise the attachment. Much more must it be necessary for raising a final attachment, into which the conditional attachment has been converted. No doubt, the ruling in *Ram Chand* v. *Pitam Mal* (18), and *Abdul Rahman* v. *Amin Sharif* (19), are contrary to this view, but, for reasons given, I must disagree with them. When the suit has not been dismissed, but decreed, it goes without saying (again taking O. XXXVIII as it stands) that the attachment continues, until it is withdrawn by the Court, so long as execution of the decree is not barred. Rule 11 makes that quite clear: See also *Ganu Singh* v. *Jangi Lal* (20).

Respondent obtained a decree in his suit. Hence, so far as O. XXXVIII goes, his attachment before judgment has not come to an end, since there is on record no formal order of withdrawal of the attachment by the Court. It can only have come to an end, if there is some other provision of the Civil Procedure Code, which has caused it to cease. Petitioner's contention is that O. XXI, r. 57, is such a provision; and that is really the only argument in his case. The whole point is:—Does the phrase "property . . . . attached in execution" in O. XXI, r. 57, include "property attached before judgment," when that attachment is utilised, by force of O. XXXVIII, r. 11, for an execution?

Petitioner's contention appears to me open to several objections. In the first place, an attachment before judgment is not *ejusdem generis* with an ordinary attachment in execution. To effect the former, the Court must, besides issuing, as required by O. XXXVIII, r. 7, the usual prohibitory order to the judgment-debtor and the public generally, under form E-24 of the first Schedule, also issue a special order in form F-7 to its Bailiff to attach the property and keep it "under safe and secure custody until the further order of the Court." This clearly implies that the order under form F-7 remains in force until it is withdrawn by a further order. It seems to me very difficult to hold that that further order is lying *perdu* in O. XXI, r. 57, and must be deemed to have been passed, when the execution application is dismissed under that rule. It is true that farm E-24 also uses the same phrase and implies a further order also. On this I can only say that it is inconsistent with r. 57, the inconsistency probably being due to the omission to notice the full effect of r. 57, when it was newly introduced into the Civil Procedure Code of 1908. I find it difficult to hold that, in passing this new rule, the Legislature intended to abolish the "further order of the Court" required by form F-7, a form not coming under O. XXI, at all, or to abrogate the clear provisions of O. XXXVIII, which had been in force substantially since 1859 at least. Rule 57, of O. XXI, is of a penal nature and should, therefore, be construed strictly. One

is not entitled to conclude that rights previously enjoyed by parties have been taken away by a new provision in a Code, unless that provision in clear terms or by necessary implication involves such a conclusion.

Secondly, r. 57, appears as a rule in an Order devoted to execution of decrees and orders, and in my view it should, therefore, be confined to such attachments as are dealt with in the Order itself and not applied to attachments effected outside that Order. It has been argued that the phrase " property attached in execution " should mean " property in a state of attachment in the course of the execution of the decree. " I think the more natural interpretation is simply that the phrase is to apply to such attachment in execution as is described earlier in the same Order—vide O. XXI, r. 11, etc. The following r. 58, uses exactly the same phrase. Yet that rule does not apply automatically to property the attachment of which occurred before judgment. A special rule under O. XXXVIII, *viz.*, r. 8, was enacted to make it applicable. There is nothing in r. 8, to indicate that it is confined to claims against an attachment before judgment, only until the judgment has ripened through a decree into an execution. The test for the application of r. 8, as I read it, is not "Has execution been taken out, " but " at what stage of the case was the property attached." O. XXXVIII, r. 8, incorporates, so to speak, r. 58 of O. XXI—vide *Prasada Nayudu* v. *Virayya* (21). There is no corresponding rule in O. XXXIII, incorporating O. XXI, r. 57, in it, and no rule from which one is entitled to infer that attachment before judgment *becomes*, when execution is taken out, on the strength of that, an attachment in execution.

No doubt there is one ruling which loosely uses the word " *becomes* " and to that case our attention was directed in arguments, *viz.*, *Sewdut Roy* v. *Sree Canto Maity* (12). In *Drupati Bibi* v. *Ramraoh Pal* (14), the language used is that an attachment before judgment shall after a judgment " be deemed to be an attachment in execution of the decree." The fact that the attachment before judgment is useful chiefly for the purpose of a subsequent sale in execution will not, to my mind, convert every attachment into an attachment in execution.

The petitioner relies strongly upon the ruling reported in *Arunachalam Chetty* v. *Periasami Servai* (2), which laid down that Article 11, of the Indian Limitation Act, which deals with the question of the limitation period for an order on a claim petition preferred to property attached in execution of a decree," applies to an order on a claim petition preferred to property attached before judgment after an order for sale in execution had been passed. Three points have to be noted with reference to this case ; first, that it was a case of a claim made *after* decree, *after* an application for execution had been put in and *after* an order for sale in execution had been passed ; secondly, that section 246 of the old Civil Procedure Code of 1859, which the Judges held to be the *fons et origo* of Article 11, of the Indian Limitation Act, applied expressly in terms to an attachment before judgment as well as to an attachment in execution ; and, thirdly, that they were oppressed by the facts that, despite the provisions of the old Code, the Legislature had provided no special period of limitation at all for claims to property attached before judgment, and that, unless " the whole object of the summary claim procedure" was to be " frustrated," a briefer period of limitation than that in Article 120 had to be found somewhere. The learned Chief Justice and the other learned Judges, who adopted his judgment in that case, considered that they " should not be justified in laying down generally that property attached before judgment is attached in execution of a decree" and they distinctly held that O. XXI, r. 57, threw no light on the point that had been then argued before them. I do not think this ruling goes further than to say that a claim put in after there is an order in execution for sale following upon an attachment before judgment "may properly be regarded as a claim to property attached in execution of a decree within the meaning of Article 11" of the Limitation Act. It cannot, therefore, be construed to lay down that in all instances where the phrase "property attached in execution " occurs in any Statute, it covers cases of property attached before judgment as soon as

(21) 47 Ind. Cas. 1000; 41 M. 849 ; 24 M. L. T. 134 ; 35 M. L. J. 231 ; (1918) M. W. N. 699 (F. B.) 8 L. W. 197.

execution is taken out on the decree arising out of that judgment; it must, in my opinion, in view of the compulsion, if it may be so called, exercised over their Lordships' minds, by the omissions of the Legislature, be strictly confined to what it lays down. I cannot, therefore, read into it a reversal of the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1). That is a direct authority in favour of the respondent in this case, to which one of the learned Judges in *Arunachalam Chetty* v. *Periasami Servai* (2) was a party, and other direct authorities quoted therein are *Ganesh Chandra Adak* v. *Banwari Lal Roy*, (5) and *Bavuddin Sahib* v. *Arunachala Mudali*, (6) and another case, which indirectly is in favour of the respondent, *Kosuri Suraparaju* v. *Mandapaka Narasimham*, reported in (7).

General considerations of equity, such as, for example, whether third parties relying, for purposes of rateable distribution, on an attachment before judgment by some one else are entitled to be in any better position than third parties relying on some one else's attachment after judgment, or whether a party defaulting in the prosecution of his execution application ought to be in a better position because he has attached before judgment than if he had attached after judgment, do not, I feel, assist me much in the decision of this case. I think the decision must be based on an interpretation of the express provisions of the Code and on a consideration of the rights conferred by prior Civil Procedure Codes before O. XXI, r. 57, was passed at all. These last were perfectly clear and included the anomalies just mentioned, and the new Civil Procedure Code has left them as they were before.

I would, therefore, in answer to the reference, say that O. XXI, r. 57, does not apply to cases where the attachment is an attachment before judgment.

Waller, J.—I think that the question referred to us should be answered in the negative. O. XXXVIII, r. 11, provides that, where there has been an attachment before judgment, a decree-holder, in order to execute the decree, must make an application for execution, but need not re-attach This is the only privilege he is given and I do not consider that it was intended to carry with it exemption from the penalty that awaits negligence on the part of attaching decree-holders in general. After he has made his application, he becomes subject to the provisions of O. XXI. I agree that O. XXXVIII contains the whole law in regard to attachment before judgment as such, but am not prepared to concede that attachment before judgment and attachment in execution are two entirely separate and distinct processes.

There is authority on both sides. In *Venkatasubbiah* v. *Venkata Seshaiya* (1), it was held that O. XXI, r. 57, had no application to attachments before judgment. The Judges followed one Calcutta and two Madras decisions on the point. The Calcutta case (*Ganesh Chandra Adak* v. *Banwari Lal Roy*, (5) is certainly a direct authority in support of their view. One of the Madras cases [*Bavuddin Sahib* v. *Arunachala Mudali*, (6)] is—if anything—an authority for the opposite view. What it actually decided was that an attachment before judgment did not cease to exist because an application for the arrest of the judgment-debtor had been dismissed for default. That is not in point here. Incidentally, however, the opinion was expressed that an attachment before judgment was converted into an attachment in execution where the decree-holder applied in execution for sale of the attached property. At the same time, a doubt was raised, with reference to the Calcutta decision, whether the opinion was correct, a doubt which the Judges expressly refrained from solving. The last case *Kosuri Suraparaju* v. *Mandapaka Narasimham*, (7) is not very clear. Apparently an execution application had been dismissed. If it was dismissed for default, the decision is a direct authority in support of *Venkatasubbiah* v. *Venkata Seshaiya*, (1). On the other side—apart from dicta in certain cases—there is *Arunachalam Chetty* v. *Periasami Servai* (2). In that case property had been attached before judgment, a decree had been passed and an order for sale had been granted in execution. The question the Court had to decide was, whether the words "property attached in execution of a decree" in Article 11 of the Limitation Act covered an attachment before judgment. The Full Bench decided that they did. The main judgment was delivered by WALLIS, C.J., with whom

MEYYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR

all the other Judges concurred. SPENCER, J., delivered a separate judgment which—as I understand it—went no further than that of the Chief Justice. It must be conceded that the particular instance with which the Court was concerned was one in which sale had actually been ordered; but I cannot agree that that fact affects the principle of the decision. An order for sale pre-supposes and is based on an existing attachment. It does not itself create the attachment. If, therefore, an attachment before judgment becomes at any stage an attachment in execution, it must, in my view, be at the stage where an application to execute has been made and admitted under O. XXI, r. 17. And that I conceive to be the principle laid down by the Full Bench. I may add that, in the present case, sale papers had been called for which is usually done after attachment has been ordered. I am unable to see how a subsequent order for sale would have altered the position. WALLIS, C.J., explicitly stated that he was considering both cases, that is, those "in which the claim . . . . is put in after decree or even, as in the present instance, after sale had been ordered in execution." Further on he observed: "This provision (O. XXXVIII, r. 11) does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree either within the meaning of Article 11 of the Limitation Act or of O. XXI, r. 57, *as execution may never be applied for.*" This sentence seems to me to indicate (*a*) that he was considering the meaning of the phrase under discussion both in Article 11 of the Limitation Act and in O. XXI, r. 57, (*b*) that he was of opinion that nothing more was necessary to convert an attachment before judgment into an attachment in execution than an application to execute. The order for sale he regarded as "proceeding on the footing that the property had to be considered as having been attached in execution by virtue of r. 11." The reference to r. 11 which requires an application to execute (and such an application would, but for the proviso in the rule itself, be for attachment as well as sale) is to my mind conclusive proof that he considered that the attachment changed its character from the time of the application to execute. And that was the view taken by SPENCER, J. WALLIS, C. J., no doubt remarked that O. XXI, r. 57, threw no light on the quesion he was considering. Nor did it. He was considering the meaning of a certain expression in Article 11 of the Limitation Act which was practically identical in terms with a phrase in O. XXI, r. 57, but found that the context in which the latter stood gave him no assistance in interpreting the former.

As I have already pointed out, the quotation given above with its reference to "within the meaning of O. XXI, r. 57" shows that he was considering that rule as well as Article 11. I see no reason to doubt that he and the other Judges would have been prepared, had it been necessary, to answer the question referred to us in the negative. Indeed, I do not see how such an answer can be avoided. When once it has been found that, for one purpose, an application to execute converts an attachment before judgment into an attachment in execution, the conclusion is, to my mind, inevitable that the conversion operates for all purposes. Following what I believe to be the principle laid down by the Full Bench, I hold that, in this case, the property had been attached in execution within the meaning of r. 57 and that the attachment ceased when the application for execution had been dismissed for default.

I may add that the same question has since been argued before me with reference to section 9 of the Presidency Towns Insolvency Act. Under that section, an act of insolvency is committed where any part of a man's property has been attached in execution of a decree for over 21 days. It would, in my opinion, be anomalous to hold that an attachment before judgment takes a judgment-debtor out of the section, even though execution had been proceeding against his property for more than the prescribed period.

The Court.—By a majority, the question will be answered in the negative.

V. N. V.
Z. K.

Question answered in the negative

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 21 OF 1923.

March 1, 1924.

Present:—Mr. Kinkhede, A. J. C.

LABHUA SAO—PLAINTIFF—APPELLANT
versus
CHATAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. Land Revenue Act (II of 1917) ss. 169, 220 (n)—Civil Procedure Code (Act V of 1908) s. 9—Jurisdiction of Civil and Revenue Courts—Jurisdiction, what determines—Partition—Direction to objector to file suit, effect of—Suit filed after expiry of six months, whether can be entertained—Special procedure, effect of.

The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff, as his cause of action and the matter involved in it does not depend upon what the defendants may assert by way of defence. It may turn out at the trial that the subject of contest between the plaintiff and defendant is not properly represented by the form in which the plaintiff has chosen to put his claim, but the occurrence of that contingency may only render the plaintiff's suit liable to be dismissed as not proved. It will not affect the jurisdiction under which the suit as brought by the plaintiff fell. [p. 163, col. 1.]

Chunder Coomar Mandal v. *Bakar Ali Khan*, 9 W. R. 598, relied on.

The exclusive jurisdiction of Revenue Officers under section 220 (n) of the C. P. Land Revenue Act is limited only to the matter of "the partition or union of *mahals* or *pattis*" and the ordinary jurisdiction of the Civil Courts in the matter of giving a declaration on the question of the liability or otherwise of such property to be partitioned, is not ousted. Unless the jurisdiction is *either expressly or impliedly barred* by the Statute, it must remain with the Civil Court in all Civil matters under section 9 of the Civil Procedure Code. [p. 163, col. 1.]

Chaturbhuj v. *Chandirmool*, 5 Ind. Cas. 705; 6 N. L. R. 27 at p. 29; *Jaguiath* v. *Khuba*, 4 Ind. Cas. 795; 5 N. L. R. 176 at p. 179, followed.

Where a Statute prescribes a particular remedy and lays down a procedure for working out that remedy, the rights and privileges of the parties must depend upon the result of their following or not following up that procedure in the manner laid down by the Statute and it is the duty of each party to adopt and follow it up, because it is only when the right recognized by the Statute is given effect to in the manner provided by the Statute, that the decision as regards such right can be given by the tribunal contemplated by the Statute and be binding as between the parties. This may involve hardship in particular cases but that is not a matter for the Courts to consider. [p. 163, col. 2; p. 164, col. 1.]

The Statute has fixed the period of six months for the filing of a suit directed to be filed under section 169 (1) (*b*) of the C. P. Land Revenue Act, and a Civil Court has no jurisdiction to entertain such a suit after the expiry of the period fixed by the Statute. [p. 162, col. 2.]

Second appeal against the decree of the District Judge, Raipur, in Civil Appeal No. 56 of 1922, dated the 10th November 1922.

Messrs. *J. C. Ghosh* and *W. R. Puranik*, for the Appellant.

Sir *B. K. Bose* and Mr. *V. Bose*, for the Respondents.

JUDGMENT.—In three villages, namely, (1) Risali, (2) Somnidehi, (3) Ambidehi, now amalgamated into one *mouza* called Risali, the plaintiff and the defendants' fathers owned a seven-anna proprietary share which they had purchased on 1st June 1893. In the year 1905 all the three brothers divided their *sir* and *khudkasht* lands equally between themselves. After this partition plaintiff purchased a seven-pie share of one Daryao and obtained a surrender of his *sir* land in 1906 and thus got possession of 25-29 acres of *khudkasht* land more than his two brothers. One Ramprashad also sold his 10½-pies *patti* to plaintiff, and the latter thus acquired some additional *sir* and *khudkasht*. He also got other lands from time to time. The result of these acquisitions was that up to the year of the Settlement (1910-11) the plaintiff had in his possession a little above 100 acres of *sir* lands and 168-97 acres of *khudkasht* lands. His acquisitions continued even after the Settlement, so that plaintiff is now in possession of 102-35 acres of *sir* and 217-54 acres of *khudkasht* lands. Defendants Nos. 1 and 2 hold 73-44 and 34-30 acres of *khudkasht* and 47-4 and 45-13 of *sir* respectively. Plaintiff claims to have improved the lands in his possession.

The defendant-respondent Chetan applied for partition and claimed equal division of all the lands. The plaintiff-appellant raised questions of previous partition and exclusive ownership and title. The Sub-Divisional Officer on 3rd August 1920 declined to grant the petition and referred the respondent to a Civil Court. This order purported

to be passed under section 169 (1) (*a*) of the Central Provinces Land Revenue Act, II of 1917. Defendant thereupon appealed to the Deputy Commissioner and got the order reversed. The Deputy Commissioner's order, which is dated 15th February 1921, purports to be passed under section 169 (1) (*b*) requiring plaintiff to institute within six months a suit in the Civil Court for the determination of the questions raised. The plaintiff went up to the Commissioner in second appeal but that appeal was dismissed on 21st November 1921.

The present suit was instituted on 3rd March 1922 for a declaration of title to the above lands. The only defence material for the purposes of this second appeal is that the suit not having been brought within six months from the date of the order of the Deputy Commissioner, namely, 15th February 1921, was barred by section 169 (2) (*b*) of the Central Provinces Land Revenue Act, II of 1917. The first Court framed the following issue :—

> "Whether time against plaintiff runs from 15th February 1921 (date of Deputy Commissioner's order)? Is suit by plaintiff, therefore, time-barred?"

The first Court found it against the plaintiff and dismissed the suit. He, therefore, went up in appeal to the District Judge, who also confirmed the dismissal. Hence this second appeal.

It is contended on behalf of the appellant that to support the dismissal is in effect to curtail the limitation prescribed by the Limitation Act for a suit for declaration that certain property is or is not liable to division. It is also urged that in any case the proceedings in the Revenue Courts should be looked upon as "another civil proceedings" within the meaning of section 14 of the Limitation Act, and all the time taken in prosecuting in *good faith* the appeal in the Commissioner's Court may be excluded under that section. On the other hand, the respondents contend that the question is not one of curtailing the limitation for a suit, but, one of jurisdiction of a Civil Court to entertain the suit, and reliance is placed on section 220 (*n*) of the Land Revenue Act, as a bar to the Civil Court's jurisdiction, and that the Civil Court's jurisdiction exists only partially and to the extent to which the Statute, *i.e.*, the Revenue Law, recognizes it, and no further, and that whoever wants to take advantage of the provisions must take it subject to the conditions imposed. That the jurisdiction of the Civil Court to entertain the suit came to an end as soon as the six months period expired on 15th August 1921.

It is, therefore, urged that the plaintiff was bound to institute the suit within the statutory period of six months given to him for filing the same, and that this period of six months had to be counted from the date of the Deputy Commissioner's order in appeal. The plaintiff-appellant's reply is that the jurisdiction of the Revenue Officer is limited to the matter of effecting *partition*, and does not extend to the determination of the question whether particular items of property are or are not liable to be partitioned, and that as this is a matter of a civil nature with which the Revenue Officers have no concern, the suit, though filed beyond six months, ought to be maintainable under general law.

I have considered the respective contentions of the parties and I am of opinion that the Civil Court's jurisdiction to entertain the suit was ousted as soon as the statutory period of six months expired. Section 9 of the Civil Procedure Code lays down that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is *either expressly or impliedly* barred.

Section 220 of the Central Provinces Land Revenue Act, II of 1917, provides that :—

> "Except as otherwise provided in this Act, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted, or application made to obtain a decision or order on any matter which the Governor-General in Council, the Chief Commissioner or any Revenue Officer is, by this Act, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters:—
>
> * * *
>
> (*n*) the partition or union of *mahals* or *pattis*."
>
> * * *

It was held by Stevens, J. C., in *Sujanmal* v. *Bhagabai* (1) with reference to the

(1) 6 C. P. L. R. 103.

provisions of section 152 (13-A) read in conjuction with section 136 (*c*) of the old Land Revenue Act, that a suit for declaration that certain fields should be declared to be the plaintiffs' fields and restored to their possession, does not involve any question of suing or applying for the partition perfect or imperfect of a *mahal*, nor is there any question of the distribution of the land, or of the allotment of the revenue of a *mahal* by partition; and that such a suit is not barred by the aforesaid sections. Viewing the provisions of section 220 (*n*) of the new Land Revenue Act in the same light it will be seen that the exclusive jurisdiction of the Revenue Officers is limited only to the matter of "the partition or union of *mahals* or *pattis*" and the ordinary jurisdiction of the Civil Courts in the matter of giving a declaration on the question of the liability or otherwise of such property to be partitioned, is not ousted. Unless the jurisdiction is *either expressly or impliedly barred* by the Statute, it must remain with the Civil Court in all Civil matters under section 9 of the Civil Procedure Code. This view finds support in the cases of *Chaturbhuj* v. *Chandirmool* (2) and of *Jagannath* v. *Khuba* (3).

The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff, as his cause of action and the matter involved in it does not depend upon what the defendants may assert by way of defence. It may turn out at the trial that the subject of contest between the plaintiff and defendant is not properly represented by the form in which the plaintiff has chosen to put his claim, but the occurrence of that contingency may only render the plaintiff's suit liable to be dismissed as not proved. It will not affect the jurisdiction under which the suit as brought by the plaintiff fell: *Chundur Coomar Mandal* v. *Bakar Ali Khan* (4).

If a recorded proprietor of a village or *mahal* or *patti* finds that there exists a dispute between himself and another co-sharer as regards the liability or otherwise of certain lands to partition, the co-sharers have two courses open. They or any of them may at once institute a suit in a Civil Court for a declaration to that effect, and such a suit will not be barred from the cognizance of the Civil Courts, because it is not a matter covered by section 152 (*n*) of the C. P. Land Revenue Act. There is nothing also in any other provisions of the said Act which can be said to take away by necessary implication the jurisdiction of the Civil Court in a matter like this.

But if, instead of resorting to this civil remedy, and securing a decision of the Civil Court on the questions in dispute in the first instance, either of the recorded proprietors were to make his election to have recourse, first, to the summary remedy of a partition through Revenue Courts and thus invoke the exclusive jurisdiction of the Revenue Officer for partitioning the estate under the Land Revenue Act, and an objection raising questions of title or of proprietary right, or any other question which it is essential to decide finally before the partition can be proceeded with were to be raised in those summary Revenue proceedings, then both the parties are bound to submit to the necesary consequences flowing from the selection of the remedy, and regulate their further procedure in the manner laid down by that Act. The questions raised not having already been determined by a Court of competent jurisdiction, the partitioning officer has the option of following any of the three courses laid down under section 169 sub-section (1) of the new Land Revenue Act.

In this case, the Sub-Divisional Officer elected to follow the course laid down in clause (*a*) of the said sub-section while the Deputy Commissioner thought fit to follow the course prescribed in clause (*b*) of the same sub-section. Once the special jurisdiction is invoked, the special procedure prescribed by the Statute vesting such exclusive jurisdiction must become applicable. Where a Statute prescribes a particular remedy and lays down a procedure for working out that remedy, the rights and privileges of the parties must depend upon the result of their following or not following up that procedure in the manner laid down by the Statute and it is the duty of each party to adopt and follow it up, because it is only when the right recognized by the Statute is given effect to in the manner provided by the Statute, that the decision as regards such right can be

(2) 5 Ind. Cas. 705; 6 N. L. R. 27 at p. 29.
(3) 4 Ind. Cas. 795; 5 N. L. R. 176 at. p. 179.
(4) 9 W. R. 598.

given by the tribunal contemplated by the Statute and be binding as between the parties. This may involve hardship in particular cases but that is not a matter for the Courts to consider.

I will explain this position by reference to two or three familiar instances.

If A attaches C's property as if it is the property of B, his judgment-debtor, the law does not cast upon C the duty of preferring a claim or objection under O. XXI, r. 58 of the Civil Procedure Code. If, however, he avails himself of the summary remedy provided by r. 58 and the Court proceeds to investigate the claim or objection and passes an order under any of the rules 60, 61 and 62, the party against whom the order is made has to institute a suit to establish a right which he claims to the property in dispute, because under r. 63 of the said Order subject to the result of such suit, if any, the order becomes conclusive. But if no such claim or objection against the attachment be preferred, neither party is under any obligation to file a suit under O. XXI, r. 63 of the Civil Procedure Code. Such a suit is necessitated only because a claim or objection was preferred and an order was passed thereon, and the order becomes conclusively binding between the parties unless set aside within one year under Article 11 of the Limitation Schedule. A person against whom no such order is made, has his usual longer period of limitation to enforce his rights. Also in the case of persons who are parties to the summary proceedings under O. XXI, rr. 97 to 101, Civil Procedure Code, the same consequences follow. If the order is against any one of them, he also has to institute his suit under O. XXI, r. 103, within one year of the order as prescribed by Article 11-A of the Limitation Schedule, otherwise the order becomes conclusive as against him. A third similar instance is of a person against whom an order under section 145 of the Criminal Procedure Code is made. He has to file his suit under Article 47 of the first Schedule of the Limitation Act within three years of the date of the order if he wants to recover the immoveable property comprised in such order, although under ordinary circumstances, if he had not been a party to such an order or had not invoked the help of the Criminal Court, he would have had 12 years within which to recover possession of the immoveable property. These instances will clearly show that he who has a recourse to any special remedy provided or invokes or subjects himself to any special jurisdiction conferred by any particular Statute, must follow up the special procedure laid down in that Statute, and must necessarily take the consequences that flow from his compliance or non-compliance with the requirements of the Statute in all its particulars. If he is successful in the remedy followed by him he puts his opponent to the disadvantages of any failure which his opponent may be guilty of, but if he is unsuccessful he subjects himself to similar disadvantages.

Under these circumstances the appellant cannot complain of the hardship to which he is subjected by reason of his own failure to strictly comply with the order passed by the Deputy Commissioner under section 169 (1) (*b*) of the new Land Revenue Act. The Statute has fixed six months period for the filing of such a suit. It gives no discretion to the Deputy Commissioner to extend that period. No question as to whether the appellate authority could have legally extended the period 'arises, as a matter of fact, the Commissioner had neither been moved to grant any extension, nor had he himself *suo motu* thought fit to grant one. It was no doubt within his authority to direct that the execution of the order under appeal be stayed but that has not been done. The plaintiff must, therefore, take the consequences of his own laches or negligence in carrying out the order of the Deputy Commissioner. The particular section 169 of the new Land Revenue Act, as I read it, does not put an end to the jurisdiction of the Revenue Officer as soon as an order is passed under sub-section (1), clause (*b*), but it simply suspends his jurisdiction temporarily so long as the proceedings before the Civil Court duly started within the statutory period of six months continue. Section 169, sub-section (2) lays down that if the proceedings have been postponed under sub-section (1), clause (*b*) and if the party ordered complies with the requisition, the Deputy Commissioner's jurisdiction is limited to deal with the case in accordance with the decision of the Civil Court, or if such

party fails to comply with the requisition the Deputy Commissioner is bound to decide the question against him.

If the Deputy Commissioner elects to proceed under section 169 (1) (c) of the said Act, and enquires summarily into the merits of the question and passes orders thereon, then under sub-section (3) his order is conclusive subject to the result of a suit to be instituted within six months to have the order set aside. It is only when he declines to exercise his jurisdiction to grant the application, under the powers given by sub-clause (a) of sub-section 1 of the said section, as was done by the Sub-Divisional Officer, that the restriction of filing a civil suit within six months does not come into operation. For these reasons I think the suit was untenable and could not be entertained.

In this view of the case no question of exclusion of time under section 14 of the Limitation Act arises in the case. The appeal is dismissed with costs. The costs in the lower Courts will be paid as already ordered.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1888 OF 1920.

February 19, 1924.

Present :—Mr. Justice Broadway and Mr. Justice Campbell.

ALI NAWAZ, SINCE DECEASED, 2. MIR MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

FAIZ ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Breach of covenant—Cause of action, when arises—Award directing party to continue in possession so long as a certain payment was made—Refusal to make payment, effect of—Withdrawal of refusal, effect of.

A right to sue accrues whenever a person becomes clothed with a legal character entitling him to a relief which a Court of Law is competent to grant. [p. 167, col. 2.]

When a contract is repudiated by one of the parties thereto before the time for its fulfilment, the repudiation gives rise to a cause of action in favour of the other party at once, and it is not necessary for such party to wait till the date fixed for the performance of the contract. [p. 167, col. 2.]

Under the terms of an award defendants were entitled to continue in possession of a certain area of land so long as they continued to pay the land revenue assessed on a certain other area of land in possession of the plaintiffs, but it was provided that if the defendants at any time claimed payment of the land revenue demand in respect of the area in possession of the plaintiffs the latter would be entitled to claim the area in possession of the defendants. During the Settlement operations the defendants made an application that the land in possession of the plaintiffs should be assessed to land revenue. The assessment was made and announced to the plaintiffs, but before it could be levied the defendants withdrew their application and prayed that matters may be left where they were before their application was made. The plaintiffs sued for the area in possession of the defendants on the ground that by making their former application they had committed a breach of the condition under which they had been allowed to continue in possession of the land under the award ;

Held, that the suit must succeed as the defendants had committed the breach complained of which gave an immediate cause of action to the plaintiffs and that it was no answer to the suit to urge that the defendants had subsequently withdrawn their application before the plaintiffs had been called upon to pay the land revenue demand.

First appeal from the decree of the Senior Subordinate Judge, Ambala, dated the 8th March 1920, dismissing the plaintiffs' suit, but ordering that the defendants shall pay the plaintiffs' costs.

Mr. *M. Sleem*, for Sheikh *Abdul Qadir*, K. B., for the Appellants.

Maulvi *Ghulam Mohi-ud-Din*, for the Respondents.

JUDGMENT.—These appeals have arisen out of a suit brought by Faiz Ali and others for the possession of 605 *bighas*, 7 *biswas* of land against Ali Nawaz and others. The following pedigree table will afford assistance :—

Najabat Khan

Kuri Khan — Buland Khan — Zulfu Khan.

The plaintiffs are the descendants of Kuri Khan and Buland Khan and the defendants

descendants of Zulfu Khan. The plaintiffs alleged that under an award, dated the 22nd of September 1854, they were allotted 180 *bighas* of land out of the whole estate belonging to Najabat Khan, the terms of the award being that Zulfu Khan, and his descendants were to keep the rest of the estate but to pay the land revenue demand on the 180 *bighas* allotted to the plaintiffs ancestors. Zulfu Khan was at that time in receipt of a pension. When that pension ceased the plaintiffs were to pay the land revenue demand *qua* 70 *bighas* of the land allotted to them, the defendants continuing to pay the land revenue demand on the remaining 110 *bighas* for ever. It was provided, however, that in the event of the descendants of Zulfu Khan at any time claiming payment of the land revenue demand on the 110 *bighas* allotted to the plaintiffs they (the plaintiffs) would be entitled to claim 2|3rds of the 1|3rd share in the village. In consequence of this award at first the entire 180 *bighas* were entered as *Kharij bachh* in the revenue papers and on the death of Zulfu Khan, when the pension referred to above ceased, the plaintiffs were shown as liable to pay the land revenue demand *qua* 70 *bighas*, the remaining 110 *bighas* continuing to be shown as *Kharij bachh* and the revenue due upon them was added to that due on other lands in the possession of the defendants.

It was asserted that on the 21st of April 1917, while the Settlement of 1917-18 was in progress, Ghulam Mustafa Khan and others of the defendants applied to the Settlement authorities saying that they were not willing to allow the *land* which had formerly been kept as *Kharij bachh* by their ancestors to continue as *Kharij bachh* and it was asked that the revenue *qua* the said land should be assessed on them and levied from the proprietors who enjoyed the produce thereof. This application was granted and the lands in question were duly assessed to revenue and included in the *bachh* when the assessment and distribution were announced in March 1919. It should be noted that by this time the 110 *bighas* had been reduced to 97 *bighas*, 18 *biswas*, the plaintiffs having sold the difference.

The plaintiffs claimed that the act of the defendants in moving the Revenue authorities to assess the lands held by them to revenue and to include them in the *bachh* entitled them (the plaintiffs) under the award aforesaid to 2|3rds of the 1|3rd of the village, and on the 1st of August 1919 instituted the present suit claiming possession of 605 *bighas*, 7 *biswas*, alleging that that was the land they were entitled to. The defendants contested the suit alleging (1) that their ancestor Zulfu Khan alone had personally acquired the entire property ; (2) that they knew nothing of the terms of the award referred to ; (3) that the assessment made on the plaintiffs' lands was made at the instance of Ghulam Jahan and others of the plaintiffs and not at the instance of the defendants ; (4) that the defendants had not refused, and did not refuse, to pay the revenue payable on the lands referred to by the plaintiffs ; and (5) that on the 1st of May 1919 they had applied to the Revenue authorities praying that the matter should be allowed to stand as heretofore, their previous application having been made under a misapprehension that the land was to be kept *Kharij bachh* during the currency of the last Settlement only. They also pleaded that the suit was barred under section 11 of the Civil Procedure Code and that the agreement between the ancestors of the parties set up by the plaintiffs was opposed to public policy and unenforceable by law.

The Trial Court settled the following issues :—

(1) Whether the present claim is barred under section 11 of the Civil Procedure Code by virtue of the judgment of 1854 ?

(2) Whether plaintiffs' claim is barred by time for the adverse possession of the defendants ?

(3) Whether the defendants' petition, dated 21st April 1917, was based on the statement of the plaintiff and had been prepared in ignorance of the litigation of 1854 and had been cancelled by the defendants' petition, dated 1st May 1919, and, if so, how do the facts affect the present claim?

(4) Whether the agreement embodied in the judgment and award of 1854 was against law and public policy and is not binding on the defendants ?

(5) If the judgment and award of 1854 be binding on the parties, to what relief are the

plaintiffs entitled under the provisions of the award of 1854 ?

It was held that the suit was not barred under section 11 of the Civil Procedure Code and that the parties were bound by the award made in 1854. The suit was, however, dismissed as, in the opinion of the Senior Subordinate Judge the action of the defendants in making the application dated the 21st of April 1917 did not amount to a breach of contract, inasmuch as they had seen and rectified their mistake by the application dated the 1st of May 1919 before the time for payment of the revenue had actually arrived and before the suit had been filed. At the same time, he ordered the defendants to pay the plaintiffs' costs.

Against this decree both parties have preferred appeals to this Court, the plaintiffs through Mr. Ghulam Mohi-ud-Din and the defendants through Mr. Abdul Qadir on whose behalf Mr. Sleem has appeared. Mr. Sleem's appeal relates only to the question of costs and need not detain us, as in our opinion the present litigation is directly due to the act of the defendants in making the application dated the 21st of April 1917 which they themselves now admit was mistaken and made without proper enquiry of the real facts. We dismiss their appeal.

In the appeal by the plaintiffs the question for decision is, whether the view taken by the learned Senior Subordinate Judge as to the nature and effect of the act done by the defendants in making the application of the 21st of April 1917 is correct. It has been contended by Mr. Ghulam Mohi-ud-Din that the action of the defendants-respondents in making the application of the 21st of April 1917 was final and was a clear indication that for the future they intended not to pay the revenue on the lands held by the plaintiffs under the award of 1854. He further contended that it was idle for the defendants to urge that they made this application under a misapprehension of the true state of affairs, and it was further pointed out that they did not attempt to remedy the effect of their action until after March 1919 when the assessment had been announced and the plaintiffs had been informed that the Government would look to them for the revenue of the lands held by them. On the other hand, it was contended that, unless and until the plaintiffs had actually been called upon to pay the said revenue, no variation in, or breach of, the contract evidenced by the award had been made. In answer to this Mr. Ghulam Mohi-ud-Din referred to *Hochster* v. *De la Tour* (1) and *Ripley* v. *M'clure* (2), in both of which authorities it was held that when a contract had been entered into and repudiated by one of the parties before the time for fulfilment of the contract, the repudiation would give rise to a cause of action in favour of the other party at once, and that it would not be necessary for such party to wait till the date fixed for the performance of the contract. Mr. Ghulam-Mohi-ud-Din appears to be correct, for a right to sue accrues whenever a person becomes clothed with the legal character entitling him to a relief which a Court of law is competent to grant. In the present case under the contract evidenced by the award of 1854 the defendants were at liberty to continue to pay the revenue of the lands held by the plaintiffs or to insist on the plaintiffs paying the said revenue themselves. In the event of the defendants electing to adopt the latter course the plaintiffs would be entitled to get certain other lands. The defendants clearly, by making the application of the 21st of April 1917, elected to make the plaintiffs pay the revenue on the lands held by them. For a period of nearly two years this application remained before the Revenue authorities and in due course the plaintiffs' land was assessed to revenue and made liable therefor. The result of this appears to be that the plaintiffs would be liable to all the penalties prescribed in section 67 of the Land Revenue Act in the event of the said revenue not being paid. It was, therefore, unnecessary for the plaintiffs to wait till they had been called upon to pay the revenue on their land. The defendants having elected to avoid the liability hitherto imposed on them can scarcely be allowed to urge that the consequences resulting from their action are serious, and cannot be relieved from such results on the sole ground that

(1) (1853) 95 R. R. 747; 2 El. & Bl. 678; 22 L. J. Q. B. 455; 17 Jur. 972; 22 L. T. (O. S.) 171; 1 W. R. 469; 118 E. R. 922.

(2) (1849) 80 R. R. 593 at p. 604; 4 Ex. 845; 18 L. J. Ex. 419; 154 E. R. 1245.

their action had been made under a mistake. Mr. Sleem referred to *Surendra Nath Banerjee* v. *Secretary of State*, (3) and *Supdu Dhondu Gujar* v. *Madhavrao Jivram Gujar* (4) and urged that, as was done in those two cases, his clients should be relieved from the serious results that would follow from their action in this case.

In *Surendra Nath Banerjee* v. *Secretary of State* (3) the facts were quite different to those in the present case. There a compromise had been effected under which an agreement of lease was to be executed within a period of two months. The relationship of landlord and tenant had been created by the compromise. There had been a default in the execution of the deed within the prescribed period, and it was held that, in such circumstances, forfeiture of the tenancy could be relieved against in equity.

In the Bombay case the question involved was whether a certain deed which appeared to be a sale was in reality a mortgage and open to redemption. The dispute was compromised on certain conditions, one of them being that a sum of Rs. 1,10) was to be paid within one month *qua* a certain plot of land and that failure to make this payment would rusult in the then defendant becoming the owner of the said land. Possession was to remain with the defendant for some time after the payment of the money had been made. The money was not paid within the prescribed time, but was paid before the party paying it could have obtained possession. It was held that in redemption suits on default by the mortgagor the mortgagee had the right to sell or to foreclose but that *till* he exercised one of these relief rights a Court of Equity would always be disposed to afford relief to the mortgagor.

The present suit does not relate to any question of tenancy and the relationship between the parties is neither that of landlord and tenant nor mortgagor and mortgagee. An agreement was entered into and under the terms of the agreement the defendants had certain advantages and were subject to certain liabilities. It rested with them entirely whether they would or would not continue to make the payment of the land revenue as agreed under that agreement. They chose to adopt a certain course. A reference to the *patwari* would have put them in possession of the reasons why they were to pay this particular land revenue and their failure to make such an enquiry appears to be without any real excuse. Undoubtedly, the consequences resulting from their action are very serious for them; but, after giving careful and anxious consideration to the case, we are unable to say that any such sufficient or valid ground has been made out as would justify us in relieving them from the natural consequences of their action.

In these circumstances, we feel constrained to accept the piaintiff's appeal and grant them a decree for possession of the land in suit. Parties to bear their own costs in this Court in both appeals.

Z. K. *Appeal accepted.*

(3) 57 Ind. Cas. 643; 24 C. W. N. 545.
(4) 57 Ind. Cas. 584 ; 44 B. 544 ; 22 Bom. L. R 780.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 136-B OF 1923.

November 22, 1923.

Present :—Mr. Prideaux, A. J. C. and Mr. Kinkhede, A. J. C.

SHEOPRATAP SHRINIVAS—APPLICANT
versus
SUKHDEO KANHAIYALAL—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115—Jurisdiction, order deciding question of—Rivision, whether lies—'Case,' meaning of.

The word 'case' in section 115 of the Civil Procedure Code must be understood in its broadest and most ordinary sense. [p. 169, col. 2.]

Mahadeo v. *Nogo*, 12 Ind. Cas. 357 ; 7 N. L. R. 130 at p. 138, followed.

The High Court has jurisdiction to revise an erroneous order holding that the Court has jurisdiction to try a suit. [p. 169, col. 2.]

SHEOPRATAP SHRINIVAS *v.* SUKHDEO KANHAIYALAL

Sultanat Johan Begam v. *Sundar Lal*, 58 Ind. Cas. 90 ; 42 A. 409 ; 18 A. L. J. 431 ; *Sawan Mal* v. *Kanhaya Lal Gopal Das*, 59 Ind. Cas. 680 ; *Dhapi* v. *Ram Pershad*, 14 C. 768 ; 12 Ind. Jur. 97 ; 7 Ind. *Dec.* (N. S.) 509 ; *Krishna Velji Marwadi* v. *Bhan Mansaram*, 18 B. 61; 9 Ind. *Dec.* (N. S.) 549 ; *Mahadeo* v. *Nago*, 12 Ind. Cas. 357 ; 7 N. L. R. 130 at p. 133, relied on.

Application against the order of the Subordinate Judge, Akola, dated the 3rd July 1923.

Mr. *M. V. Abhyankar*, for the Applicant.

Mr. *A. V. Khare*, for the Non-Applicant.

Order.—The plaintiff is a merchant residing at Akola who has had dealings with the defendant, an *adtia* at Bombay. He sues for rendition of accounts and for such balance as may be found due. Various pleas were raised including the one that the case was triable at Bombay and not at Akola where it was filed. These pleas gave rise to the following issues :-

"1. Where did the contract of agency between the plaintiff and defendant take place ?

2. Where was the defendant liable to render accounts and pay the money due to the plaintiff ? Whether at Bombay or at Akola ?

3. Whether this Court has jurisdiction to try the suit ? "

The Trial Court finds that the contract of agency took place at Bombay but that in a *pakki adat* system primarily the place for payment is where the constituent resides unless such constituent chooses to get paid in any other place, and, therefore, holds that the suit has been correctly laid at Akola. Against this decision this application for revision is filed.

A preliminary objection is raised to its hearing on the ground that section 115 of the Civil Procedure Code only relates to the decision of a case, and the decision here covers only a portion of a case being in fact but a finding on the question of jurisdiction, and that plaintiff's remedy lies in appeal after the case has been disposed of. We are referred to *Sultanat Jahan Begam* v. *Sundar Lal* (1), and *Sawan Mal* v. *Kanhaya Lal Gopal Das* (2), in support of this contention. There are, however, cases to the contrary, and we need but refer to the well known case of this Court, *Mahadeo* v. *Nago* (3).

Sir Henry Drake-Brockman therein writes :-

" For the non-applicants it is urged that the District Judge has simply erred on a point of law, so that this Court has no power to interfere under section 115, Civil Procedure Code. I think, however, that this is a case of illegal action covered by clause (*c*) of that section. The law, as I understand it, expressly permits the joinder of the defendants, and the provision to this effect has been entirely ignored by the lower Court. The order complained of is doubtless interlocutory, but I agree with the opinion expressed by Ismay, J. C., in *Narayan* v. *Pandurang* (Civil Revision No. 94 of 1901) that the word " case" must be understood in its broadest and most ordinary sense. This view finds support in *Dhapi* v. *Ram Pershad* (4), and *Krishna* v. *Bhau* (5) It is idle to leave the plaintiffs to a remedy by way of appeal from the decree which will eventually be passed for the co-mortgagees have already pleaded that as against them the claim is time-barred, and in any case a second trial would be needed if the Appellate Court ordered the co-mortgagees to be joined."

We think that in the present case where a refusal to interfere might result in a deplorable waste of public time and parties' money if they are forced to await the issue of a decree a too narrow view should not be taken and we, therefore, overrule the preliminary objection. Coming to the facts, it is clear that the plaintiff misconceived what he had to prove. The burden was laid on him to show that by custom governing the dealings between Bombay *adtia* and up-country constituents payments to the latter were payments at their town of residence and not at the *adtia* shop. The evidence adduced by him mostly refers to the custom prevailing amoug Akola *adtia* but is besides the question. We think it unnecessary to enter at this stage into the merits of the case for we are of opinion that the pleadings are defective and that the parties have not been fully examined. It must be clearly ascertained before the framing of issues what

(1) 58 Ind. Cas. 90 ; 42 A. 409 ; 18 A. L. J. 431.
(2) 59 Ind. Cas. 680.
(3) 12 Ind. Cas. 357 ; 7 M. L. R. 130 at p. 133.
(4) 14 C. 768 ; 12 Ind. Jur. 97 ; 7 Ind. Dec. (N. S.) 509.
(5) 18 B. 61 ; 9 Ind. Dec. (N. S.) 549.

GHANIA *v.* PHUMAN SINGH

exactly the case of each side is : where were the contrscts which the plaintiff seeks accounts of made ; was any portion of these contracts within the meaning of section 20, clause (*c*) of the Civil Procedure Code within the Akola District ; were there any stipulations as regards monies due to the plaintiff, being payable in Akola or in Bombay ; and is there any custom of the Bombay market in the absence of an express contract that such monies are receivable at the *adtia's* place of business, though he may agree to send them to the constituent's shop. It seems to have been assumed that the dealings in suit are *pucci adtia* contracts. This point must be ascertained.

With these remarks we set aside the decision of the lower Court on the question of jurisdiction and remand the case to be further dealt with according to law. Costs in this Court will abide the res ult. We fix pleader's fee at Rs. 50.

Z. K. *Case remanded.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 1113 OF 1923.

December 20, 1923.

Present :—Mr. Justice Broadway.

GHANIA—DEFENDANT—APPELLANT—
versus
PHUMAN SINGH—PLAINTIFF AND
DUNI—DEFENDANT—RESPONDENTS.

Custom—Ancestral property, what is—Land purchased from collateral, whether ancestral.

Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor. Therefore, land purchased from a collateral although ancestral in the lands of the latter ceases to be ancestral in the hands of the purchaser.

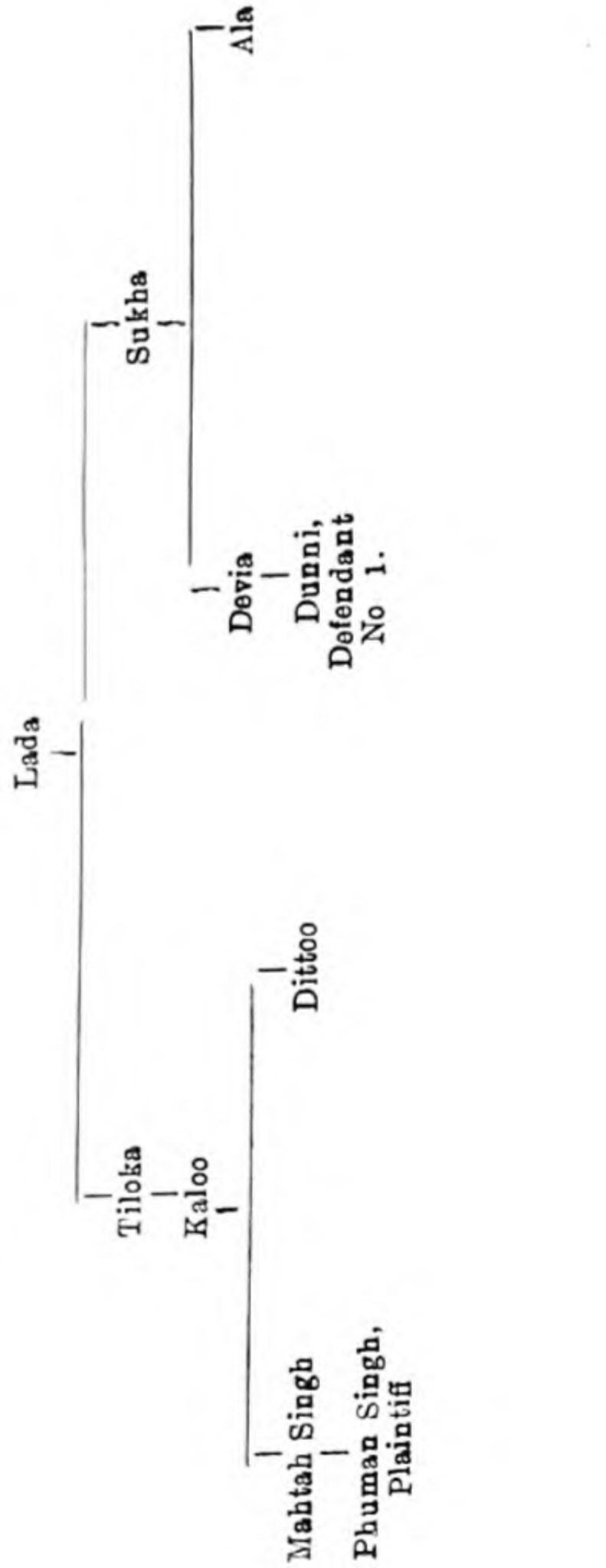
Sri Ram v. *Ramji Das*, 2 Ind. Cas. 949 ; 5 P. R. 1909 ; 86 P. L. R. 1909 ; 94 P. W. R. 1909 ; *Gurdit Singh* v. *Ishar Kuer*, 68 Ind Cas. 551 ; 3 L. 257 ; (1922) A. I. R. (L) 392, followed.

Miscellaneous second appeal from the order of the District Judge, Jullundur, dated the 23rd March 1923, reversing that of the Junior Subordinate Judge, first class, Jullundur, dated the 24th April 1922, and remanding the case under O. XLI, r. 23, Civil Procedure Code, for a decision on the merits.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *B. A. Cooper*, for the Respondents.

JUDGMENT :—The following pedigree table will assist in an appreciation of the case :—



CHURANJI LAL *v.* KARTAR SINGH

On the 18th of March 1920 Dunni sold 8 *kanals* 1 *marla* of land to one Gehna for Rs. 2,500. The plaintiff Phuman Singh instituted a suit for a declaration that the said sale would not affect his reversionary rights. He based his claim on the fact that the property was ancestral and that the sale had been effected without necessity. The Trial Court found that out of the land sold only 2 *kanals* 11 *marlas* were ancestral and that as more than half of the sale price had been shown to be for necessity the plaintiff's suit must be dismissed.

Phuman Singh thereupon preferred an appeal to the District Judge, who came to the conclusion that the entire land was ancestral and remanded the case under O. XLI, r. 23 of the Civil Procedure Code, in order that the Trial Court should arrive at a decision as to whether the remainder of the sale-price had been shown to be for necessity or not.

Gehna has come up to this Court in second appeal through Mr. Badri Das on the ground that the learned District Judge's decision as to the ancestral nature of the property is bad in law. Mr. Cooper for the respondents has not afforded much assistance in the discussion. It appears that the entire land sold formed part of the estate held by Lada, the common ancestor. Half of the land so held by him descended to Mehtab Singh and Dittoo through Tiloka and Kaloo, while the other half devolved on Devia and Ala through Sukha. Mehtab Singh and Dittoo, out of the land inherited by them from their common ancestor lada, sold 5 *kanals* 10 *marlas* to Devia. This sale was apparently not challenged by Phuman Singh or anyone else. The Trial Court held that, inasmuch as Devia was a member of the family, the acquisition by him by sale put an end to the ancestral nature of the property. The learned District Judge, however, considered that the fact that Devia was a collateral of his vendors and not a stranger did not affect the ancestral nature of the property which continued to be ancestral in his hands. This view is opposed to *Sri Ram* v. *Ramji Das* (1), in which it was held that "land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor." In the present case the land came into the hands of Devia by purchase and not by descent or by reason merely of his connection with Lada. It, therefore, ceased to be ancestral. This is in consonance with the view taken in *Gurdit Singh* v. *Ishar Kuar* (2). I hold, therefore, that of the land sold 5 *kanals* 10 *marlas* is not ancestral, and, accepting the appeal, remand the case under O. XLI, r. 23, of the Civil Procedure Code, to the lower Appellate Court for a decision of the case in the light of this finding. Stamp on appeal will be refunded. Costs in this Court will follow the event.

Z. K. *Appeal accepted.*

(1) 2 Ind. Cas. 949 ; 59 P. R. 1909 ; 86 P. L. R. 1909 ; 94 P. W. R. 1909.

(2) 68 Ind. Cas. 551; 3 L. 257; (1922) A. I. R. (L.) 392.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1087 OF 1923.

January 26, 1924.

Present :—Mr. Justice Campbell.

CHURANJI LAL—PLAINTIFF —APPELLANT
versus
KARTAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by manager—Necessity, absence of—Co-parcener, whether entitled to recover whole property.

Where a sale of joint family property by the manager of the family is found to have been without family necessity, a co-parcener challenging the sale is entitled to recover possession of the whole of the property sold and not merely of his share in the property.

Dharam Chand v. *Karm Devi*, 6 P. R. 1898 ; *Mahabeer Pershad* v. *Ramyad Singh*, 12 B. L. R. 90 ; 20 W. R. 192, not followed.

Lachhman Prasad v. *Sarman Singh*, 40 Ind. Cas. 284 ; 39 A. 500 ; 15 A. L. J. 584 ; 2 P. L. W 29 ; 21 C. W. N. 990 ; 30 M. L. J. 89 ; 19 Bom. L. R. 646 ; 26 C. L. J. 97, (1917) M. W. N. 516 ; 6 L. W. 334 ; 44 I. A. 163 (P. C.), followed.

Second appeal from the decree of District Judge, Jullundur, dated the 26th January 1923, modifying that of the Munsif, 1st Class,

CHURANJI LAL *v.* KARTAR SINGH

Nawanshahr, District Jullundur, dated the 8th August 1922, and awarding the plaintiff possession of the half the land in suit.

Lala *Jagan Nath*, for the Appellants.

Mr. *Aziz Ahmad*, for the Respondents.

JUDGMENT.—Sri Ram and his minor brother Choranji Lal formed a joint Hindu family and 4 *kanals* 11 *marlas* of land was the joint ancestral property of that family. Sri Ram, purporting to act for himself and as guardian of Choranji Lal, sold the land to Kartar Singh. Choranji Lal sued for possession on the ground that the sale was not for necessity or consideration and that he was entitled to recover the whole land sold. The first Court decreed the claim ; but on appeal the learned District Judge modified the decree to one for half only of the property sold.

The finding of the lower Appelate Court is that consideration passed and that it was required for the purpose of defraying ordinary debts due by Sri Ram but not for purposes of family necessity as recognised by Hindu Law.

Choranji Lal has come to this Court in second appeal, and it is argued on his behalf, on the authority of the Privy Council decision in *Lachhman Prasad* v. *Sarnam Singh* (1), that the sale was absolutely void and he was entitled to a decree for the whole land.

It is not disputed for Kartar Singh, respondent, that the sale was void, but it is submitted that the decree should be in the form given in the case reported as *Dharam Chand* v. *Karm Devi* (2) and should be that the property be declared as now partitioned between Sri Ram and Choranji Lal each taking a half share and that Choranji Lal should recover possession of his half share unencumbered, the sale being valid in respect of the remaining share belonging to Sri Ram. The learned Counsel for the appellant does not accept such a decree and represents that Kartar Singh may be able to recover the sale price from Sri Ram without proceeding against the joint family property and Choranji Lal is entitled to the chance or prospect of this property being kept in the family, intact.

The decision in regard to the decree in *Dharam Chand* v. *Karm Devi* (2) was based upon a case *Mahabeer Persad* v. *Ranyad Singh* reported as *Mahabeer Persad* v. *Ramyad Singh* (3) which the learned Judges of the Chief Court considered to have been reinforced by some remarks of approval by their Lordships of the Privy Council in *Madho Parshad* v. *Mehrban Singh* (4). *Mahabeer Persad* v. *Ramyad Singh*, (3) however, was discussed in *Lachhman Prasad* v. *Sarnam Singh*, (1) which is a later pronouncement by their Lordships of the Privy Council and there it was emphasized that special circumstances were found to exist in *Mahabeer Persad* v. *Ramyad Singh*, (3) namely, that the alienors had made a representation to the alienee that they had power to dispose of the joint family property. Lord Haldane made it clear in *Lachhman Prasad* v. *Sarnam Singh* (1), that the general law is not that the property of the joint family can in every case be made available for a mortgage by the head of the family to the extent of the interest of the mortgagor, and his judgment indicates that he did not consider *Mahabeer Persad* v. *Ramyad Singh* (3), a decision to be applied beyond its own particular facts.

In view of Lord Haldane's observations, I am not prepared to make a decree in the form adopted in *Dharam Chand* v. *Karm Devi* (2). I accept the appeal and restore the decree of the first Court for possession of the whole land in dispute with the declaration added that this decree shall not affect any remedy which Kartar Singh may be able to enforce hereafter against Sri Ram. The appellant will have his costs throughout.

Z. K. *Appeal accepted.*

(1) 40 Ind. Cas. 284 ; 39 A. 500 ; 15 A. L. J. 584 ; 2 P. L. W. 29 ; 21 C. W. N. 990 ; 23 M L. J. 39 ; 19 Bom. L. R. 646 ; 26 C. L. J. 97 ; (1917) M. W. N. 516 ; 6 L. W. 384 ; 44 I. A. 163 (P. C.).

(2) 6 P. R. 1893.

(3) 12 B. L. R. 90 ; 20 W. R. 192.

(4) 18 C. 157 ; 17 I. A. 194 ; 5 Sar. P. C. J. 586 ; Rafique and Jackson's P. C. No. 121 ; 9 Ind. Dec. (N. S.) 105 (P. C.).

VITHALDAS MARWARI *v.* GOMA

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 104 OF 1922.

August 28, 1923.

Present :—Mr. Prideaux, A. J. C.

VITHALDAS MARWARI—PLAINTIFF—APPELLANT

versus

GOMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (*V of* 1882) *ss.* 59, 60—*License—Work of permanent character—Transfer by grantor—Revocation—Hindu Law—Joint family—Religious endowment—Dedication of small plot, validity of.*

Where a licensee acting under the license has created a work of a permanent character on the land, the license is not revoked by the transfer of the land by the grantor to another, nor can the transferee claim compensation from the licensee.

A dedication of a small portion of joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift 'ordained for pious purposes.'

Ramalinga Chetty v. *Sivachidambara Chetty*, 49 Ind. Cas. 742 ; 42 M. 440 ; 9 L. W. 224 ; 25 M. L. T. 253 (1919) M. W. N. 426 ; 36 M. L. J. 572 ; *Bhupati Nath Smrititirtho* v. *Ram Lal Maitra*, 3 Ind. Cas. 642; 37 C. 128 ; 10 C. L. J. 355 ; 14 C. W. N. 18, relied on.

Appeal against the judgment of the Additional District Judge, Wardha, dated the 22nd November 1921 in Civil Appeal No. 40 of 1921.

Mr. *Balwantrao Pendharkar*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—The contesting defendant in this case, Paranjpe, who had started a temple and a charitable institution in 1907 selected for this purpose a plot of land which has since been demarcated as field No. 131|2 of *Mouza* Pipri, Tahsil Wardha. It then formed part of the tenancy land of one Karlekar who gave it to this defendant for the building of temples, etc. The then Lambardar Annapurnabai and the presumptive reversioner agreed to their tenant so giving the land. On this site have now been erected a *pucca* temple to Ramdas, some houses and a well and standing thereon is a hut which is the subject of this dispute in the present case.

Plaintiff's story is that defendants Nos. 1 and 2, despite his protest, built a hut on the site and he sues to get it removed. Defendants Nos. 1 and 2 disclaim all title to the hut and state it belongs to defendant No. 3. The case was dismissed in the Trial Court which held that though plaintiff by purchase from Annapurnabai was the owner and Lambardar of *khel* A of the village the defendant No. 3 was the licensee the plot and had been in possession as such and not in adverse possession. The hut was found to have stood for four years. The license was held to be perpetual and plaintiff could not obtain the relief he sued for.

On appeal the pleas of legal and prescriptive title which had failed in the first Court were not questioned. The lower Appellate Court holds thatAnnapurnabai, the then Lambardar, granted a license to defendant No. 3 in 1907 to use plot No. 131|2 for religious purposes in connection with his institution. Since the plot was so granted it has been made *abadi*. The hut was found to be a work of a permanent nature. The obstruction offered for making the hut by plaintiff's agent was found to amount to express revocation of the license but held that, in the light of section 60. of the Easements Act, the licensee acted upon the license ; having erected a work of permanent nature and incurred expenses in its execution his possession could not be interfered with. The hut was found to have been standing before the obstruction was offered by the plaintiff's agent to the repairs being made. Plaintiff was found not entitled to any compensation and the dismissal of the case was confirmed.

It is here contended for the appellant that the transfer of her right in the *kkel* by Annapurnabai to the plaintiff revoked the license. But I do not think so, and agree with the learned Judge of the lower Appellate Court in the reason he gave for that view.

It is strongly urged that in any case plaintiff is entitled to some compensation ; but I do not see on what ground he can claim this. If

the license was given and if the license has been acted upon and a work of a permanent character has been errected on the soil, and it is not denied here that the hut is a work of a permanent character, then on what ground can plaintiff claim compensation? As far as I know, none.

The lower Appellate Court has held that because the tenant could not transfer and because the permission of the then *Lambardar* was not in a legal form the defendant could not plead a legal title. It is doubtful whether this making over the soil could not be held to be a gift ordained for pious purposes. It was held in *Ramalinga Chetti* v. *Sivachidambara Chetty* (1) that a dedication of a small portion of the joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift ordained for pious purposes. There is no reasonable doubt that both the tenant and Annapurnabai did consent and give the land to defendant No. 3, for the building of an institution and a temple to Ramdas. The principle enunciated in the above case was affirmed in the Full Bench case of *Bhaupati Nath Smrititirtho* v. *Ram Lal Maitra* (2). But it is unnecessary to labour this question further. There is no doubt that defendant No. 3, is the licensee with permission to build on the site given him and the hut was erected by him under the permission before plaintiff purchased the *khel*.

It is unnecessary to discuss the subject of adverse possession. This appeal fails and is dismissed with costs. Appellant to pay respondents' costs.

Z. K. *Appeal dismissed.*

(1) 49 Ind. Cas. 742 ; 42 M. 440 ; 9 L. W. 224 ; 25 M. L. T. 253 ; (1919) M. W. N. 426; 36 M. L. J. 572.
(2) 3 Ind. Cas. 642 ; 37 C. 128 ; 10 C. L. J. 355 ; 14 C.W.N. 18.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 128 OF 1921.

February 13, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

Musammat MUBARAK-UN-NISSA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD RAZA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse-possession—Co-sharers—Muhammadan co-heirs, position of—Ouster, proof of—Transfer of Property Act (IV of 1882) s. 41—Transfer by ostensible owner, validity of—Co-heir allowing co heir to continue in possession.

Among co-sharers the possession of one co-sharer cannot become adverse to another except where the co-sharer in possession has explicitly denied and repudiated the title of the others and has been in possession since then for more than 12 years. [p. 175, col. 2.]

Corea v. *Appuhamy*, (1912) A. C. 230; 81 L. J. (P. C.) 151 ; 105 L. T. 886, relied on.

A Muhammadan co-heir who obtains possession of the property of the deceased is in the position of a co sharer and his possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of the other co-heirs.

Where a Muhammadan co-heir permits another co-heir to obtain possession of the entire property of the deceased and to get himself recorded in the Revenue papers as sole owner, and the latter makes an alienation of the property, the alienation cannot be avoided by the other co-heir where it is found that the transferee acted in good faith and gave consideration for the transfer, and that there were no circumstances which could have put the transferee on enquiry.

Partap Chand v. *Saiyida Bibi*, 23 A. 442; A. W. N. (1901) 137 ; *Asima Bibi* v. *Shamalanand*, 17 Ind. Cas. 758 ; 40 C. 378 ; 17 C. W. N. 121 ; 13 M. L. T. 159 ; (1913) M. W. N. 125 ; 11 A. L. J. 169 ; 17 C. L. J. 303; 15 Bom. L. R. 428 ; 25 M. L. J. 55 (P. C.) *Muhammad Sulaiman* v. *Sakina Bibi*, 69 Ind. Cas. 701 ; 20 A. L. J. 654 ; (1922) A. I. R. (A.) 392 ; 44 A. 674, distinguished.

Khavaja Muhammad Khan v. *Muhammad Ibrahim* 26 All. 490, relied on.

First appeal from the decree of the Subordinate Judge, Bijnor, at Moradabad, dated the 16th December 1920.

MUBARAK-UN-NISSA *v.* MUHAMMAD RAZA KHAN

Messrs. *S. Abu Ali* and *S. Raza Ali*, for the Appellants.

Dr. *Sen*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to the property of Sardar Khan, who died on the 24th of September 1907, leaving two daughters, Mst. Mubarak-un-nissa and Mst. Bismilla Begam, who are the plaintiffs, and three grandsons Muhammad Raza Khan, Maqsud Khan and Daud Khan by a predeceased son, who are the defendants Nos. 1, 2 and 3. He also left a brother Mahmud Khan and a nephew, Nazar Muhammad Khan, who was the son of one of his predeceased brothers. Mahmud Khan had two sons, Usman Khan and Chidda Khan. The plaintiff Mst. Bismilla Begam was married to Usman Khan, who died in the life-time of Mahmud Khan.

On the death of Sardar Khan his property was entered in the names of the defendants Nos. 1, 2 and 3. The plaintiffs took no steps to get their names entered in the Revenue papers in regard to the share of the property, now claimed by them. Their case was that the property in dispute devolved on the death of Sardar Khan on the plaintiffs to the extent of a two-thirds share and on Mahmud Khan to the extent of the remaining one-third; that Mahmud Khan told them that he had got their names entered in the Revenue papers in respect of their two thirds share, and that they had been in receipt of the profits of their shares from Mahmud Khan till 1324 *Fasli*. Their complaint was that the defendants Nos. 1,2 and 3 had wrongfully made certain mortgages of the property in question in favour of the other defendants and that it was not until some of the latter defendants had obtained a decree for the sale of the properties mortgaged with them that they came to know that their names were not entered in the Revenue papers. The present suit was accordingly filed by them for the recovery of possession of the two-thirds share of the properties in the villages of Patwari, Nagli Biloch and Basantpur, and for mesne profits. A declaration was also claimed that the mortgages effected by the defendants Nos. 1,2 and 3 in favour of the other defendants were not valid and binding on them.

The suit was principally contested by Narain Das and his sons, and Chhadammi Lal. Their defence was that the plaintiffs had never been in possession of any portion of the property in dispute and that the claim was barred by limitation and by section 115 of the Indian Evidence Act and section 41 of the Transfer of Property Act. It was further pleaded by some of the contesting defendants that the plaintiffs had relinquished their claim to a share in the property of their father at the time when mutation of names was effected in favour of the defendants Nos. 1, 2 and 3.

It was admitted that Ibrahim Khan, the father of the defendants Nos. 1, 2 and 3, had died in the life-time of Sardar Khan. The Court below found that the defendants Nos. 1, 2 and 3 were in possession of the property in dispute as trespassers; that the plaintiffs had never been in receipt of the profits of the property in question, and that the claim was barred by limitation. It further found that the plaintiffs had relinquished their claim to a share in the property of their father and that the mortgagees had acted, after reasonable care and inquiry, in taking the mortgages now impeached, from the ostensible owners, whose names were entered in the Revenue papers, for consideration, and in good faith.

The first question for consideration in this appeal is whether the claim of the plaintiffs was barred by limitation. The lower Appellate Court was apparently led to think, by what was stated in the plaint and which does not appear to have been contested by the other side, that the defendants Nos. 1, 2 and 3 were not entitled to any share in the property of their grantfather Sardar Khan; but that is not, however, so. Under the Muhammadan law, on the death of Sardar Khan, the property devolved on the two plaintiffs to the extent of a two-thirds share, and the remaining one-third share devolved on the defendants Nos. 1, 2 and 3 as residuaries of the first class. The defendants Nos. 1, 2 and 3 cannot, therefore, be regarded as trespassers; and on the principle laid down in *Corea* v. *Appuhamy* (1) no claim to adverse title can be set up by these defendants because among co-sharers the possession of one co-sharer cannot become adverse to another except where the co-sharer in

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

possession has explicitly denied and repudiated the title of the others and has been in possession since then for more than 12 years The plaintiffs produced evidence to show that they had been in receipt of the profits up to 1324 *Fasli* but that evidence is of little value. One of the plaintiffs was living in a village in the Meerut district ; the other piaintiff was living in the house of Chhidda Khan, the brother of her deceased husband. The defendants Nos. 1, 2 and 3 had applied for the mutation of their names on the 22nd November 1907 and they got an order for mutation in their favour without any objection some time in February 1908. After the death of Sardar Khan, Mahmud Khan was appointed lambardar of the villages in question, and there is no reliable evidence to show that any profits were paid by Mahmud Khan to any of the plaintiffs. After the death of Mahmud Khan, Nazar Muhammad Khan was appointed lambardar of the village ; but Nazar Muhammad Khan has not been produced ; and we see no reason for differing from the view taken by the learned Subordinate Judge on this matter. The finding of the learned Subordinate Judge that the possession of the defendants Nos. 1, 2 and 3 was adverse from its inception, is, however, vitiated by the fact that, according to his view, the defendants Nos. 1, 2 and 3 were trespassers, whereas they were really co-sharers ; and as co-sharers there is nothing to show that they had ever set up an express ouster against their aunts or that they had set up an adverse title within their knowledge The claim of the plaintiffs as against these defendants cannot, therefore, be deemed to be barred by limitation or by adverse possession within the meanng of Article 144 of the Indian Limitation Act.

The next question for consideration is whether the plaintiffs had ever surrendered their claim to a *ehare* in the property of their father. The only evidence produced on the point is that of Ahmad Baksh who states that some time before his death Sardar Khan had stated that his property should be entered in the names of his grandsons after his death. In the application made for the mutation of names after the death of Sardar Ahmad Khan by the defendants Nos. 1, 2 and 3 no such oral devise was referred to. The claim was then based cn inheritance and we do not consider that the evidence of Ahmad Khan Baksh on that point can be accepted as reliable. The learned Subordinate Judge refers to the conduct of Mahmud Khan in not setting up a claim to what was supposed to be his share in the property of his brother ; but as we have already pointed out that reasoning proceeds on a misapprehension of the manner in which the property devolved on the death of Sardar Khan. Mahmud Khan was not entitled to any share in the property of Sardar Khan in the presence of the plaintiffs and the defendants Nos. 1, 2 and 3 ; and his conduct in not applying for the entry of his name is explicable and cannot affect the title of the plaintiffs to a share in the property of their father.

The learned Subordinate Judge, however, proceeded to base his decision against the plaintiffs on a third ground which was stronger, namely, that the claim was barred by section 41 of the Transfer of Property Act. It appears from the description of mortgaged property given in the deeds of mortgage produced by the mortgagees that the property in dispute had been partitioned apparently some time after the death of Sardar Khan between the different co-sharers of the villages in question and that the defendants Nos. 1, 2 and 3, along with some of the other co-sharers, had made mortgages for consideration in favour of Narain Das and his son Kishori Lal and some of the other defendants between 1911 and 1917. All these deeds of mortgage given a detailed description of the mortgaged property with the *mahals* to which they appertained at the time of the mortgage ; and we have no doubt that copies or extracts from the *khewats* must have been available at the time these mortgage-deeds were written in order to supply the parties to the transaction with an accurate description of the entries that existed at that time in the Revenue papers in regard to them. These entries must naturally have satisfied the mortgagees that the mortgagors had a good title to the properties, which they were mortgaging; and we have no doubt that, acting on those entries, the mortgagees advanced the considerations mentioned in the deeds of mortgage. As observed by Lindley, L. J., in *Bailey* v. *Barnes* (2) :—

(2) (1894) Ch. D. 25 at p. 35 ; 63 L. J. Ch. 73 ; 7 R. 9 ; 69 L. T. 542 ; 42 W. R. 66.

> " A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business ; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects, which would have come to his knowledge, if he had transacted his business in the ordinary way."

There was nothing in the course of dealings connected with the property in dispute, which would have required on the part of the mortgagees who lived in other places greater circumspection than appears to have been exercised in the present instance by an examination of the entries in the Revenue papers. These entries would, in the ordinary course, have been sufficient to satisfy a mortgagee of the title of the mortgagor to mortgage the properties in question ; and we do not consider that there were any circumstances rendering a further enquiry on his part necessary. Section 41 of the Transfer of Property Acts lays down that, " where, with the consent express or implied, of the persons interested in the immovable property, a person is the ostensible owner of such property, and transfers the same for consideration, the tsansfer shall not be voidable on the ground that the transferor was not authorised to make it provided the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

The plaintiffs had, by their conduct or omission, allowed the defendants Nos. 1, 2 and 3 to get their names entered in the Revenue papers to their exclusion. These entries existed from as far back as 1908 and remained unchallenged till the present suit was filed. The mortgagees advanced money on the strength of these entries to the persons whose names were entered in the Revenue papers as the owners of these properties. They acted in good faith. There was no circumstance established which rendered it necessary for them to take greater care than what appears to have been been taken in the present instance and we consider that the mortgagees are sufficiently protected in what they did by the above provisions.

On behalf of the plaintiffs reliance has been placed on the decision in *Partap Chand* v. *Saiyida Bibi* (3), and *Azima Bibi* v. *Shamalanand* (4) ; but the circumstances of each case would naturally vary and the conclusion based on facts found in one case cannot be of any assistance in the determination of a similar issue on the facts found in another case. In the former case it was found that the transferee could have ascertained that the property which the transferors professed to transfer was acquired in their names by their father, who was a *Tahsildar*, when they were children of tender years, and that there were other circumstances which rendered it incumbent on the transferee not to rest satisfied with merely seeing that the names of the transferors were entered in the Revenue records. In the latter case the transferee was a pleader from whom greater circumspection would naturally have been expected ; and the main ground on which the transferee sought protection was that he thought that the transferor who would ordinarily have been governed by the Muhammedan Law had still retained the Hindu Law in the matter of inheritance. The plea set up on behalf of the transferee was of such an unusual nature that their Lordships of the Privy Council felt constrained to think that he had not discharged the *onus* which lay upon him of making due enquiry in regard to the manner in which the property had descended before taking the mortgage. A reference has also been made to the decision in *Muhammad Sulaiman* v. *Sakina Bibi* (5), but in that case it was found that the transferee, though aware of the title of the original owner before he had taken the transfer, had omitted to make further enquiry as to how that title had passed from the original owner to the transferor. No such special circumstances exist in the present case. On the other hand, the circumstances of the present case are somewhat similar to those in *Khwaja*

(3) 23 A. 442 ; A. W. N. (1901) 137.

(4) 17 Ind. Cas. 758 ; 40 C. 378 ; 17 C. W. N. 121; 13 M. L. T. 159 ; (1913) M. W. N. 125 ; 11 A. L. J. 169 ; 17 C. L. J. 303 ; 15 Bom. L. R. 423 ; 25 M. L. J. 55 (P. C.).

(5) 69 Ind. Cas. 701 ; 20 A. L. J. 654 ; (1922) A. I. R. (A). 393 ; 44 A. 674.

Muhammad Khan v. *Muhammad Ibrahim* (6) and we are satisfied that there was nothing in the transaction to require the mortgagees to make a further enquiry as to the real title to the property beyond what appeared from the entries in the Revenue papers.

The claim of the plaintiffs is, therefore, barred as against the transferees in regard to the property mortgaged with them. Their claim as against the defendants Nos. 1, 2 and 3 must, however, succeed. We allow the appeal accordingly and decree the claim of the plaintiffs against the defendants Nos. 1, 2 and 3 with costs here and hitherto; but dismiss it as against the remaining defendants who will get their costs here and hitherto from the plaintiffs appellants. The costs in this Court will include fees on the higher scale.

Among the papers printed by the defendants-respondents there are several papers which do not relate to the properties in dispute. There are others which were equally unnecessary to be printed for the purposes of this appeal. In fact, no reference has been made to most of these papers. We direct accordingly that the costs incurred in the translation and printing of the tabular matter exhibited from pages 116 to 181 of the printed record shall be excluded from the defendants' costs.

Z. K, *Appeal allowed.*

(6) 25 A. 409.

LAHORE HIGH COURT.

CIVIL REVISION NO. 99 OF 1920.

February 2, 1920.

Present :—Mr. Justice Broadway.

RAM JAS—PETITIONER

versus

CHANI, MINOR, THROUGH *Mt.* CHHATI, AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890) ss. 34, 47—Order calling upon guardian to pay into Court money due on account—Appeal, whether competent—Revision.

No appeal lies under section 47 of the Guardians and Wards Act against an order passed under section 34; but the order is open to examination by the High Court on the revision side.

Revision of the order of the District Judge, Hissar, dated the 21th May 1919.

Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—On the 9th of June 1916 Ram Jas was appointed the guardian of the property and person of Chani, son of Sukh Ram, minor. On the 24th June 1918 the minor's mother, *Musammat* Jiwani moved the Court asking that Ram Jas be called upon to render an account of the minor's property and, acting apparently under section 34 (*c*) of Act VIII of 1890, the learned District Judge directed Ram Jas to file his accounts. This Ram Jas did on the 10th March 1919 and in his accounts showed that for two years the income of the minor's property had been Rs. 128 2-0 and after deducting necessary expenditure for revenue, etc., he showed a balance in hand of Rs. 107-5-3. The learned District Judge, however, appointed a Local Commissioner to make a report as to what the income of the property for the two years should be. The Local Commissioner reported that he estimated the total income for that period to be Rs. 1,906 of which one-third should go to the minor. The sum arrived at by the Local Commissioner was Rs. 635-5-3. To some extent the Local Commissioner's report was supported by the *patwari*. The learned District Judge, however, considered that the least income derivable from the minor's property for that period must have been Rs. 300 and, deducting Rs. 18 on account of revenue, Ram Jas was directed under section 34 (*d*) to pay in the sum of Rs. 282 and for the future it was ordered that the minor should live with his mother who was to be paid Rs. 5 a month for the minor's maintenance.

Against this order Ram Jas has come up to this Court. Lala Jagan Nath on behalf of *Musammat* Jiwani contended that no appeal was allowed by section 47 of the Act from the order passed under section 34 and by virtue of section 48 of the Act the order was final. It seems that this contention is correct and that no appaal lies but an order under section 34 would be open to examination by this Court on the revision side.

In the present case it seems to me that Ram Jas had really nothing to complain of. It is not clear exactly how the sum of Rs. 300 was arrived at but that sum is less than half of the figure given by the Local Commissioner. I see no occasion to interfere and dismiss this petition.

I draw the attention of the learned District Judge to the necessity for insisting on regular accounts. To call for accounts after a period of two years is obviously unsatisfactory and in the present case it seems to me that it would be advisable to insist on the guardian filing the accounts after each harvest.

K. S. D. *Petition dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 778 OF 1921.

September 12, 1922.

Present :—Sir Lallubhai Shah, Kt. Acting Chief Justice, and Mr. Justice Crump.

SAKHARAM MARUTI AND ANOTHER —DEFENDANTS—APPELLANTS
versus
RAJMAL GIRDHARILAL MARWADI —PLAINTIFF – RESPONDENT.

Dekkhan Agriculturists' Relief Act (*XVII of* 1879) *ss.*43—45—*Conciliator, appointment of as arbitrator—Agreement to refer not reduced to writing—Award, whether valid—Appeal—Suit to enforce award—Procedure.*

A mortgage of certain property assigned his rights to the plaintiff who applied for a certificate under the Dekkhan Agriculturists' Relief Act when the parties appeared before the Conciliator they agreed that the matter should be settled by arbitration and appointed the Conciliator as their arbitrator who made an award the same day. The plaintiff's application for filing the award having been dismissed he filed the present suit for enforcing his rights under the award.

Held (1) that the absence of any writing referring the matter to arbitration did not affect the validity of the agreement evidenced by the award;

(2) that in view of the provisions of sections 43 to 45 of the Dekkhan Agriculturists' Relief Act the award could not treated as a valid award :

(3) that it was not open to the plaintiff to treat the award as affording a distinct and separate cause of action to be dealt with according to the ordinary rules applicable to a suit based on the award.

Second appeal from the decision of the District Judge, Ahmednagar, reversing the decree of the Subordinate Judge, Parner.

Mr. *R. J. Thakor*, for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.

Shah, Ag. C. J. :—The question of law in this second appeal relates to the validity of the award upon which the suit is based. The facts are these. The defendants represent the original owners of the property. The original owners effected a mortgage in favour of one Birdichand on the 3rd November 1890. He assigned his rights to the present plaintiff on the 27th July 1910. The plaintiff applied on the 30th July 1910 to the Conciliator under the Dekkhan Agriculturists' Relief Act for a certificate. On the 28th November 1910, apparently the parties agreed before the Conciliator that the matter should be settled through arbitration, and the yappointed the Conciliator as their arbitrator, who made an award on the same day. On the same date the plaintiff made an application to the Court of the Subordinate Judge at Parner for filing the award, and for a decree in terms of the award. The written statement of the defendants was filed on the same date, whereby they agreed that the plaintiff's application should be allowed, but the Subordinate Judge was not satisfied with that statement, and on notices being issued to the defendants, a fresh written statement was filed by them on the 21st December 1910 in which they repudiated the award. The Court rejected the plaintiff's application and refused to file the award on the 10th April 1911 on the ground that the claim on the original cause of action would be time-barred at the date of the award. It appears that the plaintiff again applied on the 28th January 1913 for the restoration of the suit in view of the Bombay Act XIII of 1913 ; but that application was rejected. Ultimately, he filed the

present suit on the 25th November 1916 claiming to enforce his rights under the award of the 28th November 1910.

The Trial Court dismissed the suit in December 1917. In the appeal by the plaintiff to the District Court, it was held that the suit was barred by *res judicata*. The plaintiff appealed to this Court, and in Second Appeal No. 427 of 1919, it was held by this Court that the plaintiff was entitled to a decision on the merits, and that his claim was not barred by the plea of *res judicata*. (See *Rajmal Girdharlal* v. *Maruti Shivram* (1).)

After the remand by this Court the appeal was decided by the learned District Judge on the merits. He held that the award in question was a legal and valid award, and accordingly decreed the plaintiff's claim in terms of the award on the 8th August 1921.

The defendants have now appealed to this Court; and it is urged on their behalf, first, that the award is not legal, because there was no reference to the arbitrator in writing; and, secondly, that the agreement between the parties as represented by the award does not represent a just and legal agreement under the circumstances. On the other hand, it is urged by Mr. Desai for the respondent that section 43 of the Dekkhan Agriculturists' Relief Act does not require any reference in writing, and that the award is not open to the objection which is now urged that it does not represent a legal and equitable agreement finally disposing of the matter.

I have stated the respective arguments on both sides as they were advanced. But as a result of these arguments, the principal point that arises for our consideration is whether, in view of the provisions as to conciliation in Chapter VI of the Dekkhan Agriculturists' Relief Act, and particularly in sections 43-45, the award in question can be held to be valid. After a careful consideration of the provisions of the Dekkhan Agriculturists' Relief Act, and of the arguments urged before us, I have come to the conclusion that this award cannot be treated as a valid award.

As regards the first point, it is true that under section 43 of the Act after the matter is once before the Conciliator, if the parties come to any agreement finally disposing of the matter, such agreement shall be forthwith reduced to writing. In the present case what happened before the arbitrator must be considered, in my opinion, to be an agreement finally disposing of the matter between the parties within the meaning of section 43. It was open to the parties to arrive at an agreement between themselves or through arbitration so as to dispose of the matter finally. There is no reference to the arbitrator in writing: but it need not be in writing. It is sufficient if the agreement finally disposing of the matter is reduced to writing. The award, which is assented to by the parties, is in writing, and that is the agreement which purports to dispose of the matter finally. The argument as to the absence of any writing relating to the reference to the arbitrator was based upon the provision in the section about an agreement to refer to arbitration. I do not treat what happened in fact before the arbitrator on the 28th November 1910 as merely an agreement to refer to arbitration, but as a completed arbitration resulting in effect in an agreement between the parties disposing of the matter finally. The provisions of section 45 refer to the procedure to be followed when there is an agreement to refer the matter to arbitration, and have no application to the present case. The absence of any writing referring the matter to arbitration does not affect the validity of the agreement evidenced by the award.

The next question is whether the award which was made by the Conciliator while the conciliation proceedings were pending before him, is a valid award which gives the parties a fresh cause of action in supersession of the original cause of action between the parties. If the provisions of section 44 are carefully examined it would appear that if there was an agreement between the parties finally disposing of the matter, the Conciliator would have to adopt the procedure laid down in that section, namely, to forward the agreement in original to the Court of the Subordinate Judge, and to deliver to each of the parties a written notice to show cause before such Judge, why such agreement ought not to be filed in such Court; and if the proper procedure had been followed, the Court

(1) 51 Ind. Cas. 755 ; 45 Bom. 939 ; 22 Bom. L. R. 1377.

would have scrutinized the agreement : and, if it thought that the agreement was legal and equitable finally disposing of the matter, and that it had not been made in fraud of stamp or registration laws, the Court might have ordered it to be filed, and then it would have taken effect as a decree of the said Court.

Even assuming for the sake of argument, without admitting it, that the application made by the plaintiff producing the award before the Court was practically a submission to the Court by the Conciliator of this agreement between the parties finally disposing of the matter, and that the matter was substantially before the Court, though not in the manner provided in section 44, it was still obligatory upon the Court to consider whether it was a legal and equitable agreement between the parties; and unless the Court was satisfied on that point, it could not have given effect to it. For one reason or other the Court refused to give effect to the agreement evidenced by the award, and it seems to me that it is not open to the plaintiff now to treat this award as affording a distinct and separate cause of action to be dealt with according to the ordinary rules applicable to a suit based on an award. The fundamental difficulty of the plaintiff seems to me to be that it was obligatory upon the parties to adopt the procedure laid down in the Dekkhan Agriculturists' Relief Act if anything which was in the nature of an agreement finally disposing of the matter before the Conciliator was to be given effect to by the Court after determining whether it was a legal and equitable agreement. By adopting any other procedure the plaintiff cannot get rid of the necessity to submit the agreement to the Court as required by section 44. In fact, what happened before the Conciliator on the 28th November 1910 seems to have been misconceived by the plaintiff and he has treated the award as an ordinary private award through an arbitrator appointed by the parties without the intervention of the Court. Once the matter was before the Conciliator, that procedure, it seems to me, was not open to them. They had either to come to an agreement finally disposing of the matter, in which case section 44 would apply, or to agree to refer the matter to arbitration in which case the provisions of section 45 would apply; and if neither of these things was done, the plaintiff was entitled to a certificate as provided in that Chapter which would enable him to prosecute the suit in a regular way on the original cause of action. The question is not so narrow as the learned District Judge seems to have thought, namely, whether it was open to the arbitrator to decide the point of dispute between the parties according to law or not. If this were treated as a private award, it does not matter whether the decision was according to law or not. If it is viewed in the light of an agreement between the parties, as I have indicated it should be viewed, then it seems to me that the non-compliance with the procedure laid down in section 44 is fatal to the suit based on the award.

I would, therefore, allow the appeal, reverse the decree of the lower Appellate Court and restore that of the Trial Court with costs here and in the lower Appellate Court on the plaintiff. The cross-objections are dismissed with costs.

Crump, J.—I agree, and in view of the possible importance of the point, I desire to add my reasons shortly. It appears to me that when, on the 30th July 1910, the plaintiff applied to the Conciliator, it must be taken, defendants being agriculturists, that the subsequent proceedings were to be governed by the provisions of the Dekkhan Agriculturists' Relief Act. The Conciliator being thus seized of the matter, it was not, in my opinion, open to him to act otherwise than is provided by the special legislation. To hold that he could do so, would be to frustrate the object of the Legislature in enacting those provisions for the benefit of agriculturists-defendants. It follows, therefore, that, when the matter came before the Conciliator, there were two courses open to him, and only two. If conciliation was to be effected, he could, under section 43, persuade the parties to come to an agreement disposing of the matter, or an agreement to refer the matter to arbitration. There was no third course, such as was suggested in the argument before us. Now, if either of those results was achieved, then the further steps were subject to the sanction of the Court. Without the sanction of the Court, anything done by the Conciliator could have no final effect. Whether the agreement in the present case is

regarded as finally disposing of the matter or as an agreement to refer to arbitration, the result is in either case the same. The next step in the former case would be that the Court would deal with the matter under section 44. In the latter case, the Court would deal with the matter under section 45. But in either case the final word lay with the Court. Apart, therefore, from any minor defects in the procedure, such as the absence of a writing or the failure of the Conciliator himself to forward the agreement to the Court, it appears to me there is a fatal defect in the plaintiff's present case, because the Court in dealing with this matter refused to give effect to that which had been done before the Conciliator. The Court apparently regarded this agreement as one finally disposing of the matter, and that is, I think, the correct view. But taking that view, the Court said that it was not an equitable agreement and, therefore, refused to give effect to it. The only course then open to the plaintiff in accordance with the provisions of the Act was to obtain a certificate from the Conciliator and to file a suit, if so advised. This he did not do. Nor, on the other hand, did he take any steps which might have been open to him to challenge the decision of the Court. Therefore, it seems to me impossible to argue, having regard to the provisions of the Dekkhan Agriculturists' Relief Act, that we have in this case any thing which could be termed a valid award. If that is so, the basis of the present suit fails, and it must necessarily be dismissed.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2096 OF 1920.

March 29, 1923.

Present :—Mr. Justice Moti Sagar.

LEKHA AND OTHERS—PLAINTIFFS —APPELLANTS

versus

BHANI AND OTHERS—DEFENDANTS —RESPONDENTS.

Ejectment, suit for—Trespasser—Co-sharer landlords, some, whether can sue—Person wrongly claiming to be heir of occupancy tenant—Civil Procedure Code (Act V of 1908) O. XXII, r. 4—Abatement of suit—Death of pro forma defendant, effect of.

The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable to a case where the defendant is not a tenant but a trespasser.

Where on the death of an occupancytenant a person claiming to be his heir gets into possession of the lands of the tenancy and it is found that he is not entitled to succeed to the deceased tenant under section 59 of the Punjab Tenancy Act, he is in the position of a trespasser and can be ejected at the instance of a co-sharer landlord from lands appertaining to the share of the latter.

In a suit for ejectment of a trespasser by some of several co-sharer landlords, the other landlords are only *pro forma* parties and the death of one of them does not result in the abatement of the suit either in part or in its entirety.

Appeal from the decree of the District Judge, Hissar, dated the 12th June 1920.

Mr. *H. D. Bhalla*, for the Appellants.

Mr. *B. D. Qureshi*, for the Respondents.

JUDGMENT.—One Sarupa had three sons, Chataria, Nandia and Moja. Chataria's son was Peria while Moja had a son Bhani, who is a defendant to this suit. Nandia died childless. Peria, son of Chataria, was the last occupancy tenant of the land in suit, and on his death the occupancy rights were mutated in the name of Bhani, defendant. The plaintiffs, who are some of the proprietors in the village, brought this suit for possession alleging that on Peria's death the occupancy rights had become extinct, and that they as landlords were entitled to succeed under section 59 of the Punjab Tenancy Act. The Trial Court

found in favour of the plaintiffs but decreed the claim only to the extent of the plaintiff's share in the land in suit. On appeal by the defendant the learned District Judge came to the conclusion that the plaintiffs were not suing on behalf of all the proprietors and that they could not maintain a suit for their own share before partition was affected. The suit was accordingly dismissed. The plaintiffs have now come up in second appeal to this Court through Mr. H. D. Bhalla, and I have heard Mr. Qureshi for the respondents.

A preliminary objection has been raised that one of the proprietors, who was a *pro forma* defendant in the suit, has died and that no application has been made to bring his legal representatives on the record within the time prescribed by law. It is, therefore, contended that the appeal has abated in its entirety and that it should be dismissed. I do not think there is any force in this contention. The other proprietors who were joined as defendants were merely formal defendants and were not interested in the result of the suit brought by the plaintiffs. It was found that the plaintiffs were not suing in a representative capacity but that they were suing in their own interest. In these circumstances, the death of one of the proprietors, who was not a necessary party to the suit, is of no consequence and cannot result in the abatement of the suit either in part or in its entirely.

On the merits, I am unable to agree with the finding of the Court below that the suit is not maintainable by the plaintiffs for their share alone. It has been found that Sarupa, the common ancestor, did not occupy the land, and it is, therefore, clear that under section 59 of the Tenancy Act Bhani, defendant, could not succeed to the occupancy rights in question. The defendant in such a case would obviously be a trespasser and not a tenant, and there is, therefore, no reason why the plaintiffs, who are co sharers in the land in dispute, should not be entitled to maintain a suit in respect of their own shares. The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable to this case, inasmuch as the defendant is not a tenant but a trespasser. I do not see any bar to the plaintiffs being granted a decree for possession in respect of their own shares.

I, therefore, accept the appeal and setting aside the order of the Court below, restore the decree of the Court of first instance with costs throughout.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1238 OF 1921.

June 29, 1923.

Present:—Justice Sir Jwala Prasad, Kt., and Mr. Justice Ross.

FIRM OF RAMDAYAL RAM NARAIN—PLAINTIFF—APPELLANT

versus

FIRM OF BHAIRO BUX GOURIDATTA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872) ss. 78, 83, 107, 118—Sale of goods, subject to inspection and approval—Sale, when complete—Re sale, right of, when arises—Goods answering particular description—Warranty, implied.

Where goods are purchased subject to the condition that they are undamaged and in good travelling condition and subject to inspection and approval, the sale is not complete till they are inspected and approved by the purchaser and till then no right of re-sale arises under section 107 of the Contract Act.

In the case of a contract of a general nature for the purchase of goods known by a certain description, there is always an implied warranty that the goods will be such as are usually sold under that denomination and not in a damaged condition.

Appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 11th May 1921 affirming a decision of the Munsif, Ranchi, dated the 28th February 1920.

Mr. *A. K. Ray*, for the Appellant.

Mr. *Ragho Prasad*, for the Respondent.

JUDGMENT.

Jwala Prasad, J.—This appeal must be dismissed. The defendant contracted to purchase five bales of thread No. 12 count from Bala Buksh. The plaintiffs say that Bala Buksh acted as their agent in the contract in question.

RAMDAYAL *v.* BHAIRO

The contract took place on the 19th August 1918. The defendant next day went to Bala Buksh and wanted the goods in question. He was directed to take delivery from the plaintiffs' godown. He sent his servant and on getting information from him himself went to inspect the five bales which were no doubt No. 12 count. He, however, found the bales damaged and refused to accept all five, but offered to accept three out of the five. The plaintiffs did not agree to this and the defendant, therefore, did not take delivery. The plaintiffs sold the properties by auction according to the custom of the firm in such matters and the price which they fetched at the auction-sale was less than the price which under the contract with the defendant they expected to get. The difference was Rs. 894 and the plaintiffs, therefore, brought this action to recover the said sum under section 107 of the Indian Contract Act.

The learned Vakil on behalf of the appellant says that the goods were ascertained and the sale was complete on the 19th August 1918 and that the sale was, therefore, irrevocable. According to him the property passed to the defendant and the defendant was, therefore, not competent to refuse to take delivery of the same. On the other hand, it is contended on behalf of the respondent that the goods were not ascertained inasmuch as the five bales of thread were mixed up with other goods in the godown of the plaintiffs and until they were separated from those goods they could not be said to have been ascertained. He relies upon section 83 of the Indian Contract Act and the learned Vakil on behalf of the appellant, on the other hand, relies upon section 78 of the said Act. Both sides have cited authorities in support of their contentions. The plaintiffs rely upon the cases of *Shosi Mohan Pal Chaudhri* v. *Nobo Kristo Poddar*(1), *Brij Kumari* v. *Salamandar Fire Insurance Co.*, (2) and *Kattayan Chetty* v. *Palaniappa Chetty* (3). The defendant relies upon the cases of *Mitheil Reid & Co.* v. *Baldeo Das Khettre* (4) and *A. Yule & Co.* v. *Muhammad Hussain* (5). The Courts below have upheld the contention of the defendant and have held that the goods were unascertained. The case, however, turns upon the actual contract between the parties. Bala Buksh with whom the defendant entered into the contract is dead. The defendant's case was that he had agreed to purchase the goods on the condition that they were to be in good travelling condition inasmuch as he was himself an agent and had to send the goods to his principals who lived 80 miles away from Ranchi where the plaintiffs reside and where the goods were at the time. He also says that he agreed to purchase the goods in "an undamaged condition", and in order to find out that the properties were undamaged and fit to be sent on to his principal, he purchased the properties subject to "inspection and approval." The learned Judicial Commissioner upon appreciation of the evidence in the case has held that the goods were purchased subject to the conditions stated above by the defendant, namely, that they were to be "undamaged" and "in good travelling condition" and the purchase should be further "subject to inspection and approval." This is a finding of fact and is conclusive in second appeal. It has not been challenged and could not possibly be challenged in second appeal ; they are, therefore, conclusive and binding upon us. Upon this finding there was no complete sale until there was an inspection by the defendant and approval by him. On inspection he rejected them. The lower Appellate Court has found that "two of the bales bore marks of tampering and the gunny packing had been stitched and there was note in each bale underneath the place where the gunny cloth had been marked. The yarn was found in these bales to be loose." Therefore, the defendant did not commit any breach of the contract and the appeal must fail.

If the defendant's case is true—and it has been found to be so—then the goods were not ascertained until they were inspected and approved of by the defendant. In this view of the case the Court below is right in holding that the goods were unascertained. Under section 118 of the Indian Contract Act he had the right to refuse to accept the goods when tendered on the 19th August, 1918. At the same time, even if the contract was complete

(1) 4 C. 801 ; 4 Ind. Jur 77 ; 2 Ind. Dec. (N. S.) 508.
(2) 32 C. 816.
(3) 27 M. 540.
(4) 15 C. 1 ; 7 Ind. Dec. (N. S.) 597.
(5) 21 C. 124 ; 1 C. W. N. 71 ; 12 Ind. Dec. (N. S.) 748.

unconditionally on the 19th August, when Bala Buksh and the defendant agreed about the sale of the five bales of thread No. 12 count which were admittedly seen by the defendant, there was an implied warrantly that the defendant would get in good condition the five bales of thread of No. 12 count. The goods which he was offered to take on the 19th August, though they answered the description inasmuch as they were the five bales of thread of No. 12 count, were not in the condition in which these bales usually are to be found. There was apparent damage to the bales and the gunny bags; and the defendant could never have contracted to purchase the very five bales of thread of No. 12 count which were lying in the godown of the plaintiffs in the condition in which they were. The contract was of a general nature with respect to the property known by a certain description. There is always, to my mind, an implied warranty that the goods will be such as are usually sold under that denomination and not in a damaged condition. The defendant was, therefore, well within his rights when he rejected the goods.

The appeal is, therefore, dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEALS NOS. 1305 AND 1306 OF 1921.

May 31, 1923.

Present :—Mr. Justice Harrison and Mr. Justice Zafar Ali.

THE PUNJAB COTTON PRESS CO.—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL —DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 2, applicability of—Damage caused by construction of Canal—Suit to recover damages—Limitation.

In consequence of the construction of the Raya Branch Tail Distributary of the Upper Chenab Canal, flood water was driven on to the plaintiff's property and caused serious damage. Plaintiff sued the Secretary of State to recover damages for the injury so caused;

***Held*, that the action taken by the Canal Officers in constructing the channel fell under sections 6 and 15 of the Northern India Canal and Drainage Act and the suit was, therefore, governed by Article 2 of Schedule I to the Limitation Act.**

Appeal from the decree of the Subordinate Judge, 1st class, Lahore, dated the 11th March 1921, dismissing the plaintiff's suit.

JUDGMENT.—In the two suits which have given rise to these Appeals (1305 and 1306 of 1921), the plaintiffs claimed damages on account of the construction of the Raya Branch Tail Distributary of the Upper Chenab Canal in consequence of which it is alleged that flood water was driven to the plaintiff's property in the high floods of 1917 and caused serious damage. The suits have been dismissed as barred under Article 2 of the Limitation Act and the first point to be decided is whether that Article applies.

The learned Government Advocate has pointed out that the action taken by the Canal Officers in constructing this channel comes under section 6 of Act VIII of 1873, and whether that action was wise or unwise any suit for damages consequent thereon had to be brought within 90 days of the date of the damage. It has not been contended that the necessary Notifications precedent to the undertaking of this work were not duly issued, and, in our opinion, there can be no doubt whatever that the work done which is said to have caused the damage in this case is covered by the words "or do any other thing necessary for such application or use of the said water." If it be contended, and this is not the case as instituted, that the cause of action consists of the construction of the channel combined with the failure of the Canal Department to deal with the situation which arose in 1917 in consequence of flood, the action or failure to take action at this late stage would be covered certainly by section 15 and we think by section 6 also. Anyhow, the suits are

clearly barred and have rightly been dismissed.

We, therefore, dismis the appeals with costs.

Z. K. *Appeals dismissed.*

BOMBAY HIGH COURT.

F. A. No. 281 OF 1921.

February 15, 1923.

Present :—Sir Norman Macleod, Chief Justice, and Mr. Justice Crump.

HIRAJI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VISHNU AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872) ss. 92—Sale deed—Evidence to show transaction was mortgage, whether admissible.

It is open to a person who is not a party to a document that the transaction embodied in the document though in the form of a sale was intended only to be a mortgage, but it would have to be established by satisfactory evidence.

Maung Kyit v. *Ma Shwe Lat* ; 42 Ind. Cas. 642 ; 45 C. 320 ; 44 I. A. 236 ; 15 A. L. J. 825 ; 33 M. L. J. 648 ; 3 P L. W. 185 ; 6 L. W. 777 ; 22 C. W. N. 257 ; 28 M. L. T. 86 ; 27 C. L. J. 175 ; 20 Bom. L. R. 278 ; (1918) M. W. N. 300 ; 9 L. B. R. 114 ; 11 Bom. L. T. 21 (P.C.), followed.

Appeal against the decision of the First Class Sub-Judge, Jalgaon, in Suit No. 442 of 1920.

Mr. *P. B. Shingne*, for the Appellants.

Messrs. *S. C. Joshi* and *S. R. Gokhale*, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued to recover posssesion of the suit lands alleging they belonged to their great grandfather Kondu. Kondu left two sons Moru and Chandra. There was a separation whereby plaintiffs' father Guna Moru got a half share, the other half going to the descendants of Chandra now represented by the defendants.

The plaint states that in 1885 plaintiffs' father gave his share to Haridas Ramdas by passing a mortgage-deed in the form of a sale for Rs. 1,000. Possession remained with plaintiffs' father. Defendant's father also gave his share to Haridas on the same condition, retaining possession. In 1886, plaintiffs' father having died, their mother, defendant and Haridas came to an arrangement by which it was found that the amount due by both branches was Rs. 5,000 and the defendants passed instalment-bond for that amount for the plaintiffs and themselves, keeping all the land in their possession and giving a portion of O. S. No. 24 and the whole of O. S. No. 17 to the plaintiffs' mother for the maintenance. In 1908-09 the defendants had liquidated the debt. The plaintiffs, therefore, claimed back from the defendants the properties originally mortgaged by their father to Haridas.

The defendants pleaded that the family properties were partitioned between Moru and Chandra. Guna sold his lands to Haridas by a sale-deed of the 12th September 1885. The lands, except O. S. No. 17, were purchased orally by defendant No. 1 and the father of defendants Nos. 2 to 5 in 1886 from Haridas. An instalment-bond in respect of the properties so purchased was given to Haridas and the amount due under the bond had been paid. Survey No. 17 was not purchased from Haridas by the defendants. A portion of S. No. 24 was sold by Krishna Chandra and was recently purchased by the plaintiffs. The plaintiffs having recently got possession of the deed of 1885 had brought a false suit against the defendants.

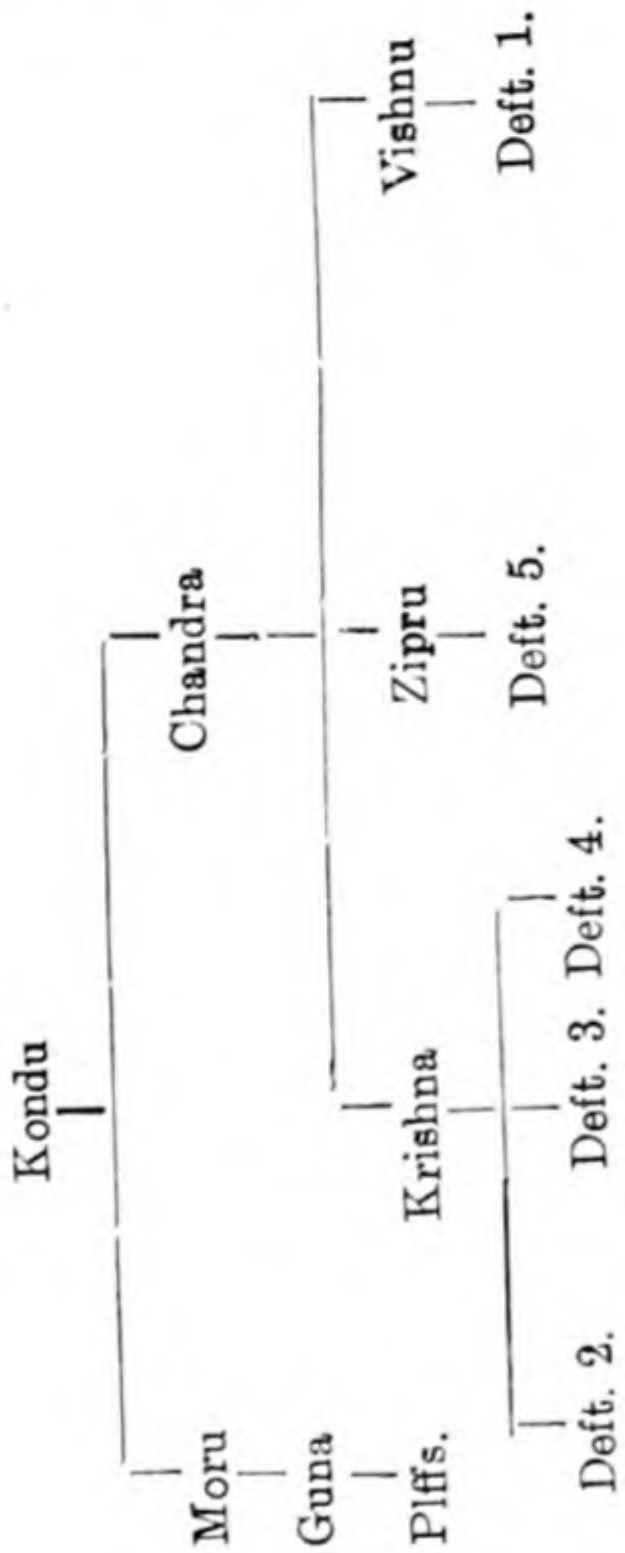
The plaintiffs filed a reply to the effect that an arrangement had been arrived at between their mother and the defendants whereby defendant mortgaged the whole property to Haridas, so that when that debt was paid off, defendants being in possession all along, the plaintiffs were entitled to get back their property.

The Trial Judge held that the plaintiffs were not entitled to prove that the document of the 12th September 1885 was a mortgage and not a sale-deed. But under the decision of the

HIRAJI *v.* VISHNU

Privy Council in *Maung Kyin* v. *Ma Shwe La* (1) the plaintiffs would be entitled to prove that the defendants purchased from Haridas knowing that he was not the owner. The question then is whether plaintiffs have succeeded in proving the arrangement they alleged was made between their mother and the defendants in 1886. They rely on the evidence of Jaysing (Exhibit 101) and Haridas (Exhibit 103). The Trial Judge has discussed that evidence in very great detail and has come to the conclusion that the agreement alleged was never made. I can find no reason for differing from him. The appeal must be dismissed with costs.

Crump, J.—The parties to this suit are related as shown in the following pedigree :—



(1) 42 Ind. Cas. 642; 45 C. 320; 44 I. A. 256; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 28 M. L. T. 26 27 C. L. J. 175; 20 Bom. L. R. 278 ; (1918) M. W. N. 303 ; 9 L. B. R. 114; 11 Bur. L. T. 21 (P.C.).

The properties in suit originally belonged to Kondu. Plaintiff's father Guna separated from his cousin Krishna, Zipru and Vishnu and took half the property. In February 1885 he mortgaged his half share to Haridas. In September 1885 he executed a sale-deed of the same property to Haridas. He died in February 1886. After his death in June 1886 defendant No. 1 and his brothers Krishna and Zipru mortgaged the whole property to Haridas.

The plaintiffs are suing for possession and they must show title and possession within twelve years of the date of suit. The suit was filed on October 29th 1920. On the face of the documents, it appears that the title of plaintiffs' father passed to Haridas by the sale of September 1885 and the natural inference from the mortgage by defendant No. 1 and his brothers to Haridas in June 1886 is that the vendee between those dates transferred the property to his mortgagors. The mortgage-deed contains a recital to that effect, and defendant pleads that there was an oral sale by Haridas to them. Haridas, who was plaintiffs' witness, says that this was so. There are thus several difficulties in the way of plaintiffs' success. Their case, as placed before us, is that the sale-deed by their father to Haridas was intended to operate as a mortgage, and, further, that the oral sale by Haridas was intended to be for their benefit, defendant No. 1 and his brothers being *benamidars* only. There is some inconsistency here but, generally, what they allege is that the equity of redemption remained with them, and that defendant No. 1 and his brothers agreed to hold the property on their behalf and to pay off Haridas, who continued to be the mortgagee, in fifteen years, and then to restore the property to plaintiffs, or at least their share of it. In order to establish this case plaintiffs must prove at the outset that the sale by their father in September 1885 was in fact intended to be a mortgage. Defendants were not parties to that document, and in view of the decision of the Privy Council in *Maung Kyin* v. *Ma Shwe La* (1) it may be open to them to do so despite section 92 of the Indian Evidence Act, but it would require to be establised by satisfactory evidence. It will be observed that the fifteen years of the original agreement expired in 1901 and on this point plaintiffs' explanation is that it was

found impossible to pay off the debts until 1908, and that the property, therefore, remained with defendants until that date.

Now at the outset it is clear that plaintiffs have been guilty of most inexplicable delay even on their own case. They knew in 1908 that they were entitled to the property in suit, but for nearly full twelve years they took no action. It would be difficult to hold their case proved on the evidence of their two witnesses Jaysing and Haridas, for, apart from the delay, the transaction alleged is of a most unusual and indeed improbable description. There is no obvious reason why defendant No. 1 and his brothers should have undertaken the payment of what Guna owed to Haridas unless the property was sold to them. They benefited in no way by doing so. There is little affirmative evidence in favour of the theory put forward by plaintiffs, and it is impossible to say that the lower Court was wrong in refusing to believe it. Some stress is laid on the fact that the documents evidencing the mortgage and sale by Guna to Haridas were produced by plaintiff but that alone is not a very convincing circumstance. It would require a far more convincing case than has been made out to justify a Court in overriding defendants' possession from 1886 down to the date of the suit.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 387 OF 1922.

April 9, 1923.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Ross.

KARSHAN BHABAN CHATALIA—PETITIONER

versus

INDRA NARAIN CHANDPA—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) O. XLI, r. 5—Stay of execution—Sheds and tram-lines belonging to judgment-debtor standing on property—Substantial loss—Execution of decree—Possession delivered behind judgment-debtor's back, whether can be reversed—Notice to judgment-debtor, necessity of—Duty of Court.

In execution of a decree the decree-holder sought to get possession of a piece of land on which stood coolie-sheds and tram-lines belonging to the judgment-debtor and erected for the purpose of working his colliery.

***Held*, that, as the removal of the sheds and lines would cause substantial injury and loss to the judgment-debtor, this was a proper case in which execution of the decree should be stayed pending the decision of the judgment-debtor's appeal.**

Where a judgment-debtor's application for stay execution was rejected by the Registrar but the order was not communicated to the applicant or his pleader and before he could move the High Court for stay of execution, the decree-holder obtained possession of the property in dispute by execution behind the judgment-debtor's back and without notice to him :

***Held*, that the delivery of possession to the decree-holder was, in the circumstances of the case, null and void, and the High Court had jurisdiction, while staying execution of the decree, to direct that possession be restored to the judgment-debtor.**

No order should be made in favour of one party to the prejudice of another unless that other has had an opportunity of showing that it should not be made.

Sudevi Devi v. *Mevaram Agarwallah*, 10 C. W. N. 806; *Gour Chandra Roy* v. *Janardan Prashad Thakur*) 68 Ind. Cas. 337; 4 P. L. T. 204; (1923) A I. R. (Pat., 180; *Ram Sukul Pathak* v. *Kesho Prasad Singh*, 43 Ind. Cas. 925 ; 3 P. L. J. 216; (1918) Pat. 17; 4 P. S. W. 75 (F. B.), relied on.

An important order, in execution proceedings, such as an order directing delivery of possession to the decree-holder, should not be passed *ex parte*, and the signature of the pleader for the opposite party should invariably be taken in column 4, provided for in the order sheet for that purpose.

The lower Courts should always notify to the parties the receipt of the record when it goes back from the High Court in order that the parties may be apprised of it and take necessary steps.

Application against the order of the Registrar in the matter of stay application in Second Appeal No. 387 of 1922.

Mr. *Abani Bhushan Mukerji*, for the Petitioner.

Mr. *Subal Chandra Majumdar*, for the Opposite Party.

KARSAN BHABAN CHATALIA *v.* INDRA NARAIN CHANDPA

ORDER.—This is an application by the judgment-debtor for stay of execution pending the disposal of the appeal in this Court. The opposite party decree-holder resists this application. The disputed property is a piece of land about 10 *kathas* in area. The judgment-debtor says that on the land in question stand his coolie shed and tram lines for the purpose of working his colliery. The opposite party denies the existence of any coolie shed or the tram lines. It is true that, in face of the extraordinary statements made on behalf of the parties, it is not possible to be certain as to whether the coolie shed and the tram lines stand on the land in dispute. If, however, they do exist, the judgment-debtor will be put to substantial injury and loss if the decree-holder removes them after getting possession of the property in dispute. According to the case of the opposite party, the land is practically *parti* and, therefore, no loss would accrue to the opposite party if the delivery of possession is stayed pending the disposal of the appeal. Any undertaking on behalf of the decree-holder not to change "the outlook and sight of the land" in dispute will be of no avail if, as he says, there is nothing on the land in question.

Considering the circumstances of the case, we are satisfied that the balance of convenience lies in staying the execution and delivery of possession of the property in dispute pending the disposal of the appeal on the judgment-debtor furnishing sufficient security for the restitution of the same to the decree-holder in the event of the appeal being dismissed. We, therefore, set aside the order of the Registrar and direct that the execution be stayed as aforesaid. The Court below will determine the amount of security necessary for the purpose.

The learned Vakil on behalf of the decree-holder, however, contends that there is no occasion now for the stay of the delivery of possession inasmuch as possession of property has already been delivered to the decree-holder. To this the learned Vakil on behalf of the judgment-debter, replies that the circumstances in which the delivery of possession was effected will justify this Court to ignore the said delivery of possession and to restore the *status quo ante* and direct the possession to be delivered back to the judgment-debtor. These circumstances are as follows:—

On the 26th February 1923, the learned Registrar refused the application of the judgment-debtor for stay of execution. The judgment-debtor shows by an affidavit filed in this Court that the order in question was not passed in the presence of his Vakil, and that neither he nor his Vakil was aware of the said order until the 1st of March, 1923, when the order was shewn to his Vakil. This allegation is not refuted and is in fact supported by the note made by Mr. Abani Bhusan Mukherjee, Vakil of the petitioner, in the order sheet on the 1st March 1923. His note was: "The order was never communicated to me. I came to see this order." This note has been penned through and is followed by the word "Seen." Mr. Mukherji says that he cancelled his note upon the representation of the Deputy Registrar that the order sheet of the High Court should not contain such a note. We do not see any reason why such a note should not have been allowed to be made if what was stated by Mr. Mukherji was a fact. This, however, does not matter for the order was actually seen for the first time by the Vakil on the 1st March 1923. Therefore, till then the learned Vakil was ignorant of the order. Mr. Mukherji states that he immediately wired to his client asking him to come and take necessary steps in order to move this Court against the order of the Registrar, on 5th March. The High Court was notified to be closed on the 3rd, 4th and 5th March on account of Holi festival, but at the eleventh hour the dates were changed into 2nd, 3rd and 4th March. Thus 2nd of March became a holiday and consequently nothing could be done by the petitioner to move this Court against the order of the Registrar until the Court re-opened on the 5th of March. An application of the petitioner was filed to the Court against the order of the Registrar on the 5th March, and was disposed of on the 6th March. In that order the Court admitted the application and directed notice to be issued to the opposite-party, granting *ad interim* stay of execution of the decree pending the disposal of the application. In the meantime, the order of the Registrar rejecting the judgment-debtor's

application for stay passed on the 26th February 1923, was communicated and received by the lower Court on the 28th February, although the order was not shown to the petitioner's Vakil, as stated above, until the 1st of March. On receipt of the order of the Registrar the lower Court directed the execution to proceed and the issue of process for delivery of possession fixing the 19th March 1923. This order was, however, not passed in the presence of the judgment-debtor or his pleader. The order-sheet does not bear the signature of the judgment-debtor or his pleader. The petitioner has sworn in his affidavit that he or his pleader was not aware of the aforesaid order. The order-sheet does not contain the signature of the judgment-debtor or his pleader. The result was that the possession was delivered to the decree-holder on the strength of the aforesaid order on the 5th March 1923, before the judgment-debtor could obtain an order of this Court on the 6th March for an *ad interim* stay of the execution. The judgment debtor applied to the Court below for stay of execution on the basis of the order passed by the High Court.

In the circumstances, we do not think that the delivery of possession can in any way, frustrate the petition of the judgment-debtor for stay of execution. It is obvious that the judgment debtor was ignorant of the order passed by the Court below on the 28th February and that order cannot, in any way, prejudice him. The order of the 28th of February was an important order. It was an order after a lapse of time during which the application of the judgment-debtor for stay of execution was pending in this Court. It has been pointed out more than once that an important order such as the present one should not be passed *ex parte* and that the signature of pleader should invariably be taken in column 4 provided for in the order-sheet for the purpose. In the present case there were stronger reasons why the order should not have been passed behind the back of the petitioner and without his knowledge or that of his pleader. The special column provided for in the order-sheet is particularly meant to guard against any injustice being done by an *ex parte* order behind the back of a party. In the case of *S. M. Sudevi Devi Covaram Ayarwalah* (1) where there was no provision relating to notice to be given to a party concerned, Woodroffe, J., held that notice should have been given. He further said that it was an elementary principle that no order should be made in favour of one party to the prejudice of another unless that other had an opportunity of showing that it should not be made. I remember to have followed and adopted the *dictum* of Woodroffe, J., in some cases and I still adhere to the view and consider the *dictum* a salutary one; vide *Gour Chandra Ray* v. *Janardan Prashad Thakur* (2) add *Ram Sukul Pathak* v. *Kesho Prasad Singh* (3).

Therefore, the order of the 28th February and delivery of possession given to the opposite party must be considered to be null and void, and cannot, in any case, give any right to the decree-holder in the property in dispute to the prejudice of the judgment-debtor as in the case of *S. M. Sudevi Devi* v. *Movaram Agarwalah* (1). The possession delivered to the decree-holder in pursuance of the order must be set aside and the property delivered back to the judgment-debtor. I would further point out to the Munsif the usual practice of notifying to the parties the receipt of the record when it goes back from the High Court in order that the parties may be apprised of it and take necessary steps. The aforesaid elementary rules of procedure should always be kept in view and the non-observance of the same works, as it has done in the present case, great hardship to the parties. I would, therefore, invite the attention of the learned Munsif specially to the rules and the authorities referred to above.

The result is that the execution and the delivery of possession are stayed pending the disposal of the appeal upon thejudgment-debtor furnishing security to the satisfaction of the Court below for restitution of the same in the event of the appeal being dismissed. In the circumstances of the case we direct that the opposite party would pay two gold mohurs to the applicant as the hearing fee.

Z. K.

(1) 10 C. W. N. 306.

(2) 68 Ind. Cas. 327 ; 4 P. L. T. 204 ; (1923) A. I. R. (Pat.) 180.

(3) 48 Ind. Cas. 925 ; 3 P. L. J. 218 ; (1918) Pat. 17 ; 4 P. L. W. 57 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 267 OF 1922.

March 19, 1923.

Present :—Mr. Justice Chatterjee and Mr. Justice Cuming.

JNANENDRA NATH MOOKERJEE—DECREE-HOLDER—APPELLANT

versus

BRAHMAPADA PRAMANICK—JUDGMENT-DEBTOR—RESPONDENT.

Construction of decree—Ejectment from land, whether includes ejectment from huts standing on land.

In a suit for the ejectment of the defendant from certain land on whioh there were some huts, the huts were not mentioned in the plaint but the decree directed *khas* possession of the land to be given to the plaintiff by ejectment of the defendant therefrom :

***Held*, that on a proper construction of the decree the defendant was liable to be ejected not only from the land but from the huts as well.**

Henry Maseyk v *Lyons*, 5 W. R. (Mis.) 49, distinguished.

Appeal against the order of the District Judge, Nadia, dated the 10th July 1922.

Messrs. *T. P. Choudhary* and *J. C. Ray*, for the Appellant.

Messrs. *S. N. Roy* and *S. C. Munshi*, for the Respondent.

JUDGMENT.—The question involved in this appeal turns upon the construction of a decree obtained by the appellant against the respondent in a suit for recovery of possession.

It appears that the suit was for ejectment of the defendant from certain land on which there were some huts. The huts are found by both the Courts below to belong to the plaintiff. There was no reference to the huts in the plaint in that suit but the decree in that suit was as follows :—

"The suit being decreed with costs and interest, plaintiff will get *khas* possession of the disputed land on ejecting the defendant therefrom, as prayed. The defendant himself must remove all his personal properties from the disputed land within one month. In default the plaintiff will have to remove the same with the help of the Court and he will get *khas* possession of the said land."

In execution of the decree, the plaintiff obtained *khas* possession of the land by turning out the defendant. The defendent thereupon applied to the Court below for restoration to possession of the huts and an order has been made in his favour by the Courts below on the ground that there was no reference to the huts in the decree for ejectment.

It is true that the huts are not referred to in the decsee. The question, however, is whether upon a proper construction of the decree the plaintiff was entitled not only to the land but was entitled to turn out the defendant from the huts as well.

As stated above, the huts have been found to belong to the plaintiff, and if the plaintiff was to get *khas* possession by ejecting the defendant from the land, it is difficult to see how *khas* possession could be given if the defendant were to retain possession of the huts. If, however, they belonged to the defendant, the decree directing *khas* possession by ejecting the defenant, would necessarily give the plaintiff a right to *khas* possession as against the defendant in respect of the huts also.

The case of *Henry Maseyk* v. *Lyons* (1), relied upon by the respondent, turned upon the construction of the terms of the decree in that case; and it is to be observed that there was no order directing the defendant to be turned out from the land in that case.

In these circumstances, we think the orders of the Courts below must be set aside and we direct accordingly. The effect of setting aside the orders of the Courts below would be that the possession, as originally delivered to the plaintiff, would stand.

Each party to bear his own costs in all Courts.

Z. K. *Appeal allowed.*

(1) 5 W. R. (Mis.) 49.

NATHALAL RAMDAS VAGHJI *v.* NADIAD MUNICIPALITY

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 10 OF 1921.

September 21, 1922.

Present:—Sir Lalubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

NATHALAL RAMDAS VAGHJI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NADIAD MUNICIPALITY—DEFENDANT—RESPONDENT.

Bombay District Municipal Act (Bom. Act III of 1901) s. 3 (12)—Street land, meaning of—Survey of town—City Survey Officer, decision of—Suit for declaration of ownership—Government, whether necessary party.

The definition of the word "street" as given in section 3, clause (12), of the Bombay District Municipal Act, does not in any sense negative the idea of private ownership.

A Survey having taken place within the Municipal limits of the town of the City Survey Officer declared certain land to be 'street land' within the meaning of section 3 (12) of the Bombay District Muncipal Act. Plaintiffs thereafter filed a suit for a declaration of ownership and for a permanent injunction restraining the defendant Municipality from obstructing them in their enjoyment thereof.

Held, **that the Government was not a necessary party to the suit because the decision of the Survey Authorities was not in favour of the Government in any way.**

Appeal from the order of the District Judge, Ahmedabad, reversing the decree of the Subordinate Judge, Nadiad.

Messrs. *Thakor* and *R. J. Thakor*, for the Appellants.

Mr. *N. M. Desai* and the *Government Pleader*, for the Respondent.

Shah, Ag. C. J.:—This is one of the several companion appeals which we have to decide; but it will be convenient to deal with this appeal first before considering what orders should be passed in the other appeals. It arises out of a suit filed by the plaintiffs for a declaration that certain land situated at Nadiad was of their ownership and for a permanent injunction restraining the defendant Municipality from obstructing them in their enjoyment thereof. The occasion for the suit was that, in pursuance of a resolution passed by the Nadiad City Municipality, the Government had, in accordance with the provisions in the Land Revenue Code, directed a Survey within the Municipal limits of the town of Nadiad, and the City Survey Officer had held that the land in question was a "street land" as defined in section 3, clause (12), under the Bombay District Municipal Act (Bom. Act III of 1901). That would involve the result that the Municipality would have certain rights in respect of the site in question under the Bombay District Municipal Act, and the whole purpose of the suit was to prevent the Municipality from interfering with the plaintiff's enjoyment of this site. With that view a declaration and an injunction, as stated above, were sought by the plaintiffs.

The defendant Municipality raised several objections to the suit, but no objection was raised that the suit was defective for want of a necessary or proper party. Four preliminary issues were raised:—

1. Whether the plaintiff's claim is time-barred?

2. Whether the plaintiff's suit is barred under section 167 of the District Municipal Act?

3. When the disputed site is decided to be a street land, whether it vests in and belongs to the Municipality? Whether Government and street people have any and what interest therein? Whether this suit can be heard in their absence? When Government is held to be a necessary party, whether this Court has jurisdiction to hear this suit?

4. Whether the defendant Municipality can dispute plaintiff's right when the disputed site is a street land?

The Trial Court held that the street people were not necessary parties, but that the Government was a necessary party, that the suit could not be heard in the absence of Government, and that, if Government were joined as a party, the Court could have no jurisdiction to entertain the suit. The Court also held that the suit was time-barred. In the result, the suit was dismissed with costs.

The plaintiffs appealed to the District Court. The learned District Judge who heard the appeal held that Government was a necessary

party, and that the other issues could not be, and should not be, considered. He set aside the order dismissing the suit, and made an order returning the plaint for presentation to the proper Court.

It is from that order returning the plaint that the present appeal is preferred to this Court, and the only question that we are really concerned with on this appeal is whether the lower Courts are right in their view that the Government is a necessary party.

It is important to remember at the outset that the question of the joinder of Government as a party in this case is one of great practical importance, for, if the Secretary of State for India in Council is a necessary or a proper party, it is clear that the suit must be tried in a different Court altogether. It is only the District Court that would have jurisdiction to try such a suit under section 32, of the Bombay Civil Courts Act (XIV of 1869). It is not, therefore, a simple question of adding a party as a matter of additional caution or convenience, but it is a question of importance as affecting the constitution of the suit.

The lower Courts have proceeded upon the view that the decision of the City Survey Officer that this land is "street land" is one which requires to be set aside; and, secondly, that as the plaintiffs claim a declaration as to the ownership of the land in suit, the interests of the Government are necessarily involved. They hold that in the case of "street land," the property would not be vested in the Municipality, and, though the Municipality would have certain control over the land, and certain statutory rights with reference to the land, the real dispute must be taken to be between the plaintiffs and the Government.

Though Government was not a party in the lower Courts, notice was issued in this case to the Government Pleader here on this appeal. We have heard the Government Pleader on behalf of Government, though not a party to the suit. We think, however, after a consideration of the arguments urged before us on both sides, and of the relevant provisions of the District Municipal Act and of the Land Revenue Code, that Government is not a necessary party to the present suit. The Survey was undertaken in this case as contemplated and provided by section 50A of the District Municipal Act. This section was inserted by Bombay Act, X of 1912, and by another Act in the same year a similar provision was inserted in the Land Revenue Code by way of addition to section 37 of the Land Revenue Code. For our present purpose, it is enough to point out that in this Municipal area the Survey was undertaken as contemplated by section 50A. Sub-section (2) of that section clearly provides that any suit instituted in any Civil Court after the expiration of one year from the date of any order passed by the Collector under sub-section (1), or, if one or more appeals have been made against such order within the period of limitation, then from the date of any order passed by the final appellate authority, as determined, according to section 204 of the Bombay Land Revenue Code, 1879, shall be dismissed, if the suit is brought to set aside such order, or if the relief claimed is inconsistent with such order, provided that the plaintiff has had notice of such order.

The order in the present case was passed first by the City Survey Officer, and then by the superior officer in appeal, and the decision was that it was "street land". The definition of the word "street," as given in section 3, clause (12), does not in any sense negative the idea of private ownership. "Street" shall mean "any road, footway, square, Court, alley or passage, accessible whether permanently or temporarily to the public, whether a thoroughfare, or not; and shall include every vacant space, notwithstanding that it may be private property, and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, * * * but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid." The decision of the Survey Authorities that the site in question formed part of a street, as defined in the District Municipal Act, does not mean that the decision was that the Government had any interest in the land. It was really a decision relating to a dispute between private owners and the Municipality, that it

was part of street land, which would mean that the Municipality would have certain powers with reference to such land which had been given under the Statute For instance, under section 90 of the District Municipal Act, the Municipality will have power to call upon the owners of the houses in the street to do certain things, and to declare it to be a public street if so advised under certain conditions. That affects the rights of private owners, and to that extent the Municipality is interested in upholding the decision of the City Survey Officer, and the plaintiffs are interested in questioning that decision. That is a dispute between the private owners and the Municipality in which, so far as I can see, the Government have no manner of interest. At least, the cause of action as stated in the plaint does not disclose any such interest, and, whatever view may be taken of the effect of the vesting clause in the District Municipal Act with reference to public streets, I do not think that the cases which relate to the decision of the City Survey Authorities that the land in question was a street land, would be affected by those considerations. The decision, so far as it goes, is entirely a matter in which the Municipality and the plaintiffs are interested, and in the suit the adjudication is sought with reference to the rights of these two parties. It is not necessary formally, in my opinion, to sue to set aside the decision of the Survey Authorities. Even if there was a prayer to set aside that decision, it would not render it necessary to join Government as a party. That is a mere matter of form, and the wording of sub-section (2) of section 50A, in my opinion, clearly indicates that whether the relief claimed is inconsistent with that order or whether the relief is to have the order set aside, the suit has to be filed within a particular time, and that the suit as there contemplated is clearly a suit between a a private party and the Municipality.

I do not desire to say anything more in this appeal as to whether, where the decision of the Survey Authorities was that a particular piece of land formed part of a public street, Government would be a necessary party or not. For the purpose of this appeal it is enough to say that Government is not a necessary party, because the decision of the Survey Authorities is not in favour of Government in any way, and the parties interested in that decision are the plaintiffs and the Municipality, who are before the Court.

We have to consider what course we should adopt now in view of the fact that the Trial Court has decided the question of limitation. We think that, on the whole, the best course, and practically the only legal course, under the circumstances, is to set aside the order made by the lower Appellate Court, and to remand the appeal to that Court for disposal according to law. If, after remand, the learned District Judge upholds the view of the Trial Court on the question of limitation, so far as that Court is concerned, the suit will end there. If the learned District Judge, however, comes to the conclusion that the suit is not time-barred, it will be for him to consider what order to make in order that the suit may be disposed of according to law. We, therefore, allow this appeal, set aside the order of the lower Appellate Court, and remand the appeal to that Court for disposal according to law. We think the respondent should pay the costs of this appeal. The other costs will be dealt with by the District Court when the appeal in that Court is disposed of. The Government Pleader to bear his own costs of this appeal.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1112 OF 1922.

May 10, 1923.

Present :—Mr. Justice Martineau and Mr. Justice Moti Sagar.

GULAB RAI-SAGAR MAL—DEFENDANTS —APPELLANTS

versus

NIRBHE RAM-NAGAR MAL—PLAINTIFFS RESPONDENTS.

C. I. F. contract—Documents against payment—Property when passes to buyer.

In the case of a C. I. F. contract, where the seller deals with, or claims to retain, the Bill of Lading in order to secure the price, as when he sends forward the Bill of Lading with a Bill of Exchange attached,

GULAB RAI-SAGAR MAL v. NIRBHE RAM-NAGAR MAL

with directions that the former is not to be delivered to the buyer till acceptance or payment of the Bill of Exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance or payment, or tender, the property in the goods does not pass to the buyer. But when payment is made the appropriation which was at first conditional becomes final and the property in the goods passes to the buyer.

Mirabita v. *Imperial Ottoman Bank*, (1878) 3 Ex. D. 164 ; 47 L. J. Ex. 418 ; 38 L. T. 597 ; 3 Asp. M. C. 591; *Ford Automobiles* v *Delhi Motor and Engineering Co.*, 70 Ind. Cas. 138 ; 24 Bom L. R. 1140 ; (1923) A. I. R. (B). 125, relied on.

Appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 18th April 1922.

Mr. *Tek Chand*, for the Appellants.

Mr. *Sardha Ram*, for the Respondents.

Martineau, J.—The plaintiffs in this case sue for the price of 15 bales of white shirting, sold by them to the defendants, of which the latter refused to take delivery. The goods had been imported by the firm of Mul Chand-Ganga Bishen of Delhi from England under a contract made on the 19th November 1919, with *Haji* Ali Akbar and Sons of Manchester. Mul Chand-Ganga Bishen sold them to Chiman Ram-Badri Narain, who sold them to the plaintiffs, who on the 21st December 1919 sold them to the defendants. The contract between *Haji* Ali Akbar and Sons and Mul Chand-Ganga Bishen was a D. P. contract, that is to say, the documents were to be delivered against payment, and the drafts and shipping documents were sent by *Haji* Ali Akbar and Sons to the National Bank of India at Delhi. The amount due was paid to the Bank by Chiman Ram-Badri Narain on the 25th January 1921. The main questions in the case are—

(1) whether the property in the goods passed to the defendants ;

(2) whether the goods offered to the defendants were in accordance with the contract ; and

(3) whether the defendants waived their right to object to them.

The lower Court has found on all these points in favour of the plaintiffs and has passed a decree for Rs. 31,050 12-0 with interest thereon at the rate of Re. 0-10-0 *per cent. per mensem* from the date of suit till realisation. The defendants appeal.

The Bill of Lading has not been produced and there is nothing to show in whose name it was made out, and as the contract between the shippers and importers was a C. I. F. contract it is contended for the respondents, and it has been held by the lower Court, that the property in the goods passed to Mul Chand-Ganga Bishen on shipment. On the other hand, the contention for the appellants is that as the goods were not to be delivered to Mul Chand-Ganga Bishen until they were paid for the property in the goods, which were not ascertained at the time of the contract, did not pass till payment was made to the Bank by Chiman Ram-Badri Narain on the 25th January 1921. We think this contention is correct. It was held by Cotton, L. J., in *Mirabita* v. *Imperial Ottoman Bank* (1), (referred to on page 377 of Benjamin's Sale of Personal Property, Fifth Edition) that when the seller deals with, or claims to retain, the Bill of Lading in order to secure the price, as when he sends forward the Bill of Lading with a Bill of Exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the Bill of Exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the buyer. The same rule is given on page 206 of Remfrey's Sale of Goods in British India, nd in a recent judgment of the Bombay High Court, *Ford Automobiles, Limited* v. *Delhi Motor Engineering Company* (2), it is mentioned as a well established rule.

But even though the property in the goods did not pass to Mul Chand-Ganga Bishen or their indentors till January 1921 this fact does not relieve the defendants from liability. The appropriation of the goods to the contract, which was at first conditional, became final when payment was made, and if it was assented to by the defendants the sale to them became complete and the property in the goods passed. In that case the suit for the price of the goods is maintainable, and we cannot accede to

(1) (1878) 3 Ex. D. 164 ; 47 L. J. Ex. 418 ; 38 L. T. 597 ; 3 Asp. M. C. 591.

(2) 70 Ind. Cas. 138 ; 24 Bom. L. R. 1140 ; (1923) A. I. R. (B.) 125.

Mr. Tek Chand's contention that, because the plaintiffs had not become the owners of the goods at the time when they made their contract with the defendants, their only remedy is to sue for damages for breach of contract.

Now the invoices and the shipment patterns were sent by Mul Chand-Ganga Bishen to Chiman Ram-Badri Narain, who forwarded them to the plaintiffs, who in turn forwarded them to the defendants. The plaintiffs wrote to the defendants on the 30th September 1920, asking them to pay for the goods, and the defendants on the 8th October sent the following reply (P. 2):—

"In reply to yours, dated 30th September 1920, we are sorry that as the exchange rate in these days is in great disorder we can't pay and take delivery of the above goods. If you will pay on our behalf we shall not be liable for that. We will pay at once as soon as the exchange will be in order."

The plaintiffs wrote again to the defendants on the 16th November asking them to take up the goods, but apparently received no reply. They wrote again on the 15th January 1921, informing them that if they did not retire the drafts by the 17th the drafts would be retired on the defendants' account and risk. The drafts were retired by Chiman Ram-Badri Narain on the 25th January 1921, as already stated, and on the 29th January a Notary Public, named Sham Bihari Lal (P. W. 3), went on behalf of the plaintiffs to the defendant's shop and tendered delivery orders for the goods. Ganeshi Lal, a member of the defendants' firm, who was at the shop, would not take the delivery orders, but said a reply would be sent in two or three days after he had consulted his father. No reply, however, was sent, and it was not till the plaintiffs' *Vakil* wrote a letter on the 2nd February calling upon the defendants to pay for the goods that the defendants' *Vakil* wrote a week later repudiating all liability. We think it is clear that the defendants signified their assent to the appropriation of the goods to the contract, first by their letter of the 8th October 1920, in which they pleaded only the unfavourable exchange as a reason for not taking up the goods, again by their silence on the receipt of the plaintiffs' letters of the 16th November 1920 and the 15th January 1921, and lastly by not having signified their dissent within a reasonable time after the delivery orders had been tendered to them on the 29th January 1921.

It is next contended that the goods offered are not according to the contract. The goods ordered were of qualities Nos. 432, 436 and 440. It does not appear that the goods supplied were not of the qualities ordered, but by an arrangement between the shippers and the importers the goods, instead of being stamped with the Nos. 432, 436 and 440 as stipulated in the importers' confirmatory indents of the 3rd December 1919, were stamped with the Nos. 1432, 1440 and 1436, respectively. The defendants contend that on account of this variation they were entitled to reject the goods. The contention is supported by *Moore & Co., Limited* v. *Landauer & Co.* (3), and if the defendants when asked to take up the goods had refused on the ground of variation from the terms of the indent, they would have had a good case. But although the Nos. 1432, 1440 and 1436 were mentioned in the invoices sent to the defendants the latter never took any objection to the goods, and from their letter P. 2, to which we have referred above, as well as from the fact of their not replying to the plaintiff's subsequent letters asking them to take up the goods, it is only reasonable to conclude that they waived any objections which they might have taken. The suit is not barred by the Specific Relief Act as is contended in the 9th ground of appeal, and we would hold, therefore, that the defendants are liable for the price of the goods.

The only other matter for consideration is the rate at which interest should be charged. The decretal amount includes interest at 8 *per cent. per annum*, and it is contended that the interest should not exceed 6 *per cent.*, which is the rate mentioned in the third clause of the importers' indent. That clause, however, relates only to what would be payable on account of loss incurred on re-sale. Eight *per cent. per annum* is the rate of interest charged by the Bank, and we see no reason why the defendants should not be required to pay interest at that rate. Ten annas *per cent. per mensem* is also not an excessive rate to allow for interest on the decretal amount.

We would, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(3) (1921) 2 K. B. 519 ; 90 L. J. K. B. 731 ; 125 L. T. 372 ; 26 Com. Cas. 267 ; 37 T. L. R. 452.

BOMBAY HIGH COURT.

CIVIL APPEAL NO. 20 OF 1921.

September 21, 1922.

Present :—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

BAI PARWATI—PLAINTIFF—APPELLANT
versus
THE NADIAD MUNICIPALITY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay District Municipal Act (III of 1901) s. 30 A—Survey Officer declaring land as public street—Suit for declaration of ownership—Government, whether necessary party.

A Survey being taken place within the Municipal limits of the City the Survey Officer declared certain lands to form part of the public street Plaintiff then sued for a declaration of ownership and for an injunction restraining the defendant Municipality from disturbing the plaintiff in the enjoyment of the land. There was a further prayer for setting aside the decision of the Survey Officer :

Held (1) that the form of the relief did not make any difference to the nature of the suit.

(2) that the matter can really one between the Municipality and private parties and the mere fact that Government could have some interest in all public streets vested in Municipalities was no reason for holding that Government are necessary party.

Krishnayya v. *The Bellary Municipal Council*, 15 M. 292 ; 5 Ind. Dec. (N.S.) 555, followed.

Appeal from the order of the District Judge, Ahmedabad, reversing the decree of the Subordinate Judge, Nadiad.

Messrs. *Thakor* and *M. B. Dave*, for the Appellant.

Mr. *N. M. Desai* and *The Government Pleader*, for Respondent No. 1.

JUDGMENT.

Shah, Ag. C. J.—In this case the facts are similar to the facts in the appeal which we have just disposed of with this difference that the decision of the Survey Authority was that the land in question formed part of a public street. There is a further point as to whether the suit was barred under section 50A. The Trial Court held that the suit was also barred under section 50A, sub-section (2).

The lower Appellate Court, however, has decided the case on the general ground that the Government is a necessary party, and that, therefore, the plaint should be returned for presentation to the proper Court, and we have to consider whether the decision of the Survey Authorities that the land in suit forms part of a public street, which is the question in this suit, involves the result that the Government is a necessary party to the suit. As we have already indicated in the other case, the suit in substance is really a suit as contemplated by the section 50A, sub-section (2). The Survey having been introduced under circumstances which would show that it was undertaken as contemplated by section 60A, the matter was really one between the Municipality and the private parties ; and the Survey Authorities decided that the plot in suit formed part of a public street. Here in the plaint the decision of the City Survey Enquiry Officer is sought to be set aside in terms. We do not think, however, that the form of the relief makes any difference in the real nature of the suit. In our opinion, the plaintiff seeks to establish that the land in suit is not part of a public street, and to restrain the Municipality, which is interested in disturbing the enjoyment of the plaintiff as owner of the disputed site. The main ground on which it has been held by the lower Courts that Government is a necessary party is, that the vesting of all public streets in the Municipality does not mean that Government have no interest in the land. They refer to certain decisions which go to show that, in spite of the vesting clause, Government have certain interests in the land, which may be a public street. Under section 50 of the District Municipal Act, it is clear that all public streets are vested in and belong to the Municipality, and are under their direction, management and control, and are held by them as trustees, subject to the provisions and for the purposes of the Act.

Various decisions which have been referred to in the judgment of the Trial Court and some of which have been referred to in the judgment of the lower Appellate Court, no doubt establish the proposition that in spite

of this vesting of public streets, the Government have some interest in the sub-soil of and in the column of air above the public streets *Kshetra Mohan Ghosh* v. *Corporation of Calcutta* (1); *Sundaram Ayyar* v. *The Municipal Council of Madura* (2), and *G. I. P. Railway Company v. The Municipal Corporation of Bombay* (3). But we do not understand how we are concerned in the present case with that question. The plaintiff finds, on account of the decision of the City Survey Authority, that the land which she claims to be of her ownership, has been declared to form part of a public street. That public street is vested in and belongs to the Municipality, and it is to get rid of the interference with her rights by the Municipality in virtue of the powers which the Municipality could exercise under the Act, on account of this public street being vested in that Municipality, that the plaintiff has filed this suit. That is the object and the scope of the suit. In that suit the parties interested are the plaintiff on the one hand and the Nadiad City Municipality on the other. We say nothing for the moment as to the other defendants who are joined in the suit. The mere fact that Government would have some interest in all public streets vested in Municipalities is not any reason for holding the Government is a necessary party in a suit of this nature which really concerns a private party on the one hand and the Municipality on the other. In all those cases where this interest of the Government in the sub-soil of the public streets has been referred to, we do not find any indication that Government has been held to be a necessary party. In fact, most of these suits have been suits in which the Government is not joined as a party. Except the case of *Sundaram Ayyar* v. *The Municipal Council of Madura* (2), we have not been able to find any indication that any attempt was made to join the Government as a party. In this case the learned Judges considered it desirable in second appeal, when certain issues were sent down for findings, that Government might be added as a party; and it does not appear that the addition of Government as a party involved any such result as the addition of Government as a party in the present suit in this Presidency would involve. We have not been able to find any provision in the Madras Civil Courts Act corresponding to section 32 of the Bombay Civil Courts Act. We are unable to find in this decision any indication that Government was considered a necessary party. On the contrary, the Madras High Court distinctly held in *Krishnayya* v. *The Bellary Municipal Council* (4) that the Secretary of State for India was not a necessary party to such a suit. The learned Government Pleader who argued in favour of the view that Government should be joined, if not as a necessary party, at any rate as a proper party, was unable to point to any decision of this Court in which in a suit between a private party on the one hand and the Municipality on the other with reference to any part of a public street, the Government was held to be either a necessary or a proper party. It seems to us that if Government were held to be a necessary party to suits of this character, it would mean that a number of suits which are at present triable by and in fact are tried by Subordinate Judges, would have to be tried in this Presidency by the District Courts. That is a result which does not appear to have been contemplated under the District Municipal Act. Section 9 of that Act provides that every Municipality shall be a body corporate, and shall have perpetual succession and a common seal, and may sue and be sued in their corporate name. That is the body, in which the "public streets" are vested according to law. That is the body, which is interested in questioning the right of a private owner who claims a particular part of a public street as his or her private land, and that is the body which can effectively interfere with the rights which would be exercisable by a private owner of the land under the Act. It is that interference which is sought to be removed by the plaintiff in the present case, and it is sufficient for the purposes of the present suit if that interference is guarded against. In our opinion the suit as originally framed was properly constituted, and it makes no difference in the result whether in form there was any prayer

(1) 37 Ind. Cas. 96; 44 C. 689; 24 C. L. J. 358; 21 C. W. N 284.

(2) 25 M. 635 M. L. at p. 642; 647; 12 M. L. J. 37.

(3) 23 Ind. Cas. 765; 38 B. 565 at p. 573; 16 Bom. L. R. 104.

(4) 15 M. 292; 5 Ind. Dec. (N. S.) 555.

to set aside the decision of the City Survey Authorities. Such interest as the Government may have in public streets, according to the decisions, has never been held to be such interest as would render the joinder of the Secretary of State for India in Council in such suits necessary: we do not think it desirable or right that such suits, which really relate to private disputes, should be unnecessarily complicated by the joinder of Government as a party. For the purposes of procedure, the vesting clause is sufficient to indicate that the Municipality is the proper party to be sued. We are, therefore, of opinion that the lower Courts have erred in holding that Government is a necessary party. Apart from necessity, the question whether Government is a proper party is not a matter of real difficulty in the case. We have already referred to the considerations which render it desirable that such suits should be left to be fought out between the parties who are really interested in the particular questions which arise in the suit for decision, and if Government were not a necessary party, as we hold they are not, we do not see any propriety in directing them to be joined as a party in this suit. The result of adopting such a procedure would be that a suit which could be tried out at Nadiad in the Court of the Second Class Subordinate Judge would have to be re-constituted and tried in the District Court of Ahmedabad. We do not see any need for adopting a course which involves that result. We would, therefore, allow this appeal and make the same order as in the other appeal. The appeal will be allowed, the order of the lower Appellate Court set aside, and the appeal remanded to that Court for disposal according to law.

The respondent Municipality to pay the costs of this appeal: other respondents to bear their own costs. The other costs will be dealt with by the District Court when the appeal in that Court is disposed of. The Government Pleader to bear his own costs of this appeal.

K. S. D. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 544 AND 546 OF 1921.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Maharaja BAHADUR KESHO PRASAD SINGH—APPELLANT

versus

RAMJAS PANDE—OPPOSITE PARTY.

Bengal Tenancy Act (*VIII of* 1885) *ss.* 50 (2), 215—*Fixed in perpetuity, presumption as to rent, when arises—Payment at fixed rate for* 25 *to* 33 *years, whether sufficient.*

Tenants are not entitled to the benefit of the presumption which arises under section 50 (2), of the Bengal Tenancy Act, and in order to establish that they are tenants at fixed rent in perpetuity, they would have to establish by evidence that they have been holding at the rate of rent which has not been changed since the time of the Permanent Settlement.

Where tenants have paid rent at a fixed rate for from 25 to 33 years it cannot be presumed that they have been paying at a fixed rate from the time of the Permanent Settlement.

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 11th December 1920, modifying a decision of the Munsif, Buxar, dated the 29th August 1919.

Messrs. *Kulwant Sahay* and *Nirsu Narain Sinha*, for the Appellant.

Mr. *Parmeshwar Dayal*, for the Opposite Party.

JUDGMENT.

Coutts, J.—These appeals arise out of suits for enhancement of rent. The suits have been dismissed in both the Courts below and the plaintiff has appealed.

The first point that arises is whether, in view of the provisions of section 115, the tenants are entitled to the benefit of the presumption which arises under section 50 (2) of the Bengal Tenancy Act. Both the Courts below, on the authority of *Gulab Misser* v. *Kumar*

Kalanand Singh (1) and *Prithi Chand Lal Choudhury* v. *Sheikh Mohammad Tahir* (2), have held that the tenants are entitled to the benefit of the presumption. These decisions, however, have been overruled by a number of decisions both in the Calcutta High Court and in this Court and I need only refer to the following cases: *Prithi Chand Lal Chowdhury* v. *Basarat Ali* (3), *Harihar Persad Bajpai* v. *Ajub Missir* (4), *Har Lal* v. *Musammat Gohri* (5), *Gurucharan Nand* v. *Sarab Ali* (6) and *Jagdeo Narain Singh* v. *Bhagwan Mahto* (7). In view of these decisions which, in my opinion, embody the correct view of the law, the tenants are not entitled to the benefit of the presumption; and, in order to establish that they are tenants at fixed rent in perpetuity, they would have to establish by evidence that they have been holding at the rate of rent which has not been changed since the time of of the Permanent Settlement.

It has been urged that the learned Subordinate Judge has found as a fact that the tenants have established this. It is true that the learned Subordinate Judge has said in his judgment that:

"apart from any presumption under section 50 of the Bengal Tenancy Act, it can be safely held that the defendant's status is *Sharahmoyan* at rent fixed in perpetuity."

How he arrives at this conclusion he does not say, but it would appear that he comes to this conclusion because the tenants have produced rent-receipts covering a period of from 25 to 33 years. It is contended by the learned Vakil for the respondents that, in view of the fact that the tenants have proved that they have paid rent at a fixed rate for from 25 to 33 years, the Court is entitled to presume that they have been paying at fixed rate from the time of the Permanent Settlement. I am unable to accept this contention. If it were correct it would lead to this—that a tenant, although he was not entitled to the presumption which arises under section 50 (2) of the Bengal Tenancy Act, would be entitled to prove that he had paid rent at the same rate for, say, 21 years and would then be entitled to what has been called a natural presumption in his favour. This could clearly not be so. No such presumption arises. The decision of the Court below is clearly wrong and must be set aside. I would accordingly set it aside and remand the cases for re-hearing and for decision as to what the amount of enhancement should be. The appellant is entitled to the costs of these appeals.

Das, J.—I agree.

K. S. D. *Cases remanded.*

(1) 6 Ind Cas. 217; 12 C. L J. 107 ; 14 C. W. N. 884.
(2) 35 Ind. Cas. 427; 1 P. L. J. 67; 3 P. L. W. 427.
(3) 3 Ind. Cas. 449 ; 37 C. 30 ; 13 C. W. N. 1149 (F. B.) ; 10 C. L. J. 343.
(4) 22 Ind. Cas. 604 ; 45 C. 930.
(5) 6 Ind. Cas. 942 ; 3 P. R. 1910.
(6) 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041
(7) 54 Ind. Cas. 672 ; 1 P. L. T. 27.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 246 OF 1921.

February 9, 1923.

Present :—Sir Norman MacLeod, Kt., Chief Justice, and Mr. Justice Crump.

SAKHARAM BALWANT PESHWE AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
LAXMAN TRIMBAK PURANDARE—AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Sanction granted for particular relief—Other reliefs claimed in suit—Procedure.

Where a suit, filed under section 92 of the Civil Procedure Code, includes reliefs for which sanction has been refused by the Collector, the whole suit is not liable to be dismissed, and that portion of the suit which is covered by the sanction of the Collector should be heard and decided on the merits.

Appeal against the decision of District Judge, Poona, in Suit No. 4 of 1921.

Messrs. *H. C. Coyajee* and *D.A. Tuljapurkar*, for the Appellants.

Mr. *G. S. Rao*, for the Respondents.

JUDGMENT.—The plaintiffs filed this suit praying for various reliefs with regard to an ancient temple of Shri Martand Dev

which had been managed by a Committee of five trustees since the year 1841. They asked the sanction of the Collector under section 92 of the Civil Procedure Code for the institution of the suit for the purpose of obtaining the five reliefs set out in the application. The Collector replied that sanction was only given to the institution of a suit for the specific purpose of settling a scheme. In spite of that order the plaint was filed on the 12th February 1921 asking, in addition to the prayer for a settlement of the scheme, for the other reliefs for which sanction had been refused by the Collector. That, no doubt, was very improper. It did not follow on that account that the plaintiffs' suit, so far as it was covered by the Collector's sanction, was not entitled to be heard on its merits. Therefore, the appeal must be allowed and the case must be remainded to the District Judge to be heard on the merits with regard to the plaintiffs' prayer that a scheme should be settled to secure the good management of the *Sansthan* in future.

Defendants are entitled to their costs in this Court. Costs of the lower Court to be costs in the cause.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 205 OF 1920.

May 9, 1923.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Lumsden.

BAHADUR CHAND—PLAINTIFF—APPELLANT

versus

MUHAMMAD ISMAIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (*I of* 1877), s. 22—*Specific performance—Agreement to sell by guardian on behalf of minor, whether can be enforced—Benefit of minor.*

No decree for specific performance of an agreement to sell immoveable property entered into on behalf of a minor by his guardian should be passed against the minor unless the Court is quite certain that the agreement was for the benefit of the minor and that it would be for his benefit that it should be enforced. [p. 207, col. 1.]

Chhitar Mal v. *Jagan Nath Prasad*, 29 A. 213; A.W. N. (1907) 25; 4 A. L. J. 24; *Jugal Keshori Chowdhrani* v. *Anunda Lal Chowdhuri*, 22 C. 545 at p. 549; 9 Ind. Dec. (N. S.) 863; *Flight* v. *Bolland*, (1828) 4 Russ 298; 28 R. R 101; 38 E. R. 817; *Puran Lal* v. *Venkatrao Gujar*, 45 Ind. Cas. 192; *Lal Gopal Datta Chowdhury* v. *Kharooriah Majozilla Zemindary Syndicate Ld.*, 18 Ind. Cas. 673; 16 C. W. N. 297, relied on.

Appeal from the decree of the Subordinate Judge, 1st Class, Lahore, dated the 21st November 1919, dismissing the plaintiff's suit.

Messrs. *Durga Das* and *J. L. Kapur*, for the Appellants.

Messrs. C. *Bevan-Petman* and *Muharram Ali Chishti*, for the Respondents.

Abdul Raoof, J.—This is a first appeal arising out of a suit for the specific performance of a contract of sale. The property in dispute is 138 *kanals* and 13 *marlas* of land including certain appurtenances. Defendants Nos. 1 to 3, Muhammad Ismail, Muhammad Ibrahim and Muhammad Rafiq, the minor sons of Allah Din, are the owners of this property. Defendant No. 4, *Sheikh* Budha, is the guardian of the minors. The plaintiff's case is that on the 17th of January 1918 defendant No. 4 as the guardian of the minors executed an agreement of sale in his favour agreeing to sell the property in dispute for Rs. 11,000; that on the same date the plaintiff paid him Rs. 100 as earnest-money for which a receipt was given in writing by *Sheikh* Budha. As the property belonged to to the minors, the guardian could not sell it without the sanction of the Court. Accordingly, on the same date, *i.e.*, the 17th of January 1918, a petition was presented to the Senior Subordinate Judge, Lahore, for permission to sell the property to the plaintiff. This application is translated and printed at pages 14 and 15 of the paper-book. The agreement to sell is translated and printed at page 12 of the paper-book. In paragraph 3, of this agreement the following condition is laid down :—

"If permission is not obtained from the Court, the agreement shall be cancelled and become null and void, and in that case I will return the earnest-money to the vendee."

Paragraph 4, of the said agreement contains the following clause :—

"The land measures 138 *kanals* and 13 *marlas*, inclusive of the village *shamilat*. If

subsequently at the time of partition according to the Revenue papers the land is found less, the vendee shall be competent to take back the earnest-money by cancelling the agreement of sale."

By paragraph 7, it was provided that—

"In case permission is obtained the deed of sale shall be completed on the 25th January 1918. During this period the vendee shall be bound to satisfy himself as to the quantity, deficiency or excess of the land sold with Reference to the Revenue papers."

On the application for permission order was made on the 21st of January 1918 granting permission to the guardian to effect the sale. A stamp-paper was purchased and on the 3rd of February 1918 a draft of the sale-deed was prepared. These important allegations are contained in paragraph 3 of the plaint which runs as follows, and it is necessary to state them here at the outset as a great deal of argument has been addressed to us on the facts contained therein :—

"On the 28th or 29th January 1918 defendant No. 4 purchased a stamp-paper worth Rs. 110 in order to execute a sale-deed. On the 3rd February 1918, defendant No. 4, with Sayad Hussan, petition-writer, came to the plaintiff and a draft sale-deed was prepared with the consent of the parties after their consultation. The said petition-writer and defendant No. 4, took away that draft and agreed to copy it out on the stamp-paper and to send for the plaintiff on the 6th February 1918, in case Shankar Shah would come, and to get the sale-deed registered."

Further facts stated in the plaint are, that defendant No. 4, did not send for the plaintiff on the 6th of February 1918 and when the plaintiff met him he said that he had made a bargain with defendant No. 5, and that he was going to sell the property to him. It appears that on the 6th February 1918 *Sheikh* Budha, defendant No. 4, presentad an application to the Senior Subordinate Judge, Lahore, stating that the plaintiff had committed a breach of the conditions of the contract of sale and had refused to purchase the land and that a bargain regarding its sale had been made with *Malik* Ghulam Dastgir and that the latter bargain was more beneficial to the minors than he one originally arranged with the plaintiff. A detail of the benefits arising under the second bargain was given in this petition and the Court made the following order upon it :—

"*Sheikh* Budha has already been granted sanction to sell land. He is at liberty to sell it to Ghulam Dastgir."

On the next day, *i.e.*, the 7th of February 1918, the sale in favour of defendant No. 5, was registered. Before the registration of the deed, the plaintiff served *Sheikh* Budha with a notice calling upon him to execute a sale-deed in his favour according to the agreement of the 17th of January 1918. *Sheikh* Budha replied to this notice, and this is translated and printed at page 23 of the paper-book. In his reply *Sheikh* Budha accused the plaintiff of having committed a breach of the contract himself and having cancelled the transaction. Later on, on the 12th of April 1918, the plaintiff gave a notice to the second purchaser *Malik* Ghulam Dastgir accusing him that he had colluded with *Sheikh* Budha and having deceived the Senior Subordinate Judge had purchased the land of the minors in spite of the fact that he knew that the said land had been sold to the plaintiff with the sanction of the Senior Subordinate Judge ; that everything had been completed and that the guardian was only to put his signature on the deed of sale when he (Ghulam Dastgir) had dissuaded him from doing so. The plaintiff also made an application to the Senior Subordinate Judge on the 14th of February 1918 which is translated and printed in the supplementary paper-book on page 1 marked as item A. In this application he gives all the facts relating to his bargain and the subsequent sale-deed executed in favour of defendant No. 5 and draws the attention of the Court to the fact that it had been deceived by *Sheikh* Budha and had granted permission for the second sale on the misrepresentation that the plaintiff had refused to purchase the land. On this application the Court made an order calling upon Ghulam Dastgir and *Sheikh* Budha to appear on the 16th of March 1918 to file their objections and produce the second sale-deed. Thereupon *Sheikh* Budha replied by an application, dated the 16th of March 1918, which is translated and printed in the supplementary paper-book on page 2 marked as item B. In this petition are to be

found all the circumstances which had induced *Sheikh* Budha to effect a sale-deed in favour of defendant No. 5. Ghulam Dastgir also put in objections in which he stated that he had purchased the land on the assurance given by *Sheikh* Budha that the plaintiff had refused to purchase and that he had only consented to enter into the bargain on the understanding that permission was granted by the Court and that, when the Court had actually granted permission, he had the sale completed in his favour. He totally denied that he had in any way combined with *Sheikh* Budha in deceiving the Court. The application for permission for sale in his favour was signed by him in good faith because he was anxious that the sale should be effected after due sanction by Court. He pleaded his *bona fides* and stated that he had entered into the bargain in good faith and without notice. The learned Senior Subordinate Judge made an order stating that, as Ghulam Dastgir did not consent to cancel his agreement with *Sheikh* Budha, the Court was unable to interfere. The plaintiff was directed to seek his redress in accordance with law.

The present suit was lodged on the 31st of July 1918 and a decree for the specific performance of the contract of sale was prayed for. The following note was appended at the end of the plaint :—

" Defendant No. 5 has got 18 *kanals* and 2 *marlas* of land, bearing *khasra* Nos. 614 and 615, included in the sale-deed by the other defendants on the ground that defendants Nos. 1 to 3 are owners thereof by abverse possession. But their possession is not shown in the papers, nor have they any concern with the said land. Hence that land has been excluded from the claim, nor does the plaintiff wish to get it entered in his sale-deed, it being not mentioned in the agreement."

Two separate written statements were filed in reply to the plaintiff's claim—one by *Sheikh* Budha, defendant, for himself and as guardian of Muhammad Ismail, Muhammad Ibrahim and Muhammad Ratiq, minors, and the other by Ghulam Dastgir, vendee, defendant No. 5. The Court framed nine issues in the case. The 7th issue was as follows:—

" 7. Is the sale in favour of Ghulam Dastgir more beneficial to the minors than the sale to the plaintiff, and what is its effect on the plaintiff's rights ?"

On this issue the opinion of the Court being against the plaintiff it dismissed the suit which has led to this first appeal.

In the arguments addressed to us the Counsel for the parties did not confine themselves to the various issues framed by the Court, but raised various other questions upon which the decision of the appeal to a large extent depends, and these may be summarised as below:—

(1) What is the contract of which the specific performance is sought by this suit? Is it the contract as contained in the agreement of sale, dated the 17th of January 1918, translated and printed at page 12 of the paper-book, or is it the contract contained in the draft sale-deed translated and printed at page 29 of the paper-book ?

(2) Whether the agreement of the 17th of January contained the terms of a completed contract which could be specifically performed ?

(3) Whether the terms and conditions given in the draft sale-deed were entered with the consent and knowledge of *Sheikh* Budha and whether the minor defendants could be forced to execute a sale-deed in accordance with those terms ?

(4) Whether the conditions and penalties entered in the draft sale-deed were onerous and the guardian was justified in refusing to execute the sale-deed in accordance with those conditions and in procuring a better bargain with more beneficial terms in favour of the minors ?

(5) Whether, as a matter of law, the performance of a contract could be ordered to be specifically performed against a minor without showing that it is to the benefit of the minors ?

A reference to the following documents clearly shows that the plaintiff sought the performance of the contract as contained in the draft sale-deed:—

(1) The notice sent by the plaintiff to *Sheikh* Budha, the guardian of the minor defendants, dated the 17th of February

1918 (Exhibit P. 6), printed at page 16 of the Paper Book ; and

(2) The replication filed by the plaintiff on the 24th of October 1918 to the *Jawab-i-dawas* filed by the defendants. It is translated and printed at page 46 of the paper-book.

In the notice at page 17 of the paper-book is to be found the following statement of the plaintiff's claim:—

" After the execution of the agreement you obtained permission for sale from the Senior Subordinate Judge, Lahore, and also purchased a stamp-paper for Rs. 120 for execution of the sale-deed. The draft sale-deed, which was prepared in consultation with both the parties, is lying with the petition-writer. The person giving this notice asked you to inform him after you had the sale-deed written *according to the draft*, so that the deed might be registered. . . . . Hence you are given one week's notice to the effect that you should execute the sale-deed and get it registered."

In the replication printed at page 46 the plaintiff in paragraph 4 makes the following allegation:—

"The petition-writer is not acquainted with me. His name might be Sayyad Ali Shah. He is a friend of defendant No. 4. The latter refused to get any document written by a petition-writer other than the said petition-writer, and got the draft prepared with his consultation. He brought him to my house for getting a draft sale-deed prepared and got the deed of sale reduced to writing on a stamp-paper in my absence."

In paragraph 5 it is stated that—

"It is wrong that I cancelled the draft sale-deed."

In paragraph 10 at the end the following statement is made :—

"A comparison of the sale-deed in my favour with that in favour of defendant No. 5 will show to the Court that the former contains no such conditions by which the defendant No. 4 or the minors were unlawfully burdened. Even if the condition as to responsibility of the minors be not entered, still they are, according to law, responsible to that extent."

From the above it is clear that the plaintiff by this suit wanted to enforce the contract entered in the draft sale-deed. This conclusion is further strengthened by the fact that the plaintiff in his supplementary cross-examination on the 25th of June 1919 made it quite clear that the agreement to sell was not a completed contract and stated as follows (*see* page 66 of the paper-book :—

"The agreement to sell is not meant to contain all the terms of the sale."

Again, in his further supplementary statement, dated the 16th of October 1919, printed at pages 69 and 70 of the paper-book, he stated that.—

'All the terms of the sale-deed are not entered in the agreement to sell. I considered all the terms entered in the draft of the sale-deed as necessary with the exeception of the last term to the effect that the person and the property of the guardian will be liable for any loss which I agreed to forego."

These admissions on the part of the plaintiff leave no doubt on the question that the specific performance of the contract contained in the draft sale-deed is sought to be enforced by the suit, and that the agreement to sell, dated the 17th of January 1917, did not contain a completed contract and could not, therefore, be specifically performed.

The question then arises whether there was any completed contract at all in existence of which the specific performance could be ordered. The plaintiff first tried to make out that the draft sale-deed had been prepared by a petition-writer on instructions given by Budha, and it was brought to him in the form in which it is now put forward. Afterwards, he tried to make out that the draft was prepared at his place with the consent of the parties after their consultation on the 3rd of February 1918 (*see* paragraph 3 of the plaint). The defendants all along denied both these allegations and asserted that the draft had been prepared by the plaintiff himself, and that the moment *Sheikh* Budha, defendant, had come to know of the terms and conditions contained therein he had refused to accept them. The plaintiff apparently insisted upon the terms. He gave evidence to prove that the draft had been prepared in consultation with Budha, who had given his consent to all the terms.

In his application, dated the 14th of February 1918, translated and printed in the supplementary paper-book at page 1 marked as item (A) the plaintiff made the following clear allegation:—

"On Sunday, the 3rd February 1918, *Sheikh* Budha, guardian, brought to the applicant a petition-writer and showed to him a draft of the sale-deed prepared by the said petition-writer. The applicant accepted it and told the guardian to execute and complete the sale-deed. They promised to do so."

It is to be regretted that in his anxiety to show that there was a fair dealing on his part the plaintiff was led to make this untrue statement. This is made apparently clear by his subsequent statements made as a witness in this case. At page 69 of the paper-book the following statement is to be found:—

"Budha, Imam Din and Joti Parshad were sent on the occasion when the terms were settled. Budha, did not bring any draft of sale-deed prepared by himself to me, nor any draft prepared on his behalf. No other draft, with the exception of that prepared by me, was prepared. The statement written in my application, dated the 14th February 1918, to the effect that the draft prepared by the petition-writer brought by Budha is not correct. Similarly, it is not correct that I directed him to prepare a fair copy of that draft and they promised to do so. . . . . when I drafted this application I was under the impression that the petition-writer had prepared a draft himself. But subsequently when that draft was filed in this Court and I inspected it I came to know that that draft was the one prepared not by the petition-writer, but myself."

The plaintiff was further compelled to admit that *Sheikh* Budha was illiterate and the draft prepared was not even read to him. His witness, Kala Ram (P. W. 3), stated that Budha went away after taking the draft. The plaintiff did not read it to Budha. On a question being put to him in cross-examination whether *Sheikh* Budha said on receipt of the draft that he would get it read and then reply whether he accepted the draft, the witness said: "He said that he would get it read." It is made clear from the evidence that *Sheikh* Budha was not satisfied with the terms contained in the draft and refused to execute a sale-deed in accordance with those terms. Kesho Das (P. W. 4), speaking as to what took place on the occasion when *Sheikh* Budha came back with the draft after knowing its terms and raised his objections, has stated as follows:—

"I came to Lahore in February 1918. It was a Sunday. It was first Sunday of February. I went to see the plaintiff on (*sic*) at his residence. Two or three men came there. I am not sure whether they were there before me or came after me. They had a draft with them which I did not read, nor was it read out in my presence. I asked the plaintiff what it was. He told me in their presence that he had agreed to buy some land and these men wanted some amendment in the draft of the sale-deed. The amendment related to the liability of the guardian. The plaintiff agreed to the amendment so that the guardian might not remain personally liable. The draft remained in their hands. I then went away. They were still there."

In the light of the above facts the conclusion is irresistible that the draft was prepared by the plaintiff without the knowledge or consent of *Sheikh* Budha as to its terms, and further that after knowing its contents *Sheikh* Budha had at once raised objections. It follows that there was no completed contract between the parties, of which specific performance could legally be claimed by the plaintiff. Even if it be taken for granted for a moment that there was a completed contract, the terms of which were reduced to writing in the draft, the question which arises for consideration is whether the terms are such which a Court of Equity would be justified in enforcing against the minor defendants.

In the agreement, dated the 17th of January 1918, a clause was entered to the effect that—

"If subsequently at the time of partition or according to the Revenue papers the land is found less, the vendee shall be competent to take back the earnest-money by cancelling the agreement of sale."

This clause was amplified and a more onerous condition was entered in the draft sale-deed to the following effect:—

"We also agree that if any defect in respect of the land sold is found, or if any deficiency occurs in the land sold at the time of

partition of village *shamilat*, the vendee will be entitled to recover the amount of damanges for the loss sustained by him, from our persons and property, and also from the person and property of our guardian."

This, as already made clear, was done behind the back of *Sheikh* Budha, the guardian of the owners of the property, and without any authority. *Sheikh* Budha had no legal authority to make the minors personally liable and he of course objected to his property and person being made liable. No one could say what would happen at the partition and the covenant making the minors liable to pay damages in consequence of any loss might place the minors entirely in the hands of the vendee and lead to serious unforeseen consequences. It is true that the plaintiff has now offered to forego the stipulation, but at the time he insisted upon the insertion of this clause and by his plaint he asked for the specific performance of the entire contract contained in the draft sale-deed. It is too late for him to withdraw from the position taken up by him and his case must be decided upon the plaint as it stands. By another condition entered in the draft sale-deed the plaintiff tried to withhold the payment of a portion of the consideration (Rs. 300) till mutation of the names. This was also a departure from what was agreed upon under the agreement of sale.

The next question to be decided is whether the bargain in favour of the plaintiff is beneficial to the minors.

As already stated, the decision of the Trial Court on this point is in the negative and against the plaintiff. We entirely agree in the decision of the learned Subordinate Judge on issue No. 7. A comparison of the terms contained in the draft deed with those in the sale-deed in favour of *Malik* Ghulam Dastgir leaves no doubt on the point that the sale-deed in favour of *Malik* Ghulam Dastgir is decidedly more benefical to the minors. Leaving aside the stringent conditions entered in the draft sale-deed, the following benefits have accrued to the minors under this latter sale-deed :—

(1) They have saved Rs. 110, the price of the stamp ;

(2) Rs. 110 on account of the commission of the broker ;

(3) Expenses of registration and execution, and

(4) Interest for one month payble to Shankar Shab, the previous mortgagee, which Ghulam Dastgir has undertaken to pay.

In the case of *Chhitar Mal* v. *Jagan Nath Prasad* (1), a similar question arose for decision under almost similar circumstances and the Court held that the contract sought to be specifically enforced against a minor not being shown to his benefit could not be ordered to be so enforced. The facts of the case and the decision thereon are fully brought out in the head-note appended to the report which runs as follows :—

"The certificated guardian of a minor, finding that it was necessary that some of the minor's property should be sold applied for permission to the District Judge, who sanctioned the sale for a price of Rs. 725. Subsequently, the guardian discovered that this was an inadequate price, and having received an offer of Rs. 825 for the property, went again to the District Judge for sanction to the second contract, obtained sanction and sold the property for Rs. 825. *Held* that the former contract being to the detriment of the minor could not be specifically enforced."

The facts of the present case are even stronger. Not only do the minors in this case save more than Rs. 250, but they also escape from very stringent conditions entered in the draft sale-deed.

In the case of *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowdhuri* (2) it was not shown that the contract sought to be specifically performed was to the benefit of a minor and the Court held that the decree for the specific performance of a contract should not be made against him during his infancy. The learned Judges of the Calcutta High Court made the following observation at page 549 of the report :—

"We know of no case in which a decree for specific performance has been made against an infant. *In Flight* v. *Bolland* (3), it was held that an infant could not maintain a suit for specific performance of a contract, the remedy

(1) 29 A. 213 ; A. W. N. (1907) 25 ; 4 A. L. J. 24.
(2) 22 C. 545 at p. 549; 9 Ind Dec. (N. S) 363
(3) (1828) 4 Russ. 298; 28 R. R. 101; 38 E. R. 817.

not being mutual, and it being a general principle of Courts of Equity to interfere only where the remedy is mutual.

Then they took into consideration the circumstance that the contract in that case was not made by the infant, but by the guardian on the infant's behalf and held that as it would be open to the minor to question the act of the guardian on attaining majority specific performance against him should not be decreed. They made the following significant observation :—

"In our opinion, if it is open to the infant on attaining majority to question the transaction, a decree for specific performance cannot, or at all events should not, be made against him while an infant."

They added—

"More than this. The jurisdiction to decree specific performance is discretionary, although the discretion must be judicially exercised. No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant, unless the contract was shown to be for the infant's benefit. It is not the case of any one that this contract should be enforced for the infant's benefit. The plaintiff's wish to enforce it against the infant for their own benefit, and the guardian says it is against the interest of the infant."

Every word of the passage applies to the facts of the present case and with greater force. Here a sale-deed has already been executed in favour of *Malik* Ghulam Dastagir on better terms and the object of the present suit is to have this sale set at naught and to get another sale-deed executed in favour of the plaintiff on terms and conditions detrimental to the minors.

In the case of *Puran Lal* v. *Venkatrao Gujar* (4), it is laid down that—

"No decree for specific performance of an agreement for transfer made by his guardian should be passed against a minor unless the Court is quite certain that the agreement was for the benefit of the minor, and that it would be for his benefit that it should be enforced."

Malik Ghulam Dastagir, the vendee, has pleaded that he is a purchaser for consideration in good faith without notice that there was any existing agreement to sell in favour of the plaintiff. *Sheikh* Budha represented to him that the agreement with the plaintiff had come to an end, and that he was free to sell the land to him. He believed in this statement and took the precaution of having the proposed sale in his favour sanctioned by the Court and it was then only that he got the sale-deed executed in his favor. *Sheikh* Budha has supported his statement and there is no evidence to the contrary showing that he had participated in a scheme to defeat the right of the plaintiff under the agreement. We see no reason to disbelieve the statement of *Malik* Ghulam Dastagir and hold that he has purchased the land in good faith.

Mr. Durga Das, the learned Vakil for the appellant, relied on the case of *Lal Gopal Datta Chowdhury* v. *The Kharooriah Majozilla Zemindary Syndicate, Limited* (5), and contended that even if the sale in favour of *Malik* Ghulam Dastagir was more beneficial to the minors it was not open to the guardian to resile from the agreement to sell in favour of the plaintiff. He relied particularly upon the following passage in the judgment to be found at page 677, right hand column :—

"We do not think the case *Chhitar Mal* v. *Jagan Nath Prasad* (1) is an authority for holding that when a valid agreement has been lawfully entered into on behalf of a minor and is to the minor's benefit it cannot be repudiated if the guardian subsequently finds he can obtain more."

The learned *Vakil* has lost sight of the fact that this observation in the judgment was a mere *obiter dictum* as the following sentence clearly shows :—

"In any event, this question does not arise in the present case, for the terms offered by Lal Gopal have not been shown to be appreciably better than those conceded by the plaintiff Company, and but for the prior contract with that Company would never have been offered at all."

Moreover, it has not been shown in this case that the agreement is to the benefit of the minors. On the contrary, it has been shown to be to their detriment. This ruling, therefore, cannot help the plaintiff.

(4) 45 Ind. Cas. 192.

(5) 13 Ind. Cas. 673 ; 16 C. W. N. 297

For the reasons given in the judgment of the Court below, and for the additional reasons set forth in our judgment, we think that the Court below was right in refusing to decree specific performance of the contract in this case.

The plaintiff, however, is entitled to a refund of Rs. 100 paid by him as earnest-money. We, therefore, grant a decree for Rs. 100 in his favour. The decree of the Court below will be accordingly modified. In other respects the appeal fails and is dismissed. As the appeal has substantially failed, the appellant must pay the costs of the respondents.

Z. K. *Appeal dismissed in substance.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 505 OF 1922.

March 9, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

NILAWA IRAYA MATHAPATI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
REVANSHIDAYA SHIDLINGYA—PLAINTIFF—RESPONDENT.

Maintenance, suit for—Quantum *of maintenance, determination of*—*Decree*—*Relief*—*Practice.*

Once a right to maintenance has been established, the *quantum* of maintenance should be ascertained in the suit itself, even though the parties may not in the first instance have provided the Court with materials, and the parties entitled to maintenance, who are generally females, should not be left to separate proceedings for the purpose of ascertaining the *quantum* of maintenance.

Appeal against the decision of the District Judge, Bijapur, in appeal No. 52 of 1920.

Mr. *A. G. Desai*, for the Appellants.

Mr. *H. B. Gumaste*, for the Respondent.

JUDGMENT.—The District Judge was wrong in not remanding the case to the Trial Court to ascertain what maintenance should be payable to defendant Nos. 1 and 11. We have repeatedly laid down the general principle that, in all cases of this class, where a right to maintenance has been allowed the *quantum* of maintenance should be decided in the suit itself, even though the parties may not have, in the first instance, provided the Court with the materials. Once that right is decided, it is eminently desirable that the *quantum* should be ascertained in the suit itself, and that the parties entitled to maintenance who are generally females should not be left to separate proceedings. The appeal will be allowed to that extent.

There will be no order as to costs.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2440 OF 1917.

May 31, 1923.

Present :—Mr. Justice Harrison and Mr. Justice Zafar Ali

THE PUNJAB COTTON PRESS CO.—PLAINTIFF—APPELLANT
versus
THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Northern India Canal and Drainage Act (VII of 1873) ss. 6, 15, 58, scope of—*Limitation Act (IX of 1908) Sch. 1, Art. 2, Applicability of*—*Damage caused by action of Canal Officers*—*Suit to recover damages*—*Limitation.*

The words "may execute all works, etc." in section 15 of the Northern India Canal and Drainage Act are independent of the preceding words of the section. [p. 210, col. 1.]

The expresson "in this behalf" of section 6 of the Northern India Canal and Drainage Act, appplies to the application or use of the said water, and the word "use," coupled with the preceding words, covers all actions necessary both for construction and maintenance and whether taken at the time of construction or later. [p 210, col. 2.]

Section 58 of the Northern India Canal and Drainage Act contemplates permanent work, for the carrying out of which the Local Government has previously authorised some of its officers, and any

PUNJAB COTTON PRESS CO. *v.* SECRETARY OF STATE

acts committed by them after that definite authorisation are covered by the section. [p. 210, col. 2.]

All that is necessary in order to bring a suit within the purview of Article 2 of Schedule I to the Limitation Act, is that a public officer should have done what he did with the honest intention of acting as the Statute authorised.

Owing to the inefficient manner in which certain flood water which had collected along the bank of a Canal was dealt withby the Canal Officers, by means of cutting the channel of the Canal in various places to allow the water to escape, the flood water was diverted from its natural course and eventually reached the property of the plaintiff and injured it. Plaintiff sued the Secretary of State for damages:

Held, that the action of the Canal Officers was covered by sections 6 and 15 of the Northern India Canal and Drainage Act, and the suit was, therefore, governed by Article 2 of Schedule I to the Limitation Act.

Appeal from the decree the senior sub-Judge, Lahore, dated the 21st May 1917, dismissing the plaintiff's suit.

Messrs. *Tek Chand*, *B. R. Puri* and *Umar Bakhsh*, for the Appellant.

Mr. *Jai Lal*, Government Advocate, for the Respondent.

JUDGMENT.—Three suits against the Secretary of State claiming damages on account of the action taken by the Canal Department, which is said to have caused the high floods in the river Ravi in the years 1914 and 1917 to injure the property of the plaintiff, have been dismissed. The three appeals being Nos. 2440 of 1917 and 1305 and 1306 of 1921 have been argued together by the same Counsel, as the preliminary point involved is almost identical in all the three. The facts, however, are not the same, and we think it better to take the two appeals of 1921 together and the earlier appeal, 2440 of 1917, separately. These two suits have both been dismissed as barred by Article 2 of the Limitation Act, and that with which we are now dealing, 2440 of 1917, has been dismissed on the merits and also on the finding that it is barred by limitation under section 9 of Act VIII of 1873. The learned Government Advocate contends that this suit also is barred by Article 2, and the first question to be decided is whether this contention is correct.

Before the year 1914 the Raya Branch Tail Distributary of the Upper Chenab Canal was constructed both for irrigation purposes and to prevent the water which remained in the natural bed from causing unnecessary damage. The bank of this Distributary nearest the river was made specially strong with a view to the latter purpose. In 1914, the first year of the working of this channel, a large amount of water collected at more than one point and the Canal Officer cut the channel in various places to allow this surplus water to escape on to the lower lands on the west of the Distributary. In spite of this action, or, as plaintiff says, because it was not efficiently and thoroughly carried out, the flood water was held up and diverted from its natural course and eventually reached the property of the plaintiff, and injured it. The position, therefore, as put by Counsel, is that the damage was caused both by the unscientific construction of the channel and the injudicious action taken in dealing with the flood. It is admitted by both sides that whatever be the Article of the Limitation Act which governs the suit, the cause of action accrued on the 23rd and 30th of July 1914. If, therefore, Article 2 applies, the suit which was instituted on the 18th of August 1915, is hopelessly barred for it is fully established that the *terminus a quo* in calculating limitation is the date of the damage and not the date of the construction of the work which caused the damage. The Government Advocate points out that the action taken, whether wise, or unwise, was so taken under sections 6 and 15 and possibly under section 58 also of Act VIII of 1873. Section 15 runs as follows:—

"In case of any accident happening or being apprehended to a canal, any Divisional Canal Officer or any person acting under his general or special orders in this behalf may enter upon any lands adjacent to such canal and may execute all works which may be necessary for the purpose of repairing or preventing such accident."

Bakshi Tek Chand for the appellants contends that the words: "may execute all works which may be necessary for the purpose of repairing or preventing such accident."

are ancillary to and dependent on the preceding words: "may enter upon any land adjacent to such canal."

He states that it is not shown that the Canal Officer first entered upon any land adjacent to the canal and, therefore, any work executed by him is not covered by the section, and further that the cutting of the banks cannot be held to have been a work necessary for the purpose of repairing or preventing such accident. We are of opinion that the words "may execute all works, etc.," are independent of the preceding words and, anyhow, it is impossible to execute any work, on a canal without entering upon the land adjacent and thereby reaching it.

So far as the actual cutting of the banks is concerned, *Bakhshi* Tek Chand points out that it did not prevent the accident and he urges that he is prepared to show on the merits that it did not repair it, inasmuch as he contends that it aggravated instead of alleviating the damage caused. We do not think there is any force in this contention, for the word "repairing" covers any attempt to minimize the natural consequences of the accident and the cutting of the banks could only have been undertaken with a view to preventing further damage. Whether it achieved that purpose or not is quite immaterial, for all that is necessary in order to bring a suit within the purview of Article 2 is that a public officer should have done what he did with the honest intention of acting as the Statute authorized. We are, therefore, of opinion that the action taken in dealing with the flood is covered by section 15 and the suit is, therefore, barred.

As far as section 6 is concerned, it is contended that the place at which this section is to be found, coupled with the use of the words "in this behalf" in line 2, show that the section only applies to action taken at the time of construcion. The place of the section between sections 5 and 7 lends some support to this contention as also does the repetition in section 15 of the authorization of Canal Officers to take action on running canals. We are, however, of opinion that the place at which the section is to be found and heading of the Chapter (of the application of water for public purposes) are not sufficient reasons for placing an interpretation on the plain words of the section which is not justified by those words themselves, and, whether section 15 be wholly tautologous or not, the expression "in this behalf" applies to the application or use of the said water and the word "use" coupled with the preceding words covers all actions necessary both for construction and maintenance and whether taken at the time of construction or later.

So far as section 58 is concerned, we are of opinion that it does not apply to the present case. It contemplates permanent work, for the carrying out of which the Local Government has previously authorized some of its officers, and any acts committed by them after that definite authorization are covered by the section. Here there is no question of any permanent work but of the immediate action required to deal with a sudden emerency in the shape of an unexpected flood. We find that the suit is governed by Article 2 and we, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

PRIVY COUNCIL APPLIACTION NO. 915 OF 1919.

July 10, 1922.

Present :—Mr. Justice Shah and Mr. Justice Crump.

SHRINIWAS LAXMIPATIRAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

HANMANT SHRINIWAS DESHPANDE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 109 (a)—Letters Patent (Bom.) cl. 39—Order remanding case for fresh decision, whether final order—Leave to appeal to Privy Council, whether can be granted.

An order passed by the High Court on a Civil Extraordinary application by which the decree of the Trial Court is set aside and the case is sent back to that Court for passing a fresh decree cannot be said to be a "final order" within the meaning of

section 109 (*a*) of the Civil Procedure Code or, a "final judgment" within the meaning of clause 39 of the Letters Patent (Bombay) as it does not finally dispose of the rights of the parties, and leave cannot, therefore, be granted to appeal to His Majesty in Council against such order.

Application against the decision of the Court in F. A. No. 41 of 1917.

K. H. Kelker, for the Applicant.

JUDGMENT.—It is unfortunate that the hearing of this Rule has been delayed so long as the notice could not be served. The order of this Court was passed on the 12th August 1919 on Appeal No. 41 of 1917 and Civil Extraordinary Application No. 333 of 1917. The circumstances under which the decree of the Trial Court was set aside and the case sent back to the Trial Court for passing a fresh decree are stated in the judgment of this Court. Apart from the difficulty in the way of the applicants in getting a certificate under section 110, arising out of the terms of section 109 (*a*), we do not think that, under the special circumstances of this case, it would be right to grant the certificate applied for. But the difficulty which we have referred to seems to be insuperable. The order of this Court cannot be said to be a final order passed on appeal. The substantial portion of the order which the applicants complain of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application which we have already mentioned. Further, it cannot be said that this is a final order ' within the meaning of S. 109 (*a*) or that it is a final judgment within the meaning of section 39 of the Letters Patent, as it does not finally dispose of the rights of the parties. The matter has been delayed beyond all reasonable limits already ; and the suit of 1911 is still practically at the stage where it was when it was filed. In view of these facts and of the nature of the order, we discharge this Rule. While doing so, we express a hope that the parties and the Court will see to it that the suit is heard and finished without any further appreciable delay.

Z. K. *Rule discharged.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 496 OF 1922.

July 28, 1922.

Present :—Mr. Justice Campbell.

PREM DAS—DEFENDANT—APPELLANT
versus
SARBALAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Collaterals, right of, nature of—Suit by one collateral for whole estate, whether maintainable—Limitation—Burden of proof—Register of Births, entry in value of—Appeal, second—Finding of fact based on wrong principles, whether binding.

The right of the collaterals of a deceased person to succeed to his estate under the customary law is not a single indivisible right, so as to give each collateral a right of action for the whole estate ; each collateral is entitled to sue only for his own share of the estate.

Semble :—Where in arriving at a finding of fact the lower Appellate Court has infringed rules and maxims laid down by the High Court and has decided the question on wrong principles as to the *quantum* of proof, the finding of fact may be challenged in second appeal.

A plaintiff must prove affirmatively and clearly that his suit is within time.

Charanjit Singh v. *Beshan Singh*, 23 I. C. 462 ; 167 P. L. R. 1914; 78 P. W. R. 1914, relied on.

A mere entry in a Birth Register that a son was born to a man of the name of the plaintiff's father does not necessarily prove that the entry relates to the plaintiff.

Husaina v. *Sahib Nur*, 7 Ind. Cas. 505; 86 P. W. R. 1910 ; 113 P. L. R. 1910, relied on.

Appeal from the order of the District Judge, Attock, at Campbellpur, dated the 1st February 1922.

Mr. *M. S. Bhagat*, for the Appellant.

Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—The suit from which this second appeal has resulted was by Sarbaland and Zakri, sons of Samundar, for possession, against the alienees of certain land sold by Samundar (now deceased) in 1906. Mutation of the sale, as a copy on the record shows, was effected on the 15th June, 1906.

PREM DAS *v.* SARBALAND

The suit was filed on 10th January 1921.

Sarbaland is admittedly 32 years of age. The question of Zakri's age was in dispute. The first Court held that Zakri had failed to prove that the suit was brought within three years of his attaining majority, and dismissed the whole suit as barred by limitation. Appeal was made to the District Judge contesting the finding regarding Zakri's age. The learned District Judge held that Zakri was born on the 27th June 1900. He accepted the appeal, set aside the dismissal of the suit by the lower Court and remanded it for decision on the merits.

On second appeal the first contention is that, so far as Sarbaland is concerned, the order setting aside the order of dismissal is illegal. Paragraph 25 of Rattigan's Digest of Customary Law is quoted where it is stated that the right of collaterals to succeed is not a single indivisible right, so as to give each collateral a right of action for the whole estate, and that each collateral is entitled only to his own share. Certain rulings in support of this contention have been cited, and as Counsel for the respondents admits that the suit must stand dismissed so far as Sarbaland is concerned, nothing more need be said.

The second point taken is that the learned District Judge decided the question of Zarki's age on materials which justify interference with his finding on second appeal. Counsel for the appellant has quoted *Nidhan* v. *Buta* (1) where, in dealing with a question of necessity for an alienation, it was ruled that that question may be one of fact or of law, and that when the point raised is whether the Court below has infringed rules and maxims laid down by this Court and has decided on wrong principles as to the *quantum* of proof of necessity required, then the question is one of law.

It is argued that the learned District Judge has decided that Zakri was born on the 27th June 1900 solely on the strength of a copy of a birth entry showing that a son was born to one Samundar, Zamindar, *Mussalman*, on that date. Two rulings are quoted *Husaina* v. *Sahib Nur*, (2) and *Charanjit Singh* v. *Bishen Singh* (3), wherein it was pointed out that a plaintiff must prove affirmatively and clearly that his suit is within time, and in favour of which it was further held that a mere entry that a son was born to a man of the name of the plaintiff's father does not necessarily prove that the entry relates to the plaintiff. It is urged, therefore, that maxims laid down by this Court regarding the *quantum* of proof required in regard to age have been infringed and that by analogy *Nidwan* v. *Buta* (1) enables this Court to set aside the finding on second appeal.

There is, however, something more than this Brith Register entry. Several witnesses cited for the plaintiffs, all more or less related to them, have stated Zakri's age to be 19, 20 or 21 years. Gulab Khan has given it as 20, Raushan Din as 19 or 20, Samundar as 21 and Fazal Katar as 21. It is true that Gulab Khan, when challenged, said that he could specify neither the year nor the month of Zakri's birth, but it appears to me to have been perfectly legitimate for the learned District Judge to accept these statements as proof that the entry of the 27th June 1900 referred to Zakri, and not to the birth of the son of some other Samundar of whom there are at least two in the same village. The learned District Judge refers specifically to this evidence as supporting the plaintiffs. He has also stated in his judgment that it seems to him clear *on the evidence* that Zakri was the boy to whom the entry dated the 27th June 1900 relates.

I, therefore, hold that the finding that Zakri was born on the 27th June 1900 is based upon admissible and direct evidence and is not one which can be interfered with in second appeal. The result is that the appeal succeeds so far only that the order of the District Judge setting aside the dismissal of Sarbaland's suit is reversed. Parties will bear their own costs in this Court.

Z. K. *Appeal allowed.*

(1) 86 Ind. Cas. 700; 107 P. R. 1916; 191 P. W. R. 1916.

(2) 7 Ind. Cas. 505; 86 P. W. R. 1910; 213 P. L. R. 1910.

(3) 23 Ind. Cas. 462; 167 P. L. R. 1914; 78 P. W. R. 1914.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 25 OF 1923.

December 20, 1923.

Present :—Sir Grimwood Mears, Kt., Chief Justice and Mr. Justice, Piggott.

B. BISHAMBHAR NATH—
PLAINTIFF—APPLICANT
versus
MUHAMMAD ABAIDULLAH AND OTHERS
—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (*Act V of* 1908), *s.* 110—*Application for leave to appeal to Privy Council—Construction of document—Substantial question of law of general interest.*

The question in dispute was whether on the terms of a document executed by the plaintiff transferring certain property to the predecessor-in-interest of the defendant, the transaction that was entered into was an out and out sale with liberty to re-acquire the property or whether it was a mortgage. The High Court confirmed the decision of the lower Appellate Court that the real transaction between the parties was an out and out sale coupled with a bargain for re-conveyance. The plaintiff then applied for leave to appeal to His Majesty in Council:

Held, that as no substantial question of law of general interest was involved leave for appeal could not be given.

Jhanda Singh v. *Wahid-ud-din*, 14 Ind. Cas. 269, distinguished.

Application for leave to appeal to His Majesty in Council.

Mr. *N. Pasthana*, for the Applicant.

Sir *Tej Bahadur Sapru*, for the Opposite Parties.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council in a second appeal*. It appears that on the 25th of June 1886 Durga Prasad and others executed a document by which they transferred certain property to Qudratullah Khan. The question that has arisen is whether on the terms of the document the transaction that was entered into was an out and out sale with liberty to re-acquire the property on a given date, or whether it was a mortgage. For the purposes of this application we are treating the subject-matter of the suit as being of the value of Rs. 10,000 and upwards and the subject-matter of the appeal as being of the value of Rs. 10,000 and upwards: but it is to be noticed that Sir Tej Bahadur Sapru, who appears for the respondents, is not able to accept the figures contained in the affidavit which has been put before the Court to-day by the applicants; and we express, and need express on this occasion no opinion as to the real value either of the suit or of the appeal. The High Court in second appeal affirmed the decision of the lower Appellate Court, who had reversed the Munsif. The Munsif decreed the suit believing that the Rs. 3,600, which was the consideration for the deed, together with a small amount of interest, namely, Rs. 196, should be the proper amount on payment of which redemption should be decreed. The lower Appellate Court on its construction of the document said that the document was not in any sense a mortgage, that redemption could not be had on the terms as decreed by the Munsif, but that the real transaction between the parties was an out and out sale coupled with a bargain or re-conveyance, on the performance of certain conditions.

In second appeal the matter was carefully gone into by two learned Judges of this High Court, and they, on a review of the authorities, and specially of *Bhagwan Sahai* v. *Bhagwan Din* (1) and *Jhanda Singh* v. *Wahid-ud-din* (2), confirmed the decision of the lower Appellate Court. In those two cases their Lordships of the Privy Council gave to the Courts in this country clear guidance as to the interpretation of documents of this character, some of which are from time to time decreed to be out and out sales, and others decreed to be mortgages. Sir Tej Bahadur Sapru has argued that there is no substantial question of law, because the broad general principles have already been subjected to such discussion and analysis that there is no difficulty in ascertaining what are the principles. The difficulty arises in their application, and he contended that difficulty of application is not a matter which can come

* Reported in 77 Ind. Cas. 572.

(1) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 P. C.

(2) 36 Ind. Cas. 38 38-A. 570; 31 M. L. J. 750; 21 C. W. N. 66; 20 M. L. J. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L.T. 131; 43 I. A. 284 (P. C.).

under the words "substantial question of law."

We have invited Mr. Narain Prasad to explain to us how and in what manner he would himself draft any document which he desired to be conclusively regarded as an out and out sale, and to take away from the document under consideration, or to add to the document under consideration, any terms which would make it more clear on the assumption of its being an out and out sale. We did this with a view to getting from him something from which it could be argued that from the very terms of the document a substantial question of law arose. He felt himself unable to make any detailed criticism of the document from the stand-point of its not being an out and out sale. We are of opinion that, having regard to the state of the authorities and again we specially refer to *Bhagwan Sahai* v. *Bhagwan Din* (1) and *Jhanda Singh* v. *Wahid-ud-din* (2), this case cannot be said to be one involving a substantial question of law; and, in accordance with the practice of the Privy Council, where special leave is asked, to that we should add a substantial question of law of general interest. This case certainly possesses no general interest. Its right decision depends on the proper construction of the particular words and clauses to be found in a particular document. Mr. Narain Prasad had relied upon a case which is reported in *Jhandu Singh* v. *Wahid-ud-din* (3) and it is interesting to refer to that because it happens to be the case which ultimately went to the Privy Council and now figures in *Jhanda Singh* v. *Wahid ud-din* (2) The application before this Court was of exactly the nature which Mr. Narain Prasad has made to-day. It so happened that when the appeal came before two Judges of this Bench there was a difference of opinion as to what should be said to be the construction of the documents. One of the learned Judges was in favour of decreeing the suit on the basis of the documents amounting to a sale, the other believed the documents to be a mortgage. Thereupon a third Judge was brought in and the Full Bench decided that 'the deeds in question evidenced an out and out sale. Now, the very facts of the division of opinion and the necessity to constitute a Full Bench, point to the substantiality of the question involved. There was a further reason why leave to appeal to His Majesty in Council was granted, namely, that at this very time in 1912, a very large number of cases of this character were believed to be on their way to this Court owing to certain legislation that had recently been enacted. This Court, welcoming a decision on the point, thought it proper to issue a certificate. The decision now appears, as we have said, in *Jhanda Singh* v. *Wahid-ud-din*, (2) and is the case to which we have referred. We are of opinion that Mr. Narain Prasad has failed to make out in this particular case that there is a substantial question of law of general interest involved. The application is, therefore, rejected with costs and fees on the higher scale.

S. D. *Application rejected.*

(3) 14 Ind. Cas. 269.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 172 OF 1922.

December 14, 1922.

Present:—Mr. Daniels, A. J. C.

GULAB RAI—PLAINTIFF—APPELLANT

versus

Mussammat KHUDAIJA BIBI, AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882)*ss. 6 (c)—*Decree for dower, sale of—Time of the essence of the contract—Vendee, failure of, to fulfil conditions—Re-sale by vendor—Second vendee, rights of.*

There is nothing in law to prevent a man transferring property of which he claims the ownership merely by reason of the fact that his title to it may be in dispute.

M held a decree for dower debt due to his sister and transferred the decree together with certain property to one *K* stipulating that if *K* did not take out execution of the decree within one year or if he did not within three days institute a suit in respect of the other property the sale should be cancelled. *K* instituted the suit but did not sue at execution of

the decree. Subsequently, *M* resold the decree to *G* who attempted to take out execution but did not succeed. Therefore, he filed the present suit for a declaration that the sale-deed in favour of *K* had become void:

Held (1) that time was of the essence of the contract of sale in favour of K;

(2) that what was sold to *G* was not a mere right to sue but property in the decree, and plaintiff was entitled to succeed.

Appeal against the decree of the District Judge, Rae Bareli, dated the 23rd February 1922, upholding the decree of the Subordinate Judge, dated the 18th July 1921.

Messrs. *Zahur Ahmad*, *Ali Muhammad* and *Syed Kalbi Abbas*, for the Appellants.

Mr. *Haider Hussain*, for the Respondents.

Judgment.—This appeal arises out of a suit brought by the appellant Gulab Rai for a declaration that a sale-deed, dated 19th March 1918, in favour of one Muhammad Ismail Khan has become void for non-fulfilment of a condition contained in it, that the plaintiff alone is competent to take execution-proceedings in respect of the decree for dower-debt which was sold by that instrument. The facts of the case are these:

Mian Jan, as representative of his sister *Musammat* Bandi Jan, held a decree for dower-debt due to the latter. By the deed referred to above he transferred that decree together with certain other property to Muhammad Ismail Khan. The other property had been transferred by *Musammat* Bandi Jan in her life time by a deed of gift to some other party and in order to recover it, it was necessary to get the deed of gift set aside. The date of the gift, as appears from Exhibit A-1 on the record, was 22nd March 1915 so that under Artice 91 of the Limitation Act the period of limitation for a suit to set it aside would expire in three days. The decree mentioned in the sale-deed was dated 8th August 1917. The sale-deed contained a condition that if Muhammad Ismail Khan did not take out execution of the decree within one year or if he did not within three days institute a suit in respect of the other property the sale-deed should be cancelled (*fiskh*) and be of no effect. The vendee fulfilled the condition regarding the institution of a suit, for he instituted a suit on the very date of the sale-deed to recover the gifted property. That suit was ultimately dismissed. He did not fulfil the condition regarding execution of the decree, for no application for execution was put in till 6th August 1920. At this time Muhammad Ismail Khan had died, and the application was made by his widow *Musammat* Khudaija Bibi, but it is admitted that he lived for more than one year after the date of the sale-deed in his favour. No application for execution having been put in within a year, Mian Jan on 7th May 1919 executed a fresh sale-deed of the decree for dower-debt in favour of the appellant Gulab Rai. On the strength of this sale-deed Gulab Rai attempted to take out execution of the decree. His application was resisted on various grounds and the litigation eventually came up to this Court. His application was dismissed on the ground that Muhammad Ismail Khan was not a party to the proceedings and, therefore, the question of title as between him and Gulab Rai could not be decided in his absence, and that the assignment to Muhammad Ismail Khan was a voidable assignment and must stand good until set aside by the decree of a competent Court. The judgment of this Court is Exhibit 3 on the record. It is not alleged that up to the time when the deed in favour of Gulab Rai was executed Mian Jan had in any way intimated to Muhammad Ismail Khan or his representatives his intention of putting an end to the previous contract of sale. The present respondents are the representatives in-interest of Muhammad Ismail Khan. On these facts the Courts below have held that what was transferred to Gulab Rai by the deed of 19th May 1919 was a mere right to sue for cancellation of the previous sale-deed in favour of Muhammad Ismail Khan, and that the suit is, therefore, barred by the provisions of section 6 (*e*) of the Transfer of Property Act. The correctness of this view is the main issue in this appeal.

The result of the litigation, so far it has gone, is somewhat paradoxical. When Gulab Rai tries to execute the decree on the basis of his sale-deed he is told that he must first get the prior sale-deed set aside. When he brings a suit to have it declared that the sale-deed has become void, he is told that he is not

entitled to get it set aside because he has no right to sue.

Before dealing with the main question it may be well to dispose of two preliminary objections raised by the respondents. It is urged, in the first place, that time was not of the essence of the contract of sale in favour of Muhammad Ismail Khan and, therefore, the vendor had, under section 55 of the Contract Act, no right even to get the sale set aside. Having regard to the circumstances of the case, it is clear that time was of the essence of the contract. This plea has no force.

The second plea is on the construction of the condition in the first sale-deed. The respondents urge that this condition should be read as meaning that the contract was only to become invalid in the event of the plaintiff's failure to take either of the steps mentioned in the condition. If he executed the decree within the time allowed but failed to institute a suit regarding the remaining property the contract was to be valid. If, as actually happened, he filed the suit but failed to execute the decree the contract would still be valid. It was only if he did neither of these things that the contract was to be set aside. In my opinion this is not the correct construction having regard to the facts of the case. Mian Jan had sold a ten-annas share in the property in the decree in the hope of recovering both and was to be entitled to a six-annas share in whatever was recovered by his transferee. As the sale-deed shows, he had not means of taking proceedings himself and he was afraid that the decree would become time-barred and the possession of the donee of the remaining property would become unassailable by lapse of time. The contract between the parties is a most elaborate one containing a number of conditions and it is clear that the vendor wished to tie down his purchaser strictly both to execute the decree and to bring the suit within the time provided in the instrument. The intention clearly was that, unless both these conditions were fulfilled, the deed should become void at any rate as regards property covered by the unfulfilled condition.

Coming to the principal issue, a perusal of the terms of the instrument shows that it did not require anything to be done by the vendor in order to avoid the contract. The covenant was that on failure to fulfil the condition the contract should *ipso facto* be cancelled and become of no effect. The condition not having been fulfilled, the vendor considered that the property in the decree had reverted to him and in this view proceeded to re-sell it to another purchaser from whom he received a substantial sum in cash. It is to be noted that Mian Jan had received nothing at the time of the execution of the earlier deed. The whole amount of the consideration had been left with the purchaser for expenses of the litigation and the vendor was to be recouped by the amount which might be realised through the Court. Under these circumstances, I am unable to concur with the Courts below that what was transferred was a mere right to sue. The typical case of a mere right to sue, the transfer of which is barred by section 6 (*e*), is a claim to damages or, as has been held in some cases, to an unascertained amount of mesne profits unaccompanied by any transfer of actual property. In this case Mian Jan claimed to be the owner of the dower-decree by reason of Muhammad Ismail Khan having failed to comply with the conditions subject to which it had been sold to him. It was thus property in the decree which he purported to sell. Whether Mian Jan had a valid title to the decree was a matter which remained to be subsequently determined. There is nothing in law to prevent a man transferring property of which he claims the ownership merely by reason of the fact that his title to it may be in dispute.

The lower Appellate Court has decided the case only on the construction of section (6) (*e*) of the Transfer of Property Act. As, however, all the questions on which the parties are at issue have been argued in this appeal there is no necessity to remand the case. It was conceded in the Trial Court that the plaintiff has acquired the remaining six-annas share in the decree by a valid transfer and this finding was not impugned by the defendants. The plaintiff is, therefore, entitled to the relief which he asked for in paragraph 11 (*a*) of his plaint.

I accordingly allow the appeal and decree the suit with costs in all Courts.

K. S. D. *Appeal allowed.*

having been given on 7th June, is not *prima facie* unreasonable and has not been shown to be so.

But where, in our opinion, the case of the plaintiffs fails completely is in the fact that they cannot show that they ever made a valid tender of payment, without which they could not claim delivery of the goods. We agree with the lower Court that the oral evidence of tender at the defendants' shop is false and we are left with Mr. Chattar Bihari Lal's letter of 9th July which was certainly not a valid tender. The money deposited with Mr. Sheo Narain was not in the plaintiffs' control and an intimation to come to the Hindustan Merechantile Association the following day was not a tender of the money in the legal sense. Mr. Sardha Ram has quoted *Shriram Rupram* v. *Madangopal Gowardhan* (2), where the plaintiffs were held not to have been obliged to make an actual tender of money, but in that case there was proof that the plaintiffs had made preparations with the object of having the money ready in hand, while here there is not. No evidence has been offered that the plaintiffs in fact took money to the Hindustan Mercantile Association on the 10th July, and it was their duty to make an unconditional offer of cash to the defendants. If they wrote on the 7th July asking to be told where to make payment (and the date on the letter is by no means clear) they took no steps to send the letter until the 9th several days after receipt of the defendants' warning of the 4th. They have failed, in our opinion, to make out any breach of contract by the defendants which would entitle them to damages and their suit was rightly dismissed. We dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(2) '80 C. 865 ; 5 Bom. L. R. 483 ; 8 C. W. N. 25.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 294 OF 1921.

November 2, 1922.

Present :—Mr. Justice Stuart.

M. FAKIRULLAH KHAN—PLAINTIFF—
—APPELLANT
versus
BALDEO SAHAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Indian Soldiers' Litigation Act (XII of 1915) s. 4—Indian soldier represented by pleader—Default by Pleader — Notice to prescribed authority, whether necessary.

Where an Indian soldier is represented in a proceeding by a person duly authorised to appear, plead and act on his behalf, the Court is under no obligation to give notice in the prescribed manner to the prescribed authority under section 4 of the Indian Soldiers' Litigation Act, merely because the pleader refuses to produce evidence in the case.

Mr. *Saila Nath Mukerji*, for the Appellant.

Mr. *G. Banerji* for *P. L. Banerji*, for the Respondents.

JUDGMENT.—The appellant Munshi Fakirullah Khan is an agent in the Supply and Transport Department. He joined the Department before August 1914. He is an Indian soldier within the meaning of Act XII of 1915. Nearly two years after Act XII of 1915 was passed, he instituted a suit in the Court of the Munsif of Nagina, to obtain possession of certain property by the exercise of an alleged right of pre-emption, and appointed a pleader to conduct his case for him. The date fixed for the hearing of the case was the 9th July 1917. On that date the defendant asked for an adjournment, and the case was adjourned to the 11th August 1917. On the 11th August 1917 the plaintiff's pleader asked for an adjournment and the case was adjourned to the 10th December 1917. On the last mentioned date the plaintiff's pleader was present. According to the entry in the order-sheet, the plaintiff's evidence was ready and witnesses were present, but certain documents had not been filed and the plaintiff's pleader refused to produce evidence

or to go on with the case, although he could have done so, because he insisted on the presence of the plaintiff. The Munsif dismissed it on the merits.

It is established satisfactorily that the plaintiff was unable to obtain leave on the 10th December 1917. He had obtained leave on a prior date and been present in Court, in another case, on the 26th November 1917, but on the 10th December 1917 he could not obtain leave. The learned Munsif refused to give any further adjournments and dismissed the plaintiff's suit on the 10th December 1917 for the following reasons. He said :—

"At the instance of the Commanding Officer, an adjournment was allowed to the plaintiff but he neglected this case altogether. He attended Court in other cases on the 26th November 1917 but did absolutely nothing for this case. He did not even procure copies of certain documents on which he seems to rely. Under the law he should have procured the copies before the filing of the suit or, at any rate, before the date of issue. No further postponement could, therefore, be allowed to the plaintiff for the procuring of the copies of certain documents. His application for adjournment being disallowed, his pleader chose to produce no evidence at all in the case. I, therefore, decide all the issues against the plaintiff."

The learned District Judge upheld this decision in appeal. The plaintiff comes here in second appeal. He filed his appeal some two years and a half after his suit had been dismissed, but under the provisions of section 11, Act XII of 1915, his appeal was within time. The first point which the learned Counsel takes on his behalf is that the whole proceedings of the Munsif were vitiated by his neglect to comply with section 4, Act XII of 1915. I find that there was no neglect to comply with the provisions of section 4. The appellant was certainly an Indian soldier, serving under War conditions, but he was not a soldier who was not represented in the proceeding by a person duly authorised to appear, plead or act on his behalf. His pleader never threw up his brief ; he refused to produce evidence and continued to attend the case. As the plaintiff was properly represented, the Court was under no obligation to give notice in the prescribed manner to the prescribed authority under Act XII of 1915 and the Court's procedure was perfectly regular and correct. I might, however, have been inclined to stretch a point in favour of the appellant if I thought he had been really prejudiced by the fact that he could not get leave on the 10th December 1917, but I do not consider that he was in any way prejudiced or was any worse off than a Government official or a non-official who finds it inconvenient or impossible to attend a Court on any particular date. Between the 26th June 1917 and the 10th December 1917 his head-quarters were at Rurki, very close to Nagina. He appears never to have gone to a very great distance from Rurki. He is certainly a literate man and must be a man of some intelligence judging from the appointment which he holds. He chose of his own accord to institute a suit to obtain property by the exercise of a right of pre emption. He had as good opportunities of obtaining documentary evidence as any body else. He could easily has instructed his pleader by letter. I see no reason of any kind why a point should be stretched in his favour. His suit was rightly dismissed as his pleader refused to go on with it. I therefore dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 737 OF 1921.

November 17, 1923.

Present :—Mr. Justice Marten and Mr. Justice Fawcett.

SHANKAR SAKHARAM JAGDALE—PLAINTIFF—APPELLANT

versus

RATANJI PREMJI SHET—DEFENDANT—RESPONDENT.

Compromise—Consent decree—Provision to do certain acts within specific time—Time whether of essence of contract—Execution after expiry of time—Leeks.

In a suit for injunction a consent decree was passed whichprovided for the payment by the defend-

SHANKAR SAKHARAM JAGDALE *v.* RATANJI PREMJI SHET

ant of a certain sum of money and the building of a new wall within two months from the date of the compromise. This was not done. Subsequently, the defendant applied to the Court offering to pay the money and asking for the construction of the wall :

Held, that the parties intended that time should be of the essence of the contract, and the defendant was out of Court because be was a year out of time and no waiover or new agreement had been proved; [p. 229, col. 1.]

(2) that even if time was not of the essence of the contract, the defendant could not succeed as he had slept over his rights for so long. [p. 229, col. 1.]

Bhagwant Gopal v. *Appaji Govind*, 36 Ind. Cas. 598 ; 18 Bom. L. R 803, distinguished and discussed.

Per Fawcett, J.—The Court should act upon the principle that the plaintiff in Equity is bound to prosecute his claim without undue delay, and a Court of Equity should refuse to comply with his demands when the plaintiff has slept upon his rights and acquiesced for a great length of time. [p. 231, col. 2.]

Second appeal from the decision of the District Judge, Thana, confirming the decree of the Subordinate Judge, Thana.

Messrs. *Thakor* and *G. P. Nurdeshwar*, for the Appellant.

Mr. *W. B. Pradhan*, for the Respondent.

JUDGMENT.

Marten, J.—The question in this case is whether, notwithstanding the lapse of time and the conduct of the parties, it is still open to the defendant to enforce the compromise embodied in the consent decree (Exhibit 28) in this suit.

The plaintiff and defendant are adjoining owners, and it would appear that before the commencement of this litigation the western wall of the plaintiff's building was a mud wall, and that the eastern wall of the defendant's building adjoined it. The defendant wanted to re-build his house and in the course of that re-building the plaintiff alleged that the defendant encroached upon his, the plaintiff's, rights. Thereupon this suit was brought for an injunction and other relief.

On the 29th of January 1920 the parties arrived at the compromise in question which is embodied in Exhibit 28. To indicate very briefly the nature of the point this Court has to decide, I will state that there is a provision in that compromise for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly, the money was not paid nor the wall built within the two months. So far as the evidence before us is concerned, nothing was done by either party until the defendant took out the present *Darkhast* of the 30th of March 1921, Exhibit 1. That *Darkhast* states that the defendant told the plaintiff several times in accordance with the terms of the decree to do certain things. But apart from that mere statement in the *Darkhast* which is not evidence, there is no evidence before us at all of any intervening acts of the parties after the date of the decree. We have, therefore, a lapse of time of just over one year from the date fixed by the compromise for the performance of these acts.

The defendant's answer is that his acts of payment of the money and the building of the new wall were all conditional upon the plaintiff first pulling down an old wall, and that as the plaintiff did not pull down that old wall, he, the defendant, is absolved from strict compliance with the provisions as to time inserted in the compromise. The *Darkhast* (Exhibit 1) is based on the defendant's view of the true construction of the contract. There he asks that the plaintiff should be made to pull down the old wall, and that, if he does not do it, the Court should have it done and direct payment of the costs out of the money the defendant was to pay. He makes there no offer of his being ready and willing to pull down the old wall at his own expense, supposing the Court is against his view of the contract. However, before us, at the conclusion of the argument of his pleader, the defendant undertook to pull down the wall at his own expense, supposing the Court was against him on the true construction of the compromise.

Here His Lordship considered and discussed the terms of the compromise, and thereafter continued :—

First of all, then, are we to consider that time was of the essence of the contract under this compromise? In the view I take, I am disposed to think that the parties did intend that time should be of the essence. This "two months" is mentioned in a couple of places. There was already litigation between the

parties. The defendant, on the one hand, was presumably wishing to get on with his new building. The plaintiff, on the other hand, had alleged that his old wall was damaged. It seems to me, therefore, quite consistent with the actual words used by the parties, that the "two months" which they stipulated for was the time intended to be kept unless there was a subsequent agreement by both parties to the contrary.

The respondent has cited to us a decision of Mr. Justice Beaman, sitting with Mr. Justice Heaton, in *Bhagvant* v. *Appaji* (1), where the learned Judge is expressed to enunciate the law in these terms:

"Speaking here for myself, I have not much admiration for the equity rule that in buying or selling or otherwise transferring real estate a man must never be allowed to mean what he says. That if he says the bargain is to be concluded within six months, he must not be taken to mean six months, but any reasonable time which, according to the view of the Courts, may extend to six or sixty years. The rule is, however, venerable and has the sanction of such high authority that it is useless now to criticise it."

With great respect to the learned Judge, the equity rule which he is there expressed to lay down is not, I venture to think, to be found in any of the authorities recognised by the legal profession at large. The real equity rule is based on, or may be expressed in, much the same terms as will be found in the Indian Contract Act, section 55, and is to the effect that the question whether time is of the essence of the contract depends on the intention of the parties. Equity has never laid it down that a man must never be allowed to mean what he says. Still less—I say this without looking up the authorities but in perfect confidence—will it be found that there is any case in England or elsewhere where a Court has decreed specific performance of an agreement to sell property after a lapse of sixty years. Nor will it do so after a lapse of six years, unless the parties themselves have expressly extended the time for completion.

(1) 36 Ind. Cas. 598 ; 18 Bom. L. R. 803.

A case, which is often useful to refer to, where acts have to be performed within a certain time, and more especially if it is alleged that there has been a waiver, is *Earl of Darnley* v. *Proprietors, &c. of London, Chatham, and Dover Railway* (2). There an agreement between Lord Darnley, the land owner, and the Railway Company was embodied in a private Act of Parliament, under which the Railway Company obtained their statutory powers to build the Railway. By article 10 of that agreement, the Company agreed "to make and maintain, for the convenience of the Earl's estate, so many crossings across the extension Railway, and of such kinds, whether above, below, or on the level, as Mr. *John Clutton*, or him failing, the Engineer or Surveyor of the Earl, his heirs or assigns, shall within one month, after obtaining possession of the land of the Earl, direct and notify in writing to the Company or their Engineer." The requisite notification was not given to the Railway Company, but in ignorance of the real facts, the Railway Company took up an award that was made under the agreement and it was then said that they had waived the provision as to time. It appears from the judgment of Lord Cranworth at p. 59 that, "the only written direction and notification which he (Mr. Clutton) made was made on the 5th of March 1859, being nearly three months, instead of one month, after the respondents had got possession of the land." The learned Judge proceeds: "It was, therefore, impossible for Lord *Darnley* to obtain a decree for specific performance of the agreement on the ground that Mr. *Clutton* had, in the stipulated mode and at the stipulated time, indicated what was to be done. It was argued, however, that relief ought to be given on one of two grounds: either that the agreement did not mean to make the one month an essential condition of the contract; or, if it did, then [there was a waiver]." Then the learned Judge proceeds: "On the first point it is unnecessary to say more than that the circumstances indicate a very clear intention on the part of the contracting parties to make time an essential part of the contraat." At page 60 the Judge said: "When parties, who have

(2) (1867) 3 H. L. 43 ; 36 L. J. Ch. 404 ; 16 L. T. 217 ; 15 W. R. 817.

bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforee, a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding--that both parties were proceeding on a new agreement, the terms of which they both understood." Then at page 61 he says: "Both parties showed by their conduct that they did not intend to act on the strict terms of the written agreement; but no definite terms were agreed on as to what was to be substituted for it. The Court is left to discover that solely from the conduct of the parties; and that is quite as consistent with the understanding of Mr. *Cubitt* as of Mr. *Clutton*."

Now, I agree that the present is not the case of a Railway Company building a Railway, when no doubt it would be of great importance to know, at the earliest possible date, what level crossings would have to be constructed. But I have already indicated the grounds for considering that time was of importance to the present parties, and *Lord Darnleys case* (2) may perhaps be regarded as, at any rate, one instance where equity did not prevent the parties from carrying out what they meant.

In that view of the case, therefore, namely that time was of the essence of the contract. for that is the view which I personally take, the defendant is out of Court because he was a year out of time, and no waiver or new agreement has been shown to have taken place.

But supposing time was not of the essence of the contract, could the defendants even then, after this lapse of time, obtain specific performance of this agreement? We have no explanation of the delay except in so far as one can infer from the present contentions of the parties, that the question as to who was to pull down the old wall was the real bone of contention. One knows that in most cases an unexplained delay of one year, or even less, is sufficient to negative the rights of a party to obtain specific performance. If parties will sleep on their alleged rights, they cannot expect a Court of Equity to give them the special relief which it is able to give. On the facts as they come before us then, I think that on this ground also the defendant has failed to establish his right to obtain the relief claimed in his Darkhast.

One other point I will mention which was relied on by the plaintiff. It is unnecessary for me to decide it, but it was claimed in reliance on *Lachiram* v. *Jana Yesu* (3) that a consent decree differs from a contract inasmuch as you can never very its terms except by consent. Now, in a broad general sense, I understand that proposition, but to my mind it cannot be laid down in that hard and fast way as being an universal proposition capable of no explanation or deviation. Admittedly, one exception is in cases of landlord and tenant and it is sufficient to say that the point was considered by Sir Norman Macleod and Mr. Justice Heaton in *Supdu Dhodu* v. *Madhavrao Jivram* (4) where Sir Norman said: "The Court cannot lay down a general principle that in no case can the terms of a consent decree be varied." In that particular case the Chief Justice thought that the consent decree amounted in effect to a redemption decree. Mr. Justice Heaton thought the contract they were there concerned with was something like an agreement of sale and something like a mortgage; but whichever it was, the Court was entitled to give relief in that particular case.

One important distinction of fact exists between that case and this. In *Supdu Dhodu* v. *Madhavrao Jivram* (4) there was a preliminary payment to be made, and the Court held that the really important date was when possession of the lands was to be given, and that, accordingly, as the first payment, though made late, was paid long before the date fixed for possession, the delay in question should be excused. Here we have nothing of that. The date for completion or for giving was two months from the date of the compromise. Nothing was done up to that date: nothing was done afterwards. So that there seems to me a broad distinction of fact between that case and the present one.

There are also clear grounds on which the other decision I have referred to, *viz.*, of Mr.

(3) 27 Ind. Cas. 830; 16 Bom L. R. 668.
(4) 57 Ind. Cas. 534; 44 B. 544 at p. 549; 22 Bom. L. R. 780.

Justice Beaman in *Bhagvant* v *Appaji* (1), could be sustained, because it would appear there that the contract had been partly performed by the party who was late in performing it. He had apparently carried out certain building operations, and, under these circumstances, if the other party chose to stand by, seeing money expended and knowing that time had elapsed, it may be that on equitable principles he would be estopped when the work was completed from turning round and saying " I will accept that work, but I won't perform my part of the contract, because your work was performad late." If here, for instance, the defendant had built that new wall, and had finished it one or two months late without any objection by the plaintiff, in my opinion the plaintiff, would not have been able to turn round and say : " I will accept that nice new wall, but as you built it late, I won't allow you to use the passage way of three feet. I shall claim to retain that as my own."

Under all the circumstances of the case, therefore, I think the conclusions arrived at by the lower Courts were incorrect, and that this appeal must be allowed with costs against the defendant throughout.

The effect of our decision is to render the compromise arrived at nugatory. But in this connection I should mention what Mr. Thakor, Counsel for the appellant, has told the Court. He said : " I have definitely elected to treat the terms of the decree as at an end and nugatory, and, therefore, I forego any relief in my suit." I say this to prevent it being suggested that it is now open to the plaintiff to go on with his suit as if there never had been any decree passed in it, or to go on at all. As far as I can see, this suit is ended except in so far as any execution as regards costs is concerned.

Fawcett, J. :—The judgment just delivered by my learned brother deals very fully and clearly with the questions arising in this appeal, and I concur generally in his observations.

I think the first question to decide is whether we are prevented in any case from granting equitable relief to the defendant against the condition in the consent decree requiring payment and the building of a certain wall within a period of two months. The appellant's pleader relied upon *Lachiram* v. *Jana Yesu* (3) which, if accepted, might be held to prevent a Court exercising this equitable jurisdiction, in any case where there was a consent decree, except where that decree itself established the relationship of landlord and tenant. But such a reading of the Full Bench decision in *Krishnabai* v. *Hari Govind* (5) seems to me entirely to ignore the basis of the judgments of Sir Lawrence Jenkins and Mr. Justice Beaman, which proceed mainly upon the view taken in *Wentworth* v. *Bullen* (6), that of the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge." That is a general principle, and the Court adopted it in overruling the previous decision of this Court in *Shirekuli Timapa Hegda* v. *Mahablya* (7) that the doctrine of equitable relief against penalties could not be given effect to as regards the compromise of a suit. It seems quite clear that the case of *Krishnabai* v. *Hari Govind* (5) followed the Madras High Court in dissenting from *Shirekuli Timapa Hegda* v. *Mahablya* (7). A similar view is also taken by the Calcutta High Court, and a recent ruling to that effect is reported in *Gopal* v. *Hari* (8) based again upon the same case of *Wentworth* v. *Bullen* (6).

Therefore, so far as *Lachiram* v. *Jana Yesu* (3) contravenes what has been actually laid down in the Full Bunch case of *Krishnabai* v. *Hari Govind* (5), it is not, I think, binding upon us, and we have, as already pointed out by my learned brother, the authority of *Supdu Dhodu* v. *Madhavrao Jivram* (4) for holding that there is no general bar against equitable relief in cases of this nature, and that each case must be considered on its merits.

In this particular case the main question we have to consider is whether time is or is not of the essence of the contract, and the relief which a Court of Equity gives in cases of this nature is (as stated in Halsbury's Laws of England, Vol. XIII, Art. 183, page 154), analogous to relief against forfeiture. The condition as to the time within which the

(5) 31 B. 15 ; 8 Bom. L. R. 813 ; 1 M. L. T. 370.
(6) (1829) 9 B. & C. 840; 9 L. J. (O.S.) K. B. 33; 33 R. R. 353; 109 E. R. 313.
(7) 10 B. 435; 9 Ind. Dec. (N. S.) 678.
(8) 66 Ind. Cas. 766 ; 34 C. L. J 157.

defendant should do the acts of payment and building is contained in separate clauses of the compromise, and it seems to me that *prima facie* the intention of the parties was that time should be of the essence of the contract. It is obvious that the plaintiff might be put to very serious inconvenience, if he was to remain in suspense for a considerable period as to whether the western wall of his house and the stone wall of the rear compound were to be pulled down or not; and inasmuch as the land in question under the compromise admittedly belonged to the plaintiff, so that compensation was given to him in respect of it, he would be in a dominant position, enabling him to stipulate that the proposed alterations must be carried out within a fixed time. This is only an application for execution and not a regular suit, and, therefore, no evidence has been recorded which might help the Court in deciding this question whether time was or was not of the essence of the contract. But the parties could have asked the Judge to record such evidence, if there was anything material to be brought to notice, and as they have not done so, we can only decide the question upon the avilable materials. I concur, therefore, with my learned brother in thinking that on those materials we should hold that time was intended to be of the essence of the contract.

But the respondent's pleader contends that the compromise contemplates that the plaintiff should first pull down his wall and that until he did so no obligation arose against the defendant. On this point I concur with my learned brother that the probabilities are that the intention was for the defendant to pull down the wall. If the intention had been that the plaintiff should do so, the natural thing would have been to have inserted this clearly in the first part of clause 1 of the compromise, where the obligations upon the plaintiff are first of all stated. On the contrary, the reference to the pulling down of the wall appears in clause 2, of the compromise—a clause which deals mainly with the acts that had to be performed by the defendant, the only clear exception being the plaintiff's supply of certain doors and windows for the new wall. The pulling down of the wall would not be a costly operation, so that it would naturally be put upon the plaintiff rather than the defendant. Therefore, I do not think we ought to accede to this argument.

But, even supposing that this was the real intention, it does not, in my opinion, follow that the defendant could stay quiet indefinitely and come at his own leisure and convenience to the Court to ask for relief of the kind he is now seeking. The compromise itself says that the new wall should only be built after the other wall had been pulled down, and as the new wall was to be built within two months, the obvious intention was that the pulling down of the old wall should be done within the same period, and necessarily at an early stage, so as to admit of the new wall being built within the period of two months. This circumstance clearly imposed an obligation upon the defendant If he found the plaintiff neglecting to pull down the wall in sufficient time to enable him to comply with the time limit of the compromise, to take some definite steps to remedy this. He could, for instance, have sent him a written notice, say, three weeks after the date of the compromise. But it is not suggested that any such step was taken, and the defendant rested on his oars for about a year.

That being so, I think that the Court should act upon the principle that the plaintiff in equity is bound to prosecute his claim without undue delay, and that a Court of Equity should refuse to comply with his demands, where the plaintiff has slept upon his rights and acquiesced for the great length of time. I thing also a further reason for such refusal is the principle on which the Court acts in an analogous case of reduction of the amount payable by a debtor to a creditor. This is dealt with in Article 179, at page 152, of Halsbury's Laws of England, Vol. 13, as follows:—"Where money is actually payable, or to become payable, a provision may validly be made for diminishing the amount, or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms; and if the debtor complies with the terms he is entitled to the benefit of the provision. But he must purchase the benefit by strict compliance with the terms; and, if he is in default, the full debt is payable and he cannot claim relief as against a penalty."

I do not say that this case directly falls under that rule of law, but in this particular case the main concessions seem to have been made by the plaintiff for the benefit of the defendant. In particular, I refer to the grant of three feet of land as a space between the two houses. That concession is given upon certain terms with which (on the principle just referred to) the defendant, being thus benefited, must strictly comply. This is only another instance of the principle that the Court will not grant relief to a person who has slept upon his rights.

I would only add that I do not think that the ruling in *Bhagvant* v. *Appaji* (1), affects our decision in this case. That was a case where there had been a part performance of the conditions, and the facts are clearly very different from those of this case.

I concur, therefore, with my learned brother that the appeal should be allowed with costs.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 489 OF 1922.

June 23, 1922.

Present :—Mr. Justice Kanhaiya Lal.

DURGA CHOWDHURI—DEFENDANT—APPELLANT

versus

JAGROOP AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901) s. 57 (d)—Landlord and tenant—Occupancy tenant, illegal transfer by—Tenancy, whether terminated—Suit by tenant to recover possession of holding, maintainability.

The execution of an illegal transfer of his holding by a tenant does not *ipso facto* terminate the interest of the tenant. The landlord must sue to eject him and till such ejectment is claimed and decreed the tenancy continues. If before such ejectment is sought; the illegal transfer is cancelled or comes to an end by voluntary redemption or otherwise, the tenancy would continue to subsist.

A mortgagee holding under an illegal mortgage from an occupancy tenant is not a trespasserr. His possession is permissive and the tenant can recover possession from him on payment of the mortgage-money.

Ramzan v. *Bhukhal Roy*, 47 I. C. 852; 16 A. L. J. 747, followed.

Ranmali Pande v. *Bisheshar Singh*, 3 A. L. J. 731; 29 A. 129; A. W. N. (1906) 200; distinguished.

Appeal from the decree of the Additional District Judge, Gorakhpur, dated the 16th December 1921.

Mr. *Sankar Saran*, for the Appellant.

JUDGMENT :—*Musammat* Lagha had an occupancy holding which she mortgaged with possession in favour of the defendant in lieu of Rs. 99 on the 12th September 1907. The mortgagee remained in possession of the holding without amy objection having been taken to the said mortgage by the proprietors of the village. The present suit has been filed by the plaintiffs for possession of the occupancy holdirg. In the plaint they offered to pay Rs 99 to the defendant. The contention of the defendant was that as the mortgage was invalid his possession was adverse and that the claim was consequently barred by limitation.

The Courts below held that the possession held by the defendant was permissive and that though the mortgage was invalid the plaintiffs were entitled to get possession of the occupancy holding.

The learned Counsel for the defendant-appellant contends that the defendant is entitled to retain possession of the occupancy holding because he has since purchased a proprietary share in the village But the purchase would not clothe him with a higher position than that which he occupied when he was originally let into possession of the holding by the mother of the plaintiffs. The occupancy holding has not become extinct, because no step was taken by the landlord to eject the plaintiffs or their mother from the holding by reason of that transfer, under section 57 (*d*) of the Agra Tenancy Act (II of 1901). The execution of an illegal transfer does not *ispo focto* terminate the interest of a tenant. The landlord must sue to eject him and till such ejectment is claimed and decreed the tenancy continues.

If, before, such ejectment is sought, the illegal transfer is cancelled or comes to an end by voluntary redemption or otherwise, the tenancy would continue to subsist.

In *Ramzan* v. *Bhukal Rai* (1), it was held under similar circumstances that an occupancy tanant was entitled to get back possession on his paying the mortgage-money, as he had offered to do. By allowing the plaintiffs to get back possession of the holding the Court is not giving effect to the mortgage or recognising its validity. It is merely restoring to the plaintiffs the occupancy holding which was and still is his and ousting a person who had taken an illegal possession under a permissive title. The learned Counsel for the defendant-appellant has referred to the decision in *Banmali Pande* v. *Bisheshar Singh* (2), but in that case a suit had been brought by a subsequent mortgagee who had no lawful title. The present suit has been brought by the occupancy tenants whose title still subsists. There is no reason, therefore, for interference with the decree passed by the Court below in second appeal, which is hereby dismissed.

Z. K. *Appeal dismissed.*

(1) 47 I. C. 852 (1918) 16 A. L. J. 747.
(2) 29 A. 129 ; 3 A. L. J. 731 ; A. W. N. (1906) 300.

LAHORE HIGH COURT.

CIVIL MISC. NO. 595 OF 1922, AND C. A. NO. 1349 OF 1922.

June 17, 1922.

Present :—Mr. Justice Scott-Smith.

THE ELECTION OFFICER, GUJRAT—PETITIONER

versus

ABDUL GHANI, ETC.—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX r. 2, scope of—Injunction whether can issue against third party—Prevention of injury.

Under O. XXXIX, r. 2 of the Civil Procedure Code a temporary injunction can only issue to the defendant in the suit and not to any other persons.

A filed a suit for a declaration that *L* was not eligible to stand for election to the Municipal Committee of Gujrat and obtained an *ad interim* order staying the election. The Election Officer applied for the discharge of the *ad interim* order :

Held (1) that inasmuch as the suit was not one for restraining *L* from committing an injury of any kind within the meaning of the rule, no injunction could issue against him ;

(2) that as the Election Officer was no party to the suit no injunction could issue against him under O. XXXIX, r. 2, Civil Procedure Code ;

(3) that to grant the injunction would be tantamount to granting the plaintiff the relief sought in his suit and might do great injustice to the defendant and the *ad interim* order shall therefore be discharged.

Mr. *Des Raj Sawhney*, for the Petitioner.

Sheikh *Niaz Ali*, for the Plaintiff.

Mr. *M. L. Puri*, for the Defendant *Lal Khan*.

JUDGMENT :—In connection with an election to fill a vacant seat on the Municipal Committee of Gujrat, the Election Officer decided that abdul Ghani, plaintiff, and Lal Khan, defendant, were ineligible as candidates for election.

The Deputy Commissioner on appeal upheld the order as regards Abdul Ghani but declared Lal Khan eligible. Upon this Abdul Ghani filed two Civil Suits in one of which he asked for a declaration that he was eligible to stand as a candidate, and in the other he asked for a declaration that Lal Khan was not eligible. The Subordinate Judge held that the suits were not triable by a Civil Court. The learned District Judge on appeal held that they were triable and, reversing the order of the Sobordinate Judge in both cases, remanded them thereto for decision on the mirits. From this order Lal Khan filed two appeals in this Court and, meanwhile, Abdul Ghani asked for an injunction to issue to stay the election. An *ad interim* order staying the election was issued and notice was sent to Lal Khan and the other two candidates *Sheikh* Muhammad Hussain and Ghulam Muhammad. Mr. D. R. Sawhney has put in an application on behalf of the Election Officer praying that this *ad interim* order be discharged. Mr. M. L. Puri on behalf of Lal Khan makes a similar application whilst

Sheikh Niaz Ali on behalf of Abdul Ghani asks that the injunction be maintained.

The application for an *ad interim* injunction was made and has been granted under O. XXXIX, r. 2, Civil Procedure Code. It is contended by Mr. Sawhney that no such injunction could issue to the Election Officer as he was no party to the suit. He was originally a party to the suits, but is so no longer. It is obvious from the wording of O. XXXIX, r. 2, that a temporary injunction can only issue to the defendant and not to any other person. Mr. Niaz Ali says that he will be quite satisfied if the injunction is maintained so as to prohibit Lal Khan from standing as a candidate at the election and says that the election can go on as between the other candidates. It is contended by Messrs. Sawhney and M. L. Puri that the suit is not one for restraining Lal Khan from committing an injury of any kind within the meaning of the rule. Now, one of the suits is for a declaration that Lal Khan is not eligible to stand as a candidate, but I am very doubtful whether it can be said to be a suit for restraining Lal Khan from committing an injury of any kind. But even supposing the suit comes within the four corners of O. XXXIX r. 2, I do not consider that the case is one in which an injunction should issue. Lal Khan has been declared by competent authority to be eligible for standing as a candidate at the election, and as the election itself cannot and obviously should not be stopped, it would not be right to restrain him from taking part in it. To restrain him in the way suggested would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled. This would be a grave injustice to him for which he could not be adequately compensated hereafter. The *ad interim* order is, therefore, discharged. As no certificates as to fees have been put in I make no order as to costs.

K. S. D. *Injunction dissolved.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 349 OF 1920.

July 4, 1922.

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

PARTAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BOHRA NATHU RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint Family—Mortgage by all members—Necessity—Mortgagee, whether bound to make inquires—Later born sons, position of.

A simple mortgage was executed by four persons *K. G. M.* & *S.* members of a joint family. The mortgagee sued to enforce the mortgage impleading the subsequently born sons of *G.* & *M.* The consideration for the mortgage consisted of money due on a previous deed executed by *K G.* & *M.* and *B.* since deceased. *S.* was *B's.* widow.

Held, (1) that inasmuch as the four executants of the mortgage-deed even at the date of the mortgage sole owners of the property, the mortgagee was under no obligation to make enquiries as to the purpose for which the money was wanted ; [p. 235, col. 2.]

(2) that the sons of *G.* & *M.* took from the moment of their birth an interest in the whole of the joint family property as it stood on the date of their birth and could not question alienations made prior to their birth ; [p. 235, col. 2.]

Chattan Lall v. *Kallu*, 8 Ind. Cas. 719; 33 A. 283; 8 A. L. J. 15 followed.

(3) that for the same reason, they could not dispute the consideration for the mortgage.

First appeal from a decree of the Subordinate Judge, Aligarh, dated the 25th of May 1920.

Dr. *Surendra Nath Sen* and Dr. *Kailas Nath Katju*, for the Appellants.

Munshi *Panna Lal*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought to enforce a simple mortgage of the 19th of January 1909. The executants were four persons, Kanhaiya Lal, Gauri Shankar, Mangal Sen and *Musammat* Shiam Kunwar. In the

suit, as brought, the defendants included Kanhaiya Lal and Gauri Shankar of the original executants. They included also two minor sons of Gauri Shankar and three sons of Mangal Sen. It was these sons of the original executants of the mortgage who really contested this suit, and the appeal before us is by the three sons of Mangal Sen and one of the sons of Gauri Shankar.

The main question litigated in the Court below was whether the consideration for the mortgage-deed in suit, amounting to Rs. 26,750, was or was not raised for such legal necessity as to make it binding upon the sons of the original executants. The learned Subordinate Judge has traced back the entire series of transactions through one hypothecation deed or simple bond after another, till he comes to loans raised in the year 1883 by Nand Ram, the great-grandfather of these contesting defendants. He has finally arrived at the conclusion that the great bulk of the consideration for the bond in suit was raised for lawful necessity, so as to make the hypothecation of the property binding upon the sons of the executants. As regards a small portion of the debt he has given a personal decree against Kanhaiya Lal and Gauri Shankar only.

The appeal before us, as already noted, is by the sons of Mangal Sen and one son of Gauri Shankar. There is no cross-objection on the part of the plaintiffs in respect of that portion of the decree of the Trial Court which gives them only a simple money-decree in respect of part of the claim. We lay stress on this fact because, upon an examination of the record, it seems to us that the essential question raised by this appeal must be decided without going into the detailed history of previous transactions which the learned Subordinate Judge has found it necessary to set forth. The entire consideration for the mortgage-deed in suit consisted of money due on a previous deed of the 28th of January, 1897. The executants of this deed were Kanhaiya Lal, Gauri Shankar and Mangal Sen, together with one Bhagwati Prasad, a brother of Gauri Shankar and Mangal Sen, who has since died without issue. It was his widow, *Musammat* Shiam Kunwar, who joined in executing the mortgage-deed now in suit. On examining the record we find it to be established beyond question that none of the appellants was in existence in the year 1897. The oldest of them is the appellant Piari Lal, son of Mangal Sen, and he was born in or about the year 1902. In fact, so far as we can ascertain, the four executants of the deed of the 28th of January 1897, were on that date the sole owners of the property with which they dealt. Under these circumstances, the mortgagees, who advanced the sum of Rs. 10,000 as consideration for that deed, were under no obligation to make inquiries as to the purposes for which the money was wanted. They were dealing with absolute owners of the property and it is quite beyond question that if the transaction of 1897 had been a sale instead of a mortgage, a valid title would have passed to the vendees which could never have been questioned by sons subsequently born to one or more of the vendors. These sons took, from the moment of their birth, an interest in the whole of the joint family property as it stood on the date of their birth. They could not question alienations made prior to the date of their birth, at a time when they had no interest in the property. This principle was laid down by a Bench of this Court in the case of *Chuttan Lal* v. *Kallu* (1) in a judgment in which the authorities are discussed and the principles of Hindu Law applied to the circumstances of the case. There seems no reason for making a distinction between an alienation by way of sale and an alienation by way of mortgage. In fact this Court has already applied the same principle to alienation of both kinds, as is apparent from the reported case above referred to. If, therefore, the present suit were one upon the mortgage of the 28th of January 1897; those defendants, who are appellants now before us, could not challenge the validity of that mortgage or put the plaintiffs to proof of the purposes for which Kanhaiya Lal, Bhagwati Prasad, Gauri Shankar and Mangal Sen raised the money. Now, the mortgage-deed in suit is in favour of the same mortgagees. The recital of the document shows clearly enough what happened. The prescribed period of limitation for a suit on the deed of the 28th of January 1897, was running out and the mortgagees were threatening to bring a suit there and then. The

deed in suit was obviously the result of negotiations between the parties, and the mortgagees seem to have behaved with all reasonable leniency. They not only refrained from instituting a suit on the deed of 1897, but remitted a certain part of the accumulated arrears of interest. Some stress has been laid in argument before us on the manner in which the sum now claimed by the plaintiffs has swollen through accumulations of interest ; but, after all, the covenant in regard to interest was not an exceptionally onerous one, and if mortgagors choose to permit compound interest to accumulate without making payments in order to keep it down, they must eventually come face to face with a result such as that involved in a claim now before us. There is this much to be said for the plaintiffs, that they have exercised much patience and have gone without any interest to speak of on this money for a very long period of years.

Now, the question of law which we have to determine involves a certain extension of the principle laid down by this Court in the case of *Chuttun Lal* v. *Kallu* (1). Admittedly, the suit before us is not on the bond of 1897 but on the bond of the 19th of January 1909 ; and by this bond an alienation of joint family property was effected in which the contesting defendants, who are the appellants before this Court, (excepting Niranjan Prasad and perhaps Partab Singh), had by that time acquired an interest. Now, if it be a sound principle of law that those of the appellants who were born between the month of January, 1897, and the month of January, 1909, acquired from the date of their birth an interest in property already saddled with a mortgage-charge which it was not open to them to dispute, it seems to follow as a reasonable and even necessary extention of this doctrine that these appellants cannot dispute the consideration for the mortgage deed now in suit which was, when all is said and done, a mere renewal of the previous mortgage of the 28th of January 1897. This view has already been taken by a Bench of this Court, in a case not quite so clearly in favour of the plaintiffs as is the present one. We refer to the decision in *Krishnanand Nath Khare* v. *Raja Ram Singh* (2), to which one of us was a party. On the question of law, therefore, we have come to the conclusion which is decisive of this appeal. As a matter of fact, in the view which we take there ought to have been a decree for sale on the mortgage in respect of its entire consideration ; but that question need not arise in view of the fact that the plaintiffs have submitted to the decree passed by the Trial Court.

In the course of argument, however, one question of fact was raised with which it is advisable that we should deal. It was suggested that Mangal Sen, the father of three of the appellants, was not of age when he concurred in executing the deed of the 28th of January 1897. The evidence on this point is scanty enough. A single witness, by name Kedar Nath, was examined regarding the ages of various members of the family, and with regard to Mangal Sen he stated that this man was born in the *Sambat* year 1937. If this were so, then in the month of January 1897, Mangal Sen could not have completed even his 17th year. However, when further pressed, Kedar Nath admitted that he had given the dates of birth of the various parties, as he put it, "by guess." As against this we have the registration certificate on the document itself. From this we know that Mangal Sen represented himself as being about 19 years of age, that the other executants concurred in this representation, and the Sub-Registrar saw nothing in Mangal Sen's appearance to lead him to suspect that the young man had not completed the 18 years necessary for the attainment of his majority under his personal law.

The only other piece of evidence to which we have been referred is in the deposition of a witness named Madan Lal, one of the attesting witnesses to the document in suit. He is an oldish man and might have been expected to know the age of Mangal Sen. He was asked what Mangal Sen's age was not in the year 1897, but the year 1892, and if he could have answered that question his answer might have thrown considerable light on the

(1) 8 Ind. Cas. 719 ; 33 A. 283; 8 A. L. J. 15.

(2) 66 Ind. Cas. 150 ; 44 A. 393 ; 20 A. L. J. 233 ; (1922) A. I. R. (A.) 116.

issue we are called on to determine. Unfortunately, his answer was that Mangal Sen was no doubt a minor in the year 1892, but he could not remember his age. In the state of the evidence we are bound to hold that Mangal Sen had attained mojority on the 28th of January 1897, and that his execution of that document is valid and not open to objection on the score of alleged minority.

The result is that this appeal must, in our opinion, fail and we dismiss it accordingly with costs.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 120 OF 1922.

November 14, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

KHUNAI TEWARI—PLAINTIFF—APPLICANT

versus

Mt. DIL KUNWAR—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Order returning plaint for presentation in proper Court—Revision—Interference, whether desirable.

In a suit for the plaintiff's share of the profits valued at Rs. 400, after a portion of the evidence had been recorded plaintiff applied to the Court stating the suit had been valued by mistake at Rs. 400 insted of Rs. 4,000 and asked that the plaint might be amended and returned for presentation to the proper Court. This application was allowed. An application for revision against this order was rejected by the Court of the Judicial Commissioner in view of the fact that an appeal was pending in the Court of the District Judge. The appeal was subsequently allowed the Court directing that the plaint should be sent back to the original Court. The plaintiff filed a petition of revision :

Held, that as it was not possible to restore the plaintiff to his previous position and the direction for the return of the plaint back again to the original Court would further delay the hearing of the suit, it was not desirable to make any further interference with the progress of the suit.

Civil Revision from the order of the District Judge, Gonda, dated the 11th September 1922.

Mr. *Ghulam Hasan*, for the Applicant.

Mr. *Bishambar Nath*, for the Opposite Party.

JUDGMENT.—A suit was filed by a *thekadar* against a *co-thekadar* for his share of the profits for 1328 and *kharif* 1329 *Fasli*. The suit was valued at Rs. 400. During the progress of the hearing of that suit, after a portion of the evidence of the plaintiff had been recorded, an application was made by the plaintiff that he had by a mistake valued his suit at Rs. 400 instead of Rs 4,000. He asked that the plaint might be amended and returned for presentation to the proper Court. The Munsif allowed the amendment to be made and directed that the plaint should be returned for presentation to the proper Court. An application for revision against the order allowing the amendment, was filed in this Court and rejected on the 26th July 1922. The learned Judge of this Court who heard that application, observed that the order of Munsif allowing the amendment, was a perverse order ; but considering that an appeal from the order returing the plaint for presentation to the proper Court, was pending before the District Judge, and that the plaint had already been amended and filed in the Court of the Subordinate Judge, he did not think it proper to set aside the order allowing the amendment.

The appeal from the order directing the return of the plaint after amendment for presentation to the proper Court was subsequently heard by the District Judge and allowed. He was of opinion that the application for the amendment of the plaint was improperly granted and that the Munsif should have proceeded with the trial of the suit. He set aside the order of the Munsif granting the amendment accordingly and directed that the plaint should be sent back to the Court of the Munsif, who should proceed with the trial of the suit. In substance, the order of the learned District Judge is quite correct; but it does not appear how the defendent can possibly be prejudiced by the amendment having been granted. The effect of the order granting the amendment was that the plaintiff had to pay the additional Court-fee, when he filed the

plaint before the Subordinate Judge and was made liable for the costs incurred by the defendant in the Court of the Munsif.

It is not now possible to restore the plaintiff to his prior position and any direction for the return of the plaint back to the Munsif will further delay the hearing of the suit. In fact, after the order of this Court refusing to interfere with the order allowing the amendment to be made, it does not seem desirable that any further interference should be made with progress of the hearing of the suit before the Suboridate Judge.

The application is, therefore, allowed and the order passed by the learned District Judge is set aside with the direction that the parties shall bear their own costs here and of the appeal in the Court below.

K. S. D. *Application allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1862 OF 1921.

July 17, 1922.

Present: —Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

KISHEN SINGH AND OTHERS—
APPELLANTS
versus
CHHAJJU SINGH—AND OTHERS—
RESPONDENTS.

Hindu Law—Joint Family—Father's debt—Son's liability of, when enforceable—Antecedent debt, when can be recovered.

The doctrine of antecedent debt resting as it does on the theory of pious obligation, is only intended for the protection of the parties who may have acquired rights in good faith in the family property and it is not open to a creditor whose mortgage has been declared to be invalid to recover the debt represented by that mortgage while the mortgagor is alive from the share of his sons who have been exempted from liability out of the very property the mortgage of which has been declared to be unenforceable. [p. 241, col. 2.]

Sahu Ramchandra v. *Bhup Singh*, 39 Ind Cas. 280; 39 A. 437 ; 21 C. W. N. 608 ; 1 P. L. W. 557 ; 15 A. L. J. 437 ; 19 Bom. L. R. 498 ; 26 C. L. J. 1 ; 23 M. L. J. 14 ; (1917) M. W. N. 439 ; 22 M. L. T. 22 ; 6 L. W. 213 ; 44 I. A. 126 (P. C.), followed.

Sripat Singh v. *Pradyat Kumar Tagore*, 39 Ind. Cas. 252 ; 21 M. L. T. 222; 32 M. L. J. 133 ; 15 A.L. J. 147 ; (1917) M. W. N. 193 ; 21 C. W. N. 442 ; 25 C. L. J. 220 ; 19 Bom. L. R. 290 ; 44 C. 524 ; 44 I. A. 1 ; (P.C.) ; *Gadadhar Ramanuj Das* v. *Ghanashyam Das*. 47 Ind. Cas 212 ; 3 P. L. J. 533 ; *Hari Ram* v. *Bishnath Singh*, 22 A. 408 ; A. W. N. (1900) 158 ; 9 Ind. Dec. (N. S.) 1308, distinguished.

Second appeal from a decree of the District Judge, Saharanpur, dated the 25th of November 1921, confirming a decree of the Subordinate Judge, Saharanpur dated the 6th of September 1917.

Mr. *Nihal Chand*, for the Appellants.

Dr. *M. L. Agarwala* and Babu *Piari Lal Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of an execution proceeding and the question for consideration is whether the property in dispute was liable to attachment and sale in execution of a decree, obtained against Kallu Singh personally. The objectors are the son and grandsons of Kallu Singh, who had been exempted by the decree from liability. They contest the right of the decree-holders to attach the family property.

It appears that Kallu Singh, Nathu Singh and Maru Singh took a lease of certain property from Pirthi Singh and executed a mortgage to secure the payment of the lease money. The mortgage purported to hypothecate certain properties belonging to the lessees. As the lease-money was not paid, a suit was filed by the lessor for the recovery of the money due to him against Kallu Singh and the present respondents, who are the legal representatives of the other lessees. The present respondents paid the entire decretal money and saved their property and the property of Kallu Singh from sale.

They then filed a suit for the recovery of the share of the lease-money, payable by Kallu Singh, making the son and grandsons of Kallu Singh, namely, the present appellants, parties to that suit. The latter contested the claim on the ground that the lease was not taken for the benefit of the family and that they were not liable to pay the money due

under the decree. The finding of the Court in that suit was that the lease was a speculative and risky transaction, not binding on the family. The claim of the respondents was accordingly decreed against Kallu Singh personally and the present appellants were exempted from liability.

In execution of that decree the property, which had been hypothecated by Kallu Singh for the payment of the rent secured by the lease, was attached and sought to be brought to sale in satisfaction thereof. The appellants objected to the said attachment, urging that they had already been exempted from liability under that decree; but the Courts below held that, by reason of the pious obligation that rested on them to pay the debts due by Kallu Singh, the decree could be executed against the entire family property.

The liability of a son or grandson to pay a debt by his ancestor, which is not tainted with immorality or was not taken for illegal purposes, cannot, however, be enforced so long as the original debtor is alive and is capable of paying his debts. According to Virhaspati, if the father is no longer alive, the debt must be paid by his sons. Vishnu says:—"If he who has contracted the debt, should die, or become a religious ascetic, or remain abroad for twenty years, the debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will." A similar injunction is laid down by Narada, who declares:—"After the father's death his sons, whether divided or joint, must discharge his debt in proportion to their shares." So says Yajnavalkya:—"If a father has gone abroad or died or is subdued by calamity, his debt shall be paid by his sons and grandsons. On their denial the debt must be proved by witnesses." Commenting on this passage, the author of the *Mitakshara* observes:—"If the father, without paying the debt which is due, dies or goes to a distant country, or is afflicted with an incurable disease and the like, then his debts must be paid by his son and grandson by reason of their sonship and grandsonship, even if no assets of the father or of the grandfather have been left. The liability will be in this order. In default of father, the son, and in default of son, the son's son must pay. In case of denial by the son or grandson, the debt being proved by the testimony of witnesses and the like, must be paid by them." He then goes on to discuss how far a debt due by the father could be enforced, if he has gone abroad, and says:—"By the text '*If a father has gone abroad*' the payment is merely enjoined, but the specific time for payment, as declared by Narada, is to be observed. The father, or, if the family be undivided, the uncle or the elder brother, having gone abroad, the son shall not be forced to discharge the debt until twenty years have elapsed." It is obvious, therefore, that the liability of a son to pay the debt due by his father cannot be enforced, until the father has died or has gone abroad, and has been so long absent as to render a reasonable expectation of his return practically impossible, or has become physically disabled by reason of disease to earn his living and discharge his liabilities. As West and Buhler point out:—"It is impossible that of the numerous texts, treating of debts contracted for the family, and of the sons' liability as survivors of their father, all should have omitted to mention their liability during the father's life, had the liability been recognized." (West and Buhler's Hindu Law, 4th edition, p. 598).

During the life-time of the father, apart from any question of family benefit or necessity, the liability of a son to pay a debt due by his father is only contingent. The existence of that liability, contingent or vested, has been utilized to build up the doctrine of antecedent debt to validate a mortgage or sale effected by the father to pay such debt; and in many cases, a creditor has been allowed to recover a debt due by the father from the entire family property, if not tainted with immorality, as if the liability were concurrent. In *Sahu Ram Chandra* v. *Bhup Singh* (1) their Lordships of the Privy Council remarked that too little weight had been attached to the consideration that so far as the joint family estate was concerned, the law had been invoked for the benefit of third parties, whose rights in, or with regard to, it had been acquired in good faith, *and not for the protection of the creditors*. They repelled the attempt made to support the mortgage on the theory of pious

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 113; 44 I. A. 126 (P. C.).

obligation and observed :—" While the father remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself which they with their father jointly own, must fail ; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death, there may be ample personal estate, belonging to the father himself, out of which the debt may be discharged."

If the attempt to enforce a mortgage on the theory of pious obligation fails, the right to attach the family property during the life-time of the father on the strength of that pious obligation can be still less recognized, because if no pious obligation exists, it must be as insufficient to support the one as to support the other.

In *Jai Narain* v. *Bajrang Bahadur* (2), and *Ram Singh* v. *Chet Ram* (3) it was held in respect of certain antecedent debts, credited by a transferee in a subsequent transaction, that there was no pious obligation on the sons or grandsons of the transferor to pay those debts, while their father was alive. In *Bharath Singh* v. *Prag Singh* (4) it was held that where there was no suggestion that the debt was incurred for the benefit of the family, it was only the father's share, and not the entire family property inclusive of the share of the sons, that could be sold in execution of a personal decree against the father while the father was alive. In *Manna Lal* v. *Bhagwan Din* and *Sheodhan Singh* v. *Bhagwan Singh* (5) the same view was adopted.

The lower Appellate Court relies on the decision in *Sripat Singh* v. *Tagore* (6); but that was a case in which the property had passed out of the family by an auction-sale held in satisfaction of a debt which was found to be binding on the family, and different considerations were, therefore, applicable. It cites a passage from that judgment, which forms a part of the statement of the grounds of the action rather than of decision, and the question now at issue was not in issue there. A reference has also been made to the decisions in *Gadadhar* v. *Ghana Shyam Das* (7) and *Hari Ram* v. *Bishnath Singh* (8), but in the former case the property had already passed out by sale, and in the latter case the debt was found to have been incurred for the benefit of the family.

The decisions in *Madhusudan Das* v. *Iswari* (9), *Peda Venkanna* v. *Sreenivasa Deekshatulu* (10) and *Hanmant Kashinath* v. *Ganesh Annaji* (11) have also been brought to our notice, along with a decision of this Court in *Mohan Lal* v. *Bala Prasad* (Ex. F. A. No. 158 of 1920). But all those decisions proceed on the principle that the decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (1) could not be deemed to have overruled the previous decisions of their Lordships in the earlier cases, and in two of them the learned Judges profess to abide by the earlier decisions till there was some further pronouncement on the part of their Lordships. It is necessary here to observe that the earlier cases were either cases in which the property had passed out of the family by sale, to which different considerations applied, or cases in which an attempt had been made to enforce a mortgage, after the death of the mortgagor, against his sons.

In *Girdharee Lall* v. *Kantoo Lall* (12) the property had already passed out of the family for a consideration, the bulk of which had been taken for valid necessity. In *Musammat Nanomi Babuasin* v. *Modun Mohun* (13) their Lordships of the Privy Council pointed out that sufficient care had not always been taken to distinguish between the question how far

(2) 48 Ind. Cas. 914 ; 5 O. L. J. 691.
(3) 51 Ind. Cas. 119 ; 41 A. 529 ; 1 U. P. L. R. 52; 17 A. L. J. 706.
(4) 43 Ind. Cas. 291 ; 20 O. C. 311 ; 5 O. L. J. 9.
(5) 64 Ind. Cas. 75 ; 43 A. 496 ; 19 A. L. J. 431 ; 3 U. P. L. R (A.) 80 ; (1922) A. I. R. (A.) 323.
(6) 39 Ind. Cas. 252 ; 21 M. L. T. 222 ; 32 M. L. J. 133 ; 15 A. L. J. 147 ; (1917) M. W. N. 193 ; 21 C. W. N. 442 ; 25 C. L. J. 220; 19 Bom. L. R. 290 ; 44 C. 524 ; 44 I. A. 1 (P. C.).
(7) 47 Ind. Cas. 212 ; 3 P. L. J. 533.
(8) 22 A. 408 ; 22 A. W. N. (1900) 158 ; 9 Ind. Dec. (N.S.) 1308.
(9) 61 Ind. Cas. 25 ; 48 C. 841 ; 24 C. W. N. 949.
(10) 43 Ind. Cas. 225 ; 41 M. 136 ; 22 M. L. T. 334; 33 M. L. J. 519 ; 6 L. W. 649 ; (1918) M. W. N. 55.
(11) 51 Ind. Cas. 612 ; 43 B. 612 ; 21 Bom. L. R. 435.
(12) 1 I. A. 321 ; 14 B. L. R. 187 ; (P. C.) ; 22 W. R. 56 ; 3 Sar. P. C. J. 380.
(13) 13 I. A. 1 ; 13 C. 21 (P. C.) ; 10 Ind. Jur. 151 ; 4 Sar. P. C. J. 682 ; 6 Ind. Dec. (N.S.) 510.

KISHEN SINGH *v.* CHHAJJU SINGH

the entirety of the joint estate was liable to answer the father's debt and the question how far the sons could be precluded by proceedings taken by or against the father alone from disputing that liability, and they declared that the decisions had for some time established the principle that the sons could not set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts, if not tainted with immorality. In *Bhagbut Pershad* v. *Musammat Girja Koer* (14), *Meenakshi Nayadu* v. *Immadi Kanaka Goundan* (15) and *Babu Mahabir Pershad* v. *Mahsewar Nath Sahai* (16) the ancestral property had similarly passed out of the family by virtue of execution sales, the validity of which could not have been questioned except on the ground that the debts in satisfaction of which the sales took place had been incurred for illegal or immoral purposes. It is unnecessary to refer to decisions in *Karan Singh* v. *Bhup Singh* (17), *Babu Singh* v. *Bihari Lal* (18) and *Indar Pal* v. *The Imperial Bank* (19), because the authority of those decisions has been shaken by the later decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1).

If a further pronouncement was needed, it is supplied by the recent decision of their Lordships in *Chet Ram* v. *Ram Singh* (20), where the view taken by this Court in *Ram Singh* v. *Chet Ram* (3) on this matter has been affirmed. In that case a mortgage of the family property made by a grandfather was followed by a sale by him of the equity of redemption to the mortgagee three years later, which was attested by his sons, and on the validity of the mortgage and the subsequent sale being questioned by the grandsons of the mortgagor or vendor, their Lordships repelled the contention that, although by the rules of the *Mitakshara* a mortgage was at its date an invalid deed in so far as purporting to encumber the joint family property, yet when it purported to be the consideration of a sale, it became then a just and legal consideration on the principle of *antecedent debt*." They then proceeded to consider whether by reason of the doctrine of pious obligation the liability of the family property could be enforced, and, after referring to their decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), in which a similar appeal to the pious obligation doctrine was made during the father's life-time, observed that the doctrine could not be invoked against grandsons in the life-time of sons. The doctrine of antecedent debt, resting as it does on the theory of pious obligation, is only intended for the protection of third parties, who may have acquired rights in good faith in the family property, and if a vendee cannot invoke it for validating a sale effected in lieu of an invalid antecedent mortgage in his own favour, it is still less open to a creditor, whose mortgage has been declared to be invalid, to recover the debt represented by that mortgage, while the mortgagor is alive, from the shares of his sons, who have been exempted from liability, out of the very property the mortgage of which has been declared to be unenforceable. The debt, for the payment of which this liability is sought to be enforced, is in no sense an antecedent debt. It is the very debt, for the re-payment of which the mortgage was made; and if the doctrine of pious obligation cannot be invoked to support the mortgage, it can hardly be invoked during the father's life-time to enforce the liability of the family property other than the interest of the debtor for its re-payment.

We allow the appeal accordingly, and, modifying the order passed by the Courts below, direct that execution shall not proceed against the shares of the appellants in the family property, such shares being two-thirds of the property attached and sought to be sold. The appellants will get their costs from the decree-holders-respondents here and hitherto. The execution can proceed against the remaining one-third share of Kallu Singh.

K. S. D. *Appeal allowed.*

(14) 15 I. A. 99; 15 C. 71; 5 Sar. (P. C.) 7 P.C.J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062.
(15) 16 I. A. 1; 12 M. 142; 5 Sar. P. C. J. 271; 13 Ind. Jur. 9; 4 Ind. Dec. (N.S.) 448.
(16) 17 I. A. 11; 17 C. 584; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N.S.) 929.
(17) 27 A. 16 (F. B.) 1 A. L. J. 310; A. W. N. (1904) 151.
(18) 30 A. 156; A. W. N. (1908) 61; 5 A. L. J. 175.
(19) 28 Ind. Cas. 593; 37 A. 214; 18 A. L. J. 211.
(20) 67 Ind. Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P.C.) 64; (1922) A. I. R. (P.C.) 347; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79.

HAJI MOHAMMUDIN AND COMPANY *v.* THE EASTERN JAPAN TRADING COMPANY

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL NO. 77 OF 1922
IN SUIT NO. 1554 OF 1922.

July 20, 1922.

Present :—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Thomas Richardson, Kt.

HAJI MOHAMMUDIN AND COMPANY —DEFENDANTS—APPELLANTS
versus
THE EASTERN JAPAN TRADING COMPANY—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XXXVII, rr.* 5, 6—*Letters Patent* (*Cal.*) *cl.* 15—*Order for security and in default for attachment, whether Judgment—Appeal, whether competent—Procedure.*

On an application by the plaintiffs alleging that the defendants were disposing of their stock-in-trade with a view to obstruct or delay the execution of any decree which might be passed against them, the Court made an order calling upon the defendants to show cause why they should not furnish security for the claim and costs of the plaintiff or why in default the stock-in-trade should not be attached until the final determination of the suit. The defendants having shown cause, the Court made its order absolute. The defendants appealed :

Held, (1) that the order, in so far as it directed attachment of the property, was a judgment and was appealable but in so far as it directed security to be furnished it was not appealable ; [p. 243, col. 2.]

(2) that inasmuch as the order for security had been complied with, the order as to the attachment of the property was infructuous and the appeal was also, therefore, the infructious. [p. 243, col 2.]

Per Sanderson, C. J.—It was intended by those, who framed the Code, that where the Court confines its order to a direction that the defendant should give security within a fixed time, there should be no appeal from that order inasmuch as O. XXXVII, r. 5 is omitted from the provisions of O XLIII, r. 1 But where the Court makes an order that the defendants' property should be attached before judgment, the Code provided that there should be an appeal inasmuch as O. XXXVIII, r. 6 is specifically mentioned in O. XLIII, r. 1. [p. 243, col. 2.]

Appeal from an interlocutory order of Mr. Justice Buckland.

Mr. *B. C. Mitter*, for the Appellants.

Mr. *B. K. Ghose*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal from an order of my learned brother Mr. Justice Buckland, against the defendants in a suit. The suit was brought for a balance alleged to be due in respect of certain drafts accepted by the defendants in consideration of certain goods which had been supplied by the plaintiffs to the defendants. The plaintiffs made an application to the learned Judge, based upon an affidavit whereby the plaintiffs alleged that the defendants were disposing of their stock-in-trade with a view to obstruct or delay the execution of any decree which might be passed against them, and the learned Judge, in the first instance, made an order, dated the 8th May 1922. By that order the defendants were called upon to show cause why they should not furnish security for the claim and costs of the plaintiffs or why, in default, their stock-in-trade at 55-11, Canning Street, should not be attached until the final determination of the suit or until the further order of the Court, the plaintiffs, by their Advocate, undertaking to indemnify the defendants from any damage which they might sustain by reason of the *ad interim* injunction thereinafter mentioned.

The defendants appeared and put in affidavits and the matter was heard by the learned Judge and then he made the following order on the 25th May 1922 : "It is ordered that the defendant firm do at once give security to the satisfaction of the Registrar of this Court to the extent of the plaintiff firm's claim and costs in this suit and that in default thereof a writ of attachment do issue out of, and under the seal of, this Court commanding the Sheriff of Calcutta to attach until the final determination of this suit or until the further order of this Court the stock-in trade of the defendant firm lying at No. 55-11, Canning Street."

The learned Counsel for the plaintiffs, who are the respondents in this Court, has raised the preliminary point that there is no appeal from this order. In my judgment, having regard to the form in which the order is drawn, there is an appeal from this order. The order in its present form could not have been made by the learned Judge without having recourse to r. 6, O. XXXVIII of the Code of

Civil Procedure. By O. XLIII, r. 1, it is provided that an appeal shall lie from the following orders under the provisions of section 104 and clause (*q*) is: "an order under r. 2, r. 3 or r. 6 of O. XXXVIII." It is clear, therefore, that the Code provides that there should be an appeal where an order is made by a Court under O. XXXVIII, r. 6, attaching the property of one of the parties, and, in my judgment, it may be said that that is a judgment within the meaning of clause 15 of the Letters Patent from which an appeal lies to this Court. But it is necessary to examine the order more closely. The first order of the learned Judge may be divided into two parts. The defendants, in the first instance, where called upon to show cause why they should not furnish security and as regards this matter the final order of the learned Judge was, that they were directed to give security at once to the satisfaction of the Registrar. As far as that part of the order is concerned, in my judgment, it was made under the provisions of O. XXXVIII, r. 5. That order provides that in certain events and under certain conditions the Court may direct the defendant within a time to be fixed by it either to furnish security in such sum as may be specified in the order or to appear and show cause why he should not furnish security. In my judgment, O. XXXVIII, r. 5 gives the Court jurisdiction to call upon the defendant to show cause why he should not furnish security and if the defendant fails to show cause to the satisfaction of the Court, the Court has jurisdiction under that rule to direct him to furnish security within the time specified by the Court. Then, r. 6 provides that "where the defendant fails to show cause why he should not furnish security, or fails to furnish the security, required within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree, which may be passed in the suit be attached." It seems to me that the only power which the Court has under that rule is to make an order for the attachement of the property. It is r. 5, which gives the Court power to direct security to be given and it is r. 6, which gives the Court power to attach the property; and it seems to me that this interpretation is borne out by the form which is to be found in First Schedule, Appendix F, No. 7 of the Civil Procedure Code. It seems to me, therefore, that it was intended by those who framed the Code that, where the Court confines its order to a direction that the defendant should give security within a fixed time, there should be no appeal from that order insamuch as O. XXXVIII, r. 5, is omitted from the provisions of O. XLIII, r. 1. But where the Court makes an order that the defendant's property should be attached before judgment, the Code provided that there should be an appeal inasmuch as O. XXXVIII, r. 6, is specifically mentioned in O. XLIII, r. 1. Consquently, in my judgment, taking the provisions of the Code of Civil Procedure as a guide, it may resonably be held that the orderi in so far as it directs the attachment of the property, is a judgment and is appealable, but in so far as it directs security to be furnished, it is not appealable.

In this case, the defendants have complied with the order that they should deposit security, and the result is that the other portion of the order, which directs the attachment of the property of the defendants, is infructuous and although it is, in my judgment, an appealable order, we are entitled to take the facts into consideration; and when it appears upon such consideration that the order as to the attachment of the property is infructuous, inasmuch as the order for the security has been complied with, in my judgment, there is no course open to this Court except to dismiss the appeal.

The appeal is, therefore, dismissed with costs.

Richardson, J.—I agree. Rule 6, of O. XXXVIII, empowers the Court, in the events stated, to direct the attachment of the defendant's property. The power given by r. 5, to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause why he should not furnish security carries with it as an incident the power, after hearing the defendant, to confirm the order that security be furnished. Under its general powers the Court may then, if necessary, extend the time for the furnishing of the security.

Where the defendant fails to show cause why he should not furnish security, the Court may

under r. 5, direct finally that security be furnished or in the alternative, under r. 6, direct the attachment of the defendant's property. The power of attachment also exists if the required security is not furnished.

The provisions of the Code do not, in my opinion, contemplate an appeal from an order directing the defendant to furnish security. Rule 5 is omitted from O. XLIII, r. 1, clause (*q*). An appeal lies from an order of attachment made under r. 6.

In the present case the order may be appealable so far as it is a conditional order of attachment, but such an appeal would be necessarily infructuous, because, security having in fact been furnished, there is no operative order of attachment and the remainder of the order is merely an order for the furnishing of security not appealable either under the Code or as a judgment under the Letters Patent.

I agree with my Lord that the appeal should be dismissed.

K. S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 82 OF 1922.

April 4, 1923.

Present :—Mr. Justice Lentaigne and Mr. Justice Heald.

BON KWI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAYEK YON AND OTHERS—DEFENDANTS—RESPONDENTS.

Chinese Buddhists—Widow—Succession — Chinese Customary Law.

Under Chinese customary law, in cases where there are children, a widow takes no share in her deceased husband's estate. She has a claim for maintenance against the estate, and possibly, in certain cases, certain other claims, but the estate belongs to the children.

Appeal against the decree of the District Court, Pyapon, in Civil Suit No. 38 of 1921.

Messrs. *Giles* and *Ormiston*, for the Appellants.

Mr. *Villa*, for the Respondents.

JUDGMENT.—It is admitted by both sides that the only question now raised in this appeal is whether or not the wife of a Chinese Buddhist is, on his death, entitled to any share in his estate. The grounds of appeal alleged that the first three appellants were entitled to an extra share of the estate, but this ground was abandoned at the hearing in this Court.

The authorities on the subject of the widow's share were considered in the case of *Maung Po Maung* v. *Ma Pyit Ya* (1), recently decided by this Bench, and the conclusion was reached that, under Chinese customary law, in cases where there are children, the widow takes no share in the deceased husband's estate. She has a claim for maintenance against the estate, and possibly, in certain cases, certain other claims, but the estate belongs to the children. If she is not maintained, she can of course sue the persons in whose hands the estate is, for maintenance.

In the present case, since the deceased was a Chinese Buddhist, the Chinese customary law would apply to his estate but I would hold that the lower Court was wrong in finding that the widow was entitled to a one-third share of the estate in suit.

I would, therefore, modify the preliminary decree so as to declare that each of the first three appellants is entitled to a one-fifteenth share of the estate and the fourth appellant is entiled to a one-fifth share. I would order that the costs be paid out of the estate before partition.

W. C. A. *Decree modified.*

(1) 74 Ind. Cas. 933 ; 2 Bur. L. J. 79 R. 161 ; (1923) A. I. R. (R.) 180.

BOMBAY HIGH COURT.

CIVIL APPEAL No. 314 OF 1922.

December 13, 1922.

Present :—Sir Norman Macleod, Kt, and Mr. Justice Crump.

KASTURIBAI BHRATAR ONKARDAS MARWADI—APPELLANT
versus
G. I. P. RAILWAY COMPANY AND OTHERS—RESPONDENTS.

Tort—Wrongful detention—Measure of damages—Extravagant claim—Amount awarded substantial—Costs.

Plaintiff sued the G. I. P. Railway and various Officials of the Railway Company claiming Rs. 25,000 as damages on the ground that she was wrongfully detained by the defendants on account of her travelling in a first class compartment of a Railway carriage while holding a second class ticket. It appeared that she had been put into a first class compartment by the officers of the Railway Company. The Court having awarded Rs. 1,200, plaintiff appealed.

***Held*, (1) that the plaintiff was entitled to damages but it was not a case in which vindictive damages could be claimed from the Railway Com-not a pany or their servants.**

All that was required was for their Court to show by the amount awarded that it considered that the action of the Railway Company and their servants could not be justified, and, therefore, it was necessary that substantial sum should be awarded, and nominal sum.

(2) that the amount awarded was a substantial sum :

(3) that the claim as originally made being extravagant, plaintiff was liable to pay so much of the costs which were incurred by the defendants owing to the extravagance of her claim.

Appeal against the decision of Sub-Judge, Jalgaon in suit No. 430 of 1920.

Messrs. *Coyajee* and *D. C. Virkar*, for the Appellant.

JUDGMENT.—The plaintiff filed this suit against the G. I. P. Railway Co., and various officials of the Ry. Co., at Bhusawal claiming Rs. 25,000 damages on the ground that she was detained at Bhusawal wrongfully by the Railway Co., and its servants, for refusing to pay excess fares on account of her having travelled in a first class compartment with a second class tickets. The facts are practically admitted. There was a mistake made owing to certain circumstances. The ladies were put into a first class compartment by the officials of the Railway Co., at the Shegaon station between Nagpur and Bhusawal. That fact was not sufficiently recognised when the party arrived at Bhusawal. The Judge has found in favour of the plaintiff. He has considered the question of damages, and has allowed the plaintiff Rs. 1,200 damages from defendants 1, 2, 4, and 7, that is to say the Railway Co, the Railway Guard and the Station Master and ths Ticket Collector at Bhusawal, and Rs. 100 from the Ticket Collector on the ground the he had annoyed and insulted the plaintiff and used improper language. Undoubtedly, the whole case was very unfortunate for all parties. But it is not one of those cases in which vindictive damages could possibly be claimed from the Railway Co., or their servants and on the face of it a demand for Rs. 25,000, even if everything the plaintiff set out to prove had been proved, would be absurd. All that was required was for the Court to show by the amount awarded that it considered that the action of the Railway Co., and their servants could not be justified, and, therefore, it was necessary that a substantial sum should be awarded, and not a nominal sum. We think the amount awarded was a substantial sum, and that the claim as originally made was extravagant. The result would be that the plaintiff would have to pay so much of the costs which were incurred by the defendants owing to the extravagance of her claim. The order regarding costs was a perfectly proper order to be made in the circumstances. The result of her suit has fallen short of the plaintiff's expectation, but it is undoubtedly her own fault in having exaggerated her claim. If she had demanded a reasonable sum of damages against the Railway Co., it is possible that the Railway Co., would have paid without a suit. But the plaintiff having sued for an exaggerated claim the Railway Co., was bound to defend the case. We see, therefore, no reason to allow the case to go further as in no case do we think, after reading the judgment, that the amount of damages awarded to the plaintiff could be increased, as not being a proper and sufficient sum. The appeal is dismissed.

K. S. D. *Appeal dismissed.*

MASITA BIBI *v.* KHUDA BAKSH

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 141 OF 1921.

July 6, 1922.

Present:—Mr. Justice Sulaiman.

Musammat MASITA BIBI —PLAINTIFF —APPELLANT

versus

KHUDA BAKSH —DEFENDANT— RESPONDENT.

Oaths Act (*X of* 1873), s. 9, *whether mandatory—Discretion of Court—Agreement to refer by agent, validity of—Agreement to abide by statement of third person, whether reference to arbitration—Civil Procedure Code* (*Act V of* 1908), *Sch. II, para.* 1.

Section 9 of the Oaths Act is not mandatory and under special circumstances the Court has a discretion to refuse to refer the matter to the referee.

Wasi ul-Zaman Khan v. *Faiza Bibi*, 32 Ind. Cas. 848 ; 38 All. 131 ; 14 A. L. J. 38, followed.

The agent or vakil of a party may bind the party by an agreement under section 9 of the Oaths Act.

During the pendency of an appeal the parties made a statement that the case may be decided in accordance with the statement of a particular person, but the statements of the parties were not recorded and before the matter could be referred to the person named the defendant made an application that as the referee had colluded with the other side he desired to withdraw from the agreement. On this the Court made an order that the case should be proceeded with and decided it on the merits ;

Held, (1) that the agreement between the parties did not amount to a reference to arbitration within the meaning of para. 1, of schedule II to the Civil Procedure Code;

(2) that as it was not clear that the statement of the referee by which the parties had agreed to be bound was to be on oath or solemn affirmation, the agreement did not fall within the scope of section 9 of the Oaths Act ;

(3) that in any case the Court was not bound to refer the matter to the referee as the provisions of section 9 of the Oaths Act were not mandatory.

Appeal from a decree of the Court of Small Causes, Allahabad, dated the 30th October 1920.

Mr. *Mukhtar Ahmad*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT :—This is a plaintiff's appeal arising out of a suit for possession of some land by demolition of certain constructions made by the defendant. The defendant had denied the plaintiff's title and the main issues raised in the case were questions of fact. Both the Courts below have dismissed the plaintiff's claim. So far as the decision on the merits is concerned, it is not challenged in second appeal before me and ground No. 3, taken in respect to the vague decision to which the finding has been arrived at, has not been pressed. The only point that has been strongly contended before me was that, in view of the agreement arrived at between the parties on the 14th of September, 1920, under which they had agreed to abide by the statement of one Muhammad Hadi Hasan, the lower Appellate Court was not justified in going behind that agreement and disposing of the appeal on the merits.

It appears that, on the 14th of September 1920, when the learned Judge of the Small Cause Court went to make a local inspection, a statement was made before him by the defendant-respondent on the one side and by the vakil as well as the husband of the plaintiff-appellant on the other to the effect that the case should be decided in accordance with what Muhammad Hadi Hasan, Mukhtar, had stated. On that date, however, no proceeding was recorded by the learned Judge of the Small Cause Court. Next day, on the 15th of September, 1920, an application was presented by the defendant to the Court to the effect that, although he had agreed to the decision of the case being left on the statement of Mahammad Hadi Hasan, Mukhtar, the day before, yet inasmuch as he had come to know that the said witness was under the influence and in collusion with the plaintiff he withdrew from the agreement. On this application the learned Judge of the Small Cause Court passed an order that, inasmuch as the defendant-respondent was not willing to abide by the statement of Muhammad Hadi Hasan, Mukhtar, the case should be put up for disposal. After this, the appeal was argued on both sides and disposed of on the merits.

The point raised on behalf of the plaintiff-appellant is that the lower Appellate Court should not have allowed the defendant to withdraw from his previous agreement. It is first contended this agreement amounted to an agreement to refer the matter in dispute to an

arbitration. This, in my opinion, is not correct. In the first place, from the way in which the agreement is entered in the *Robkar* of the Court and the application of the defendant dated the 15th of September 1920, it appears that the parties had agreed to abide by the statement of Muhammad Hadi Hasan, Mukhtar, and not that they had agreed to refer the matter in dispute for decision by Muhammad Hadi Hasan, Mukhtar. Futhermore, no application in writing showing the agreement to refer the matter in dispute was ever filed in Court, nor did the defendant ever apply to the Court to refer the matter to Muhammad Hadi Hasan, Mukhtar. The provisions of section 1 sub-clauses (1) and (2) of Schedule II of the Civil Procedure Code were, therefore, not complied with. I am, therefore of opinion that there was not a reference to arbitration by Muhammad Hadi Hasan, Mukhtar, and accordingly the Court was not deprived of its jurisdiction to hear the appeal. It is next contended that, even if it be not a reference to arbitration, the case fell under section 9 of the Oaths Act and strong reliance was placed on the case of *Chhiddu* v. *Kuar Sen* (1), where it was pointed out by Aikman, J., that when a party to a suit has made a reference of this kind he should not be allowed arbitrarily to withdraw himself from the reference, specially when that party produced no evidence whatsoever to support the allegation that the referee had colluded with the opposite party.

There are, it appears to me, many difficulties in the way of the appellant. First of all, it is not clear that the agreement between the parties was that they would abide by Muhammad Hadi Hasan's statement "on oath or solemn affirmation." Neither the *Robkar* nor the application of the defendant mentions this. If they agreed merely to abide by the statement of this referee even though not 'on oath or solemn affirmation' then neither section 8, nor section 9, of the Oaths Act would be applicable. Section 9 is by no means mandatory and it seems that, under certain special circumstances, the Court may have discretion to refuse to refer the matter to the referee. The way in which section 9 is worded is significant, and it says that if any party offers to be bound by any such oath or solemn affirmation *the Court may if it thinks fit* ask such party or witness, etc. It seems to me, therefore, that it was open to the lower Appellate Court, if it was satisfied that there was sufficient reason for it, to refuse to refer the matter to the referee. In the present case, inasmuch as no judicial proceeding had been recorded, it might very well have been that the so-called agreement was an informal talk not reduced to writing, and, in any case, from the fact that the respondent had the very next day withdrawn from the agreement and revoked it, I am unable to say that the Court was wrong in exercising its discretion and in ordering that the appeal should be disposed of on the merits. The conduct of the appellant herself also shows that she did not insist that the matter should necessarily be referred to a referee. No application was made on her behalf pressing the Court to refer the matter to the witness, nor is there any reference in the judgment which would go to show that any objection was taken on her behalf at the time of the argument.

The case of *Chhiddu* v. *Kuar Sen* (1), and the previous cases referred to therein, are all cases in which the Court had got the statement of the referee actually recorded and disposed of the case in accordance with it. The present case, however, stands on a different footing. Here the Court itself did not get the statement recorded but has disposed of the appeal on the merits. The question, therefore, is whether the Court had jurisdiction to proceed in the way in which it has done, or whether its procedure was illegal or improper. I am unable to say that the Court either had no jurisdiction or that it had acted in an improper manner.

On behalf of the respondent it was also urged that there was no person duly authorised who could agree to this reference on behalf of the plaintiff and that it is only the party and not her agent who can agree to a reference under section 9 of the Oaths Act. I am, however, of opinion that the *vakalatnama* executed by the plaintiff gave sufficient authority to the vakil to proceed with the case in any way he liked, and that, whatever he did in the case, was accepted as binding on the plaintiff. The case is similar to that of *Wasi-*

(1) 29 A. 49 : 3 A. L. J. 654; A. W. N. (1906) 280.

ul-Zaman Khan v. *Faiza Bibi* (2) which is also an authority for the contention that a party's agent may bind the party by an agreement under section 9 as much as a party herself. For the reasons given, however, I am of opinion that the decree of the lower Appellate Court cannot be disturbed in second appeal.

The result is that this appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(2) 32 Ind. Cas. 343 ; 38 A. 131; 14 A. L. J. 38.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1744 OF 1920.

May 5, 1923.

Present :—Mr. Justice Harrison and Mr. Justice Zafar Ali.

JHUMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DULIA AND OTHERS—DEFENDANTS RESPONDENTS.

Bengal Regulation XVII of 1806, *proceedings taken under, effect of—Mortgage—Foreclosure, decree for—Redemption, suit for, maintainability of—Transfer of Property Act* (*IV of* 1882), *principles of, applicability of, to Punjab.*

The principles of the Transfer of Property Act are applicable to the Punjab, but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to the non-observance of prescribed formalities.

In 1882, defendant who was the mortgagee of the land in dispute, took action under Bengal Regulation XVII of 1806, alleging that the mortgage-deed contained a clause of conditional sale. Notice was duly issued and after the expiry of the year of grace defenddant brought a suit for possession as owner, obtained a decree and was put in possession of the mortgaged property as owner. As a matter of fact, the mortgage-deed did not contain any clause of conditional sale. In 1919 the mortgagor brought a suit to redeem the property :

Held, that the fact that the mortgage-deed did not contain a clause of conditional sale was immaterial, as the defendant having obtained a decree for possession as owner, the mortgage must be deemed to have been extinguished and no rights survived to the mortgagor.

Second appeal from the decree of the Additional Judge, Rohtak, at Hissar, dated the 5th May 1920, reversing that of the Subordinate Judge, 2nd Class, Rohtak, dated the 14th October 1919, and dismissing the plaintiffs' suit.

Mr. *Manohar Lal*, for the Appellants.

Mr. *C. L. Gulati*, for the Respondents.

JUDGMENT.—The facts of this case are that in the year 1878 the land in suit was mortgaged to the predecessors-in-title of the defendants by the father of the plaintiff. The mortgage was without possession, but in 1879 the mortgagees were put in possession by the Judicial Assistant Commissioner. In 1882 the mortgagees took action under Regulation XVII of 1806 alleging that the deed contained a clause of conditional sale, and a notice was duly issued and the year of grace expired on the 13th of May 1883. As a matter of fact, the mortgage contained no such clause and it is established by *Bhag Singh* v. *Basawa Singh* (1) that the words used therein did not create a mortgage by way of conditional sale. In the same year the mortgagees brought a suit for possession and were given a decree '*baibat*' in accordance with which they were formally put in possession as owners by the Tahsildar. It is now contended that, inasmuch as the proceedings under the Regulation were irregular and the form of the final decree was not that prescribed in O. XXXIV, r. 3 of the present Code of Civil Procedure and in the Transferof Property Act, the mortgage is still alive and the mortgagor has a right to redeem, which he can now enforce. Counsel has quoted ample authority for his contention, more especially *Alimea Chowdhuri* v. *Roshan Ali* (2), *Somesh* v. *Ram Krishna* (3), *Narayana Reddi* v.

(1) 50 P. R. 1906; 3 P. W. R. 1906.
(2) 3 C. L. J. 323.
(3) 27 C. 705; 4 C. W. N. 699; 14 Ind. Dec. (N. S.) 463.

Papayya (4) and *Sulig Ram* v. *Muradan* (5) and it is clear that had the suit been brought where the Transfer of Property Act was in force at the time of its institution the decree obtained would not debar the mortgagor from pursuing his remedy and redeeming the property. In the Punjab, however, the position is quite different. The principles of the Transfer of Property Act certainly apply but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to the non-observance of prescribed formalities. It was clearly the practice at the time the suit in question was instituted to bring such a suit for possession as owner. It is true that the judgment speaks of a decree for possession being given in lieu of the sum due on the mortgage-deed but the decree itself which is very brief merely states that a decree '*baibat*' is given. These words mean a decree for possession as owner. The fact that the clause of conditional sale was not really present is immaterial, for the decree was quite clear and in accordance therewith the mortgagees became owners and were put in possession, as such, and have been in possession ever since, and cannot now be disturbed. The mortgage was extinguished and no rights survive in the mortgagor.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(4) 22 M. 133; 8 M. L. J. 205; 1 Ind. Dec. (N. S.) 91.

(5) 25 A. 231; A. W. N. (1903) 20.

RANGOON HIGH COURT.

SPECIAL SECOND APPEAL NO. 83 OF 1922.

June 20, 1922.

Present :—Mr. Justice Maung Kin.

AUNG KAING SAING AND ANOTHER—APPELLANTS

versus

MAUNG SAN AND OTHERS—RESPONDENTS.

Mortgage—Gift by mortgagors—Sale by donee—Vendee, rights of—Registration, whether amounts to notice.

The mortgagors, defendants Nos. 1 and 2, remained in possession of the land in suit for six years as mere squatters paying revenue to Government. They then gifted the land to their children, defendants Nos. 3 and 4, who occupied the land, worked it, paid revenue thereon for 3 years, and then sold it to defendant No. 5 who made no inquiries as to their title. Plaintiffs mortgagees sued on foot of his mortgage :

Held (1) that defendants Nos. 1 and 2 had no doubt the right to transfer their interest in the property to anybody they pleased ;

(2) that defendants Nos. 3 and 4 must be held to have taken their property subject to the mortgage in favour of the plaintiffs if they had legal notice of it and defendant No. 5 got nothing more than her vendors lid.

(4) that as the mortgage was by a registered deed the defendants must be deemed to have notice of it and plaintiffs were entitled to succeed.

Special appeal against the decree of the Divisional Court, Tenasserim.

Mr. *Ormiston*, for the Applicants.

Mr. *Ginwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a mortgage-decree upon the mortgage of a house and a piece of paddy land, effected by the first and second defendants.

The controversy before me is in connection with the paddy land only.

The mortgagors remained in possession of the land for six years. Up to that time they had not acquired the status of a landholder under the provisions of the Lower Burma Land and Revenue Act. They were mere squatters, paying revenue annually to the Government. The first defendant had to go to the civil jail at the instance of his creditors, but before he did so, he transferred the land by a *pyatpaing* to the third and fourth defendants who were his children. The *pyatpaing* is not before me, but the history of the land shows that the transfer was made by way of an outright gift, as the words used show. The third and fourth defendants occupied the land, worked it, paid revenue thereon for three years, and then sold the land under a registered deed, to the fifth defendant.

It is quite clear that, before buying the property, the fifth defendant made no enquiries into the title of her vendors. A proposal was made by one of them, and she relied on what he said, and then bought the property.

The first question for consideration is whether the third and fourth defendants went into possession of the land after the rights of the first and second defendants had ceased. If the question is answered in the affirmative, then the plaintiffs will have no further interest in the land as mortgagees. But the facts do not, in my opinion, justify an affirmative answer. As there was a transfer from the first and second defendants to the third and fourth defendants, whatever the nature of the transaction may have been, this at least is certain that the third and fourth defendants went into occupation of the land in order to work it for their own benefit with the consent of the first and second defendants.

That being the case, there was a transfer of whatever interest the first and second defendants had in the land to the third and fourth defendants. That the first and second defendants had the right to transfer their interest in the property to anybody they pleased, there is no doubt: See *In re Maung Naw* v. *Ma Shwe Hmat* (2). What the fifth defendant is getting under her registered deed is also what the third and fourth defendants had in the property, that is, mere possessory title, the same kind of title as the first and second defendants had when they consented to the third and fourth defendants going upon the land. Therefore, the third and fourth defendants must be held to have taken their property subject to the mortgage in favour of the plaintiffs, if they can be held to have legal notice of it, and the fifth defendant gets nothing more or less than the third and fourth defendants got from the first and second defendants.

The mortgage was by a registered deed. If the fifth defendant had enquired into the title of her vendors, she would have discovered what title they really had in the property, and what their predecessors-in-title had, and also what they had done with it; that is to say, they would have discovered this registered mortgage and also the fact of there having been a transfer from the first and second defendants to her vendors. But, as I said before, she has not made any enquiry whatever. The position then is, she had no actual notice of the plaintiffs' mortgage. Can she be held to have constructive notice of the same? There is a Bench ruling by this Court in *Bank of Bengal* v. *Aung Tha Hla* (2), which is now under appeal before their Lordships of Privy Council (P. C. A. No. 149 of 1920). The appeal is still pending. In the meantime, I am bound by the ruling. It is there held that registration amounts to notice. That decision must be applied to this case. The result is that plaintiffs must succeed.

There will be an ordinary mortgage-decree, not only for the house but also for the paddy land. There will be a sale decree in the usual terms in respect of the house and the paddy land in suit, with costs throughout.

K. S. D. *Appeal allowed.*

(1) 80 Ind. Cas. 772; 8 L. B. R. 227; 8 Bur. L. T. 191

(2) 47 Ind. Cas. 774.

PRIVY COUNCIL.

APPEALS FROM THE BOARD OF REVENUE, AGRA AND OUDH.

April 10, 1922.

Present :—Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

JAI INDRA BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

BIJAI RAJ KUNWAR—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), S. 107—Rent-free grant—Will, construction of—Legatee, whether can repudiate terms of Will—Sir Land, meaning of—Privy Council record—Courts, duty of.

R, a *Taluqdar* of Oudh, made a Will which provided that in the event of *R* dying sonless, his brothers' son *J* shall be the owner and take possession of all his moveable and immoveable properties, and that his wife *B* shall get Rs. 500 per mensem from the estates in cash besides the *Sir* lands in her possession. Subsequently, *R* gifted *Mauza C* to *B* and applied to the Revenue authorities for mutation praying that the *Mauza* may be entered in her name as *muafi*. After the death of *R*, *J* having sued to assess the *Mauza* to rent, *B* sued for a declaration that she was entitled to hold it for her life rent-free;

JAI INDRA BAHADUR SINGH *v.* BIJAI RAJ KUNWAR

Held (1) That R intended by his Will to bequath to *B* an absolute estate for her life in the '*Sir* lands in her possession ' and not merely a right of tenancy other subordinate interest in them ;

(2) that in confirmation of his gift of *Mauza C* to his wife *B* rent-free for her life, *R* did by his will intend to bequeath and did bequeath to her the *Mauza* for her life as a proprietor and without any liability to have it assessed to rent ;

(3) that *J*, who took his interest in the Taluqa under the Will could not repudiate the condition of the Will that *Mauza C* should be held by *B* for her life rent-free.

Parbati Kunwar v. *Deputy Commissioner of Kheri*, 47 Ind. Cas. 394; 45 I. A. 111 ; 20 Bom. L. R. 1095 ; 5 O. L J. 433 ; 24 M. L. T. 292 ; 35 M. L. J. 525 ; 16 A. L. J. 865 ; 8 L. W. 586 ; 5 P. L. W. 302 ; 28 C. L. J. 249 ; 41 A. 541 ; (1918) M. W. N. 880 ; 23 C. W. N. 125 (P. C.), distinguished.

The word *Sir* as used in Oudh applies to the land frequently assigned to junior branches of a family for their support instead of breaking up the estate and giving them the ancestral shares to which they may be entitled.

It is the duty of the Court to exercise control upon the wholesale inclusion of irrelevant documents in the preparation of a record of appeal to the Privy Council.

Consolidated appeals from (*a*) a judgment and decree of the Board of Revenue for the United Provinces of Agra and Oudh, and (*b*) from a decree of the Court of the Judicial Commissioner, Oudh.

Messrs. *Dunne*, K. C., and *A. Jackson*, for the Appellant.

Messrs. *De Gruyther*, K. C., and *Kenworthy Browne*, for the Respondent.

JUDGMENT.—These are two consolidated appeals. In the earlier of these appeals Rani Bijai Raj Kunwar is the appellant, and Thakur Jai Indra Bahadur Singh is the respondent. It is an appeal from a decree or order of the 16th December, 1916, made by the Board of Revenue of the United Provinces of Agra and Oudh in appeal in a suit which was brought in the Court of the Deputy Commissioner of Kheri, on the 19th March 1915, by the then manager under the Court of Wards of the property of Thakur Jai Indra Bahadur Singh, then a minor, against Rani Bijai Raj Kunwar, to have Rs. 5,542-11-9 assessed as rent on *Mauza* Chhauch under section 107G of Act XXII of 1886. In the latter of the two consolidated appeals Thakur Jai Indra Bahadur Singh is the appellant and Rani Bijai Raj Kunwar is the respondent. It is an appeal from two decrees, of the 31st January and 30th August 1918, made by the Court of the Judicial Commissioner of Oudh in appeal in a suit which was brought in the Court of the Subordinate Judge of Lakhimpur, on the 27th July, 1915, by Rani Bijai Raj Kunwar against Thakur Jai Indra Bahadur Singh, for adeclaration that she was entitled to hold *Mauza* Chhauch for her life rent-free, under her deceased husband's Will, and that the *Mauza* was not liable to be assessed to rent during her life-time. It is to be mentioned here that a *chak*, which is within *Mauza* Chhauch, is known as *Chak* Khakra. That *chak* belongs to other persons ; in *Chak* Khakra neither of the parties to these consolidated appeals has or claims interest or title. Where *Mauza* Chhauch is later referred to in this judgment, it is to be understood that what is referred to is *Mauza* Chhauch. excluding *Chak* Khakra.

After the suppression of the Mutiny of 1857 the *taluqa* or estate of Mahewa, which included *Mauza* Chhauch, was, in the Oudh Summary Settlement, settled with Gajrang Singh ; he died in 1860, and his brother Girwar Singh succeeded to the estate. Girwar Singh died in 1865, and Balbhaddar Singh succeeded to the estate. Balbhaddar Singh died in 1898, and, on his death, his widow claimed to be entitled to the estate of Mahewa ; her claim was resisted by Rajindra Bahadur Singh, who was Balbhaddar Singh's son. He claimed to be entitled to the estate. These conflicting claims resulted in litigation, and ultimately the Board of the Judicial Committee of the Privy Council decided that Rajindra Bahadur Singh was entitled to the estate, and he entered into possession of the Mahewa estate in 1905 or 1906.

In the first Regular Settlement in Oudh *Mauza* Chhauch (except *Chak* Khakra) was, with plots of cultivated lands in eight other *Mauzas*, recorded under the heading "*sir*" as in the possession of the widow of Girwar Singh. By that entry in the Register it was meant that *Mauza* Chhauch and those other plots had been given to her by Girwar Singh for her

maintenance. Before the next Regular Settlement in Oudh the Revenue Authorities decided that in future in the Revenue Registers only such lands as were actually home-farm lands of the *Taluqdar* should be entered under the heading of " *sir*, " and accordingly *Mauza* Chhauch was then entered in the Revenue Register as "*muafi*"—that is, as rent-free land. When Raghubans Kunwar, widow of Balbhaddar Singh, took possession of the Mahewa estate under her claim of title, she was entered in the Revenue Register as *muafidar* of *Mauza* Chhauch.

After the decision in his favour of the Board of the Judicial Committee, Rajindra Bahadur Singh,on the 26th February 1906, obtained, as owner of the Mahewa estate, possession of *Mauza* Chhauch and of all those cultivated plots in the eight other villages.

Rajindra Bahadur Singh, as the owner of the estate of *taluqa* Mahewa, had powers to give, sell, mortgage or bequeath the *taluqa* or any part of it to whomever he pleased, but his widow, should he leave one, would be entitled to maintenance suitable to her condition as his widow. Rajindra Bahadur Singh in 1911 handed over to Rani Bijai Raj Kunwar, his wife, possession of *Mauza* Chhauch, and on the 1st September 1911, he presented a petition to the Revenue Authorities, which, so far as is material, was as follows :—

" 1. The petitioner is the absolute owner of *taluqa* Mahewa, district Kheri, and the village of Chhauch bearing the '*hadbast*' (boundary) No. 249 forms part of *taluqa* aforesaid. The petitioner has all proprietary powers in respect of his *taluqa*.

" 2. The petitioner has given the entire village of Chhauch to his wife as '*muafi*'. The revenue of this village would be paid from the income of the *taluqa* and the village would always remain in the possession of his wife, as revenue-free '*muafi*'.

"3. This application is, therefore, presented, and it is prayed that entries regarding mutation of names in favour of the aforesaid wife may be made in the Revenue department as herein prayed for and the village may be intered as '*muafi*' under cl. 6."

On that the Tahsildar reported, on the 10th November, 1911, to the Deputy Collector as follows :—

" *Sir*,—An application was made by Thakur Raj Indar Bahadur Singh,*Taluqdar* of Mahewa, to the effect that he had given *Mauza* Chhauch in *parganar* Kheri to his wife as *muafi*, that its revenue would be paid from the *taluqa*, and that it might be entered in the name of the Rani as *muafi*. An enquiry was made. A writing from the *Taluqdar* corroborates the contents of the application. The *Taluqdar* has given *Mauza* Chhauch to his wife, the Rani, as *muafi*. As no document has been executed, mutation proceedings cannot be taken. Of course, as reported by the office, entries can be made in papers, under clause 6. In my opinion, there is no harm in making entires in this way. Under clause 6 A, under the head of *muafi*, in the column of remarks, these words should be written : " The whole of this village has been given by the *Taluqdar* to the Rani as " *muafi* " for her ' maintenance.' Hence this report is submitted to sanction the entires aforesaid. "

Thereupon the Assistant Collector made the following order :—

" Claim for mutation of names in respect of *Mauza* Chhauch, pargana Kheri.

ORDER.—" I have no objection to the above being noted in the remarks column.

" (Sd.) M. Abdul Latif Khan, Assistant Collector, 1st class.

" 11*th December*, 1912. "

In the Register relating to *Mauza* Chhauch it was accordingly entered that the village was " rent-free land granted by the *zemindar*, " and under the heading " Remarks " that—"The whole of this village is by way of maintenance allowance of Bari Bahu Sahiba (the Rani Bijai Raji Kunwar) *muafi* on behalf of "*Talukdar*" (*Talukadar*). It is not contended, on behalf of Rani Bijai Raj Kunwar, that, by the petition of the 1st September, 1911, and those entries in the Register, any indefeasible title in *Mouza* Chhauch for her life was conferred on her by Rajindra Bahadur Singh, or that he could not thereafter have sued under Act XXII of 1886, as amended by Act IV of

1901, to have rent assessed upon the *Mauza*, but it is contended on her behalf that the petition of the 1st September 1911, and those entries in the Register consequent on ,it show that it was then Rajindra Bahadur Singh's intention that Rani Bijai Raj Kunwar should hold *Mauza* Chhauch for her life free of liability to pay rent. In fact, she held the *Mauza* from 1911 until his death rent-free.

Rajindra Bahadur Singh died on the 1st October 1912. Rajindra Bahadur Singh had, on the 14th June 1907, made his Will, which, so far as it is material, is as follows:—

"WILL: I, Thakur Rajindra Bahadur Singh, *Taluqdar* of Mahewa, son of Thakur Sheo Singh, resident of Garhi Prasadpur, portaining to *Mauza* Madhaia, *pargana* and district Kheri, declare as follows:—

"This borrowed life is uncertain, and God has not as yet blessed me with a son; but I have a daughter, three years old. I have a strong hope that He will grace me with a male child. Therefore, in order to avoid a dispute in future, I make a Will to the effect that if a son is born to ms, he will be the owner, and take possession of all my moveable and immoveable properties after my death that in case I get more sons than one, the eldest will be the owner of all my estate according to the rule of succession to the '*gaddi*' and the remaining sons will get allowance; that if no male child is born to me, then dear Jai Indar Bahadur Singh, *alias* Jhunnu Bhaiya, son of Kunwar Sheo Indra Bahadur Singh, who is the son of my own brother, shall be the owner, and take possession of all the moveable and immoveable properties owned and possessed by me at the time of my death, or to which I have a right of ownership or possession of any kind, or to which I may acquire a right in future, without the exception of anything or right; that *Musammat* Jai Raj Kunwar, my wife, shall get Rs. 500 per mensem from the estate in cash, besides the '*sir*' lands in her possession; that my wife shall be the owner, and take possession of all my personal goods, such as clothes, ornaments, utensils used in eating and cooking, articles of decoration of the residential house, etc.; that Rs. 250 per mensem shall be paid from the estate to my younger brother, Kunwar Sheo Indar Bahadur Singh, who is living with me up to this time, besides the '*sir*' lands possessed by him, and both these two allowances in cash shall be a charge on the estate, and the person in possession of the estate shall be liable for the same; that the person in possession of the '*taluka*' shall be responsible to pay Rs. 50,000 for the expenses of each of the daughters who may be unmarried at the time of my death; that if, God forbid, dear Jai Indar Bahadur Singh, aforesaid, die intestate without leaving a male child, then his nearest male heir descending from Mahendra Bahadur Singh, Narendra Bahadur Singh and Sheo Indar Bahadur Singh, will be entitled to succeed to the '*gaddi*' and to be the owner of all the estate."

Thakur Jai Indra Bahadur Singh is the nephew described in the Will as Jai Indar Bahadur Singh, and Rani Bijai Raj Kunwar is in the Will referred to as *Musammat* Jai Raj Kunwar, the testator's wife.

Thakur Jai Indra Bahadur Singh did not suceeed by right of inheritance to the Mahewa estate or to any part of it; his title depends on the Will, and such interest in the Mahewa estate as he has depends on the Will. He took under the Will, and not otherwise. On behalf of Rani Bijai Raj Kunwar it is contended that under the Will *Mauza* Chhauch (*Chak* Khakra excepted) passed to her for her life free of rent, and that *Mauza* Chhauch will not vest in Thakur Jai Indra Bahadur Singh until she had died, and that until that event shall have happened Thakur Jai Indra Bahadur Singh will not be the proprietor of *Mauza* Chhauch within the meaning of Act XXII of 1886, as amended by Act IV of 1901, or entitled to sue to have any rent assessed upon that *Mauza*. That contention depends upon the true construction of the Will, which involves the meaning of words in the Will which have been thus translated by the official translator: "That *Musammat* Jai Raj Kunwar, my wife, shall get Rs. 500 per mensem from the estate in cash besides the *sir* lands in her possession." That is the official translator's rendering of the vernacular words in the Will. In the judgment of the Board of Revenue of July 1916, the words in question are translated thus: "To my wife for life five hundred rupees per mensem besides *sirat maqbuza* will be given from the estate." In their Lordships' opinion the two

translations have the same meaning. *Sirat* is the plural of *sir*, and *sirat maqbuza* means *sir* lands in possession. It does not appear to have been doubted by any of the Courts in that the "*Sir* lands in her possession" passed by the Will to Rani Bijai Raj Kunwar as a rent-free estate for her life. But the question is, what did Rajindra Bahadur Singh mean by "*sir* lands in her possession" in his Will? That he intended by his Will to bequeath to Rani Bijai Raj Kunwar an absolute estate for her life in the "*sir* lands in her possession" and not merely a right of tenancy or other subordinate interest in them, and that he intended that she alone should be the proprietor of those lands during her life, their Lordships have no doubt.

The Courts in India who have had these suits before them arrived at different conclusions as to what Rajindra Bahadur Singh meant by the words "*sir* lands in her possession." The Deputy Commissioner of Sitapur, who tried the Revenue Court suit, in reference to the words "*sir* lands possessed by her," as he translated the Will, stated in his judgment that,—

"These last words must be taken to refer to the '*sir*' lands possessed by the Rani at the time of the testator's death. The village in suit is not *sir* land in the strict sense of the term, but I think there can be little doubt that the word '*sir*' is used by the testator in a loose sense, and signifies 'land held as "*guzara*."' This is not seriously disputed by the plaintiff. It is then clear that the testator wished that the defendant should continue to hold her '*guzara*' land rent-free for her life-time.

He, however, being of opinion that Thakur Jai Indra Bahadur Singh was proprietor, and was thus entitled to sue to have *Mauza* Chhauch assessed to rent, gave Thakur Jai Indra Bahadur Singh a decree assessing the rent. From his decree there was an appeal by Rani Bijai Raj Kunwar Singh to the Commissioner of the Lucknow Division, who in his judgment stated, in reference to Rajindra Bahadur Singh's Will:

"By his Will he bequeathed to his widow . . . and the *sir* or *guzara* land. . . . It had, before the *Talukdar's* death, been duly entered as *guzara* held rent-free.

"The present *Talukdar*, nephew of the late *Talukdar*, who is under the Court of Wards, succeeded to the property under the terms of the Will. He sues now to have rent assessed, as the rent-free *guzara* of his aunt, the widow of the testator.

"The Deputy Commissioner has decreed the claim. It appears to me that the suit should never have been brought. The present *Taluqdar*, as represented by the Court of Wards, is willing himself to be benefited by the terms of the Will. But he wishes to deprive his benefactor's widow of the benefit which was meant accure to her under the same Will. We must clearly take it that the defendant-appellant is entitled under the terms of the grant or Will to hold this village rent-free for her life."

The Commissioner of the Lucknow Division dismissed the Revenue Court suit. From that decree dismissing the suit Thakur Jai Indra Bahadur Singh appealed to the Board of Revenue. The Board of Revenue in their judgment said:

"It is urged by the respondent that under the Succession Act of 1865, she has devised (had devised to her) the land held by her as *sirat maqbuza*, and the effect was to give her a proprietary title for life. It is further urged that, as the village in suit was held by her in the same way as she had held the other lands at the time of the Will, that the result of the Will also was to confer on her a proprietary grant for life of this village. It may be admitted that the words *sirat maqbuza* in the Will were certainly intended to cover the rent-free grants held by her at the time of the execution of the Will. The appellant argues, however, that there is a great difference between a whole village and plots of land within a village, however numerous the latter might be, and that a whole village could not be termed *sir*, however loosely the word is used, and that the fact that the previous *Taluqdar* made a separate application in 1911 about the whole village clearly shows that he meant to differentiate it from the other land, and for this argument there is a good deal to be said."

In the result, the Board of Revenue held that section 107G of Act XXII of 1886, as amended by Act IV of 1901, applied, and made a decree assessing *Mauza* Chhauch to rent.

From that decree Rani Bijai Raj Kunwar has appealed to His Majesty in Council.

The Subordinate Judge of Kheri, before whom the civil suit first came, framed six issues, the first of which was, "Is the suit not cognizable by the Civil Court?" He held that the questions whether the plaintiff (Rani Bijai Raj Kunwar) was "entitled to hold the village (*Mauza* Chhauch) rent-free as a life interest bequeathed to her under her late husband's Will and that she is not liable to assessment of rent during her life-time" were exclusively for the Court of Revenue, and by his decree dismissed the suit. Rani Bijai Raj Kunwar appealed from the decree to the Court of the Judicial Commissioner of Oudh. The learned Judicial Commissioners on the appeal held that the Civil Court had jurisdiction to entertain the suit for a declaration of Rani Bijai Raj Kunwar's legal title to *Mauza* Chhauch under her husband's Will, but that the Civil Court had not jurisdiction to give her a declaration that *Mauza* Chhauch was not liable to be assessed to rent during her life-time, and remanded the suit to the Court of the Subordinate Judge for the trial of certain issues.

The suit on the remand came before another Subordinate Judge, who apparently was not himself familiar with the popular descriptions in Oudh applied to lands held for maintenance. He recorded much evidence on the subject. One of the witnesses, who had been for some years a Naib-Tahsildar in Lakhimpur, said: "Every sort of cultivated land, whether rent-free or assessed to rent, and whether held by grantee, or Shankahapdar, and under-proprietor or ordinary tenant, is commonly called *sir*. I never heard a whole village called as *sir* of any body, though I heard a whole village called a *guzara* of a *guzaradar*." The Subordinate Judge's comment on the Naib-Tahsildar's evidence was: "His evidence goes to show that when a member of a *Taluqdar's* family cultivates *guzara* land given to him and calls it his *sir*, others also call it by the same name." Another witness said: "Thakur Rajindra Bahadur Singh thought that land given to the members of a *Taluqdar's* family for their *guzara* are called their *sir*. He considered the village Chhauch to be *sir* of the plaintiff (Rani Bijai Raj Kunwar)." There was much other evidence, and in conclusion the Subordinate Judge found that "the word *sir* is used in common parlance to describe a *muafi* grant of plots of land made to a member of the *Talnqdar's* family for maintenance, but that a whole village assigned for a similar purpose is not called by the name of *sir* . . . I find that the words '*sirat-maqbuza*' were used in the Will in this sense."

On the return to the order of remand the learned Judicial Commissioners proceeded to consider what Rajindra Bahadur Singh meant by the term "*sirat-maqbuza*" (*sir* lands in possession) which he used to describe the bequest to his wife Rani Bijai Raj Kunwar. They considered that the opinions expressed by the witnesses on that subject did not possess any particular value for the decision of that question. It has not been shown to their Lordships that the Judicial Commissioners formed an incorrect estimate of the value of that oral evidence. The learned Judicial Commissioners took, in their Lordships' opinion, safer ground for the consideration of that question in the history of the manner in which *Mauza* Chhauch had been dealt with since it had been settled with Gajrang Singh, and particularly by Rajindra Bahadur Singh. They also placed great reliance on the introduction to the late Mr. Sykes's well-known and valuable compendium of the Law relating to the *Taluqdars* of Oudh, and quoted the following passage which occurs in Mr. Sykes's observations on the various classes of *sir* in Oudh. Mr. Sykes, in discussing that subject, stated that:—

"Amongst the various classes of *sir* under-proprietors who never had the full and exclusive proprietary right of the whole village is the land frequently assigned to the junior branches of a family for their support, instead of breaking up the estate and giving them the ancestral shares to which they were entitled. Such appanages are known in Oudh by the name of *sir*. They also form one and the chief class of *Jewan Birt*, which is a name also sometimes applied to this class of *sir*. Whole villages assigned in this way were also called *Bhayai* villages."

In support of that statement by Mr. Sykes, the Judicial Commissioner quoted a passage from Volume I of the Oudh Gazetteer of 1877 which was published under the authority of the Government, and a passage from the

Fyzabad Settlement Report of 1880. The passage from the Oudh Gazetteer is as follows :—

"Second, it was common to assign to the junior branches of a family certain lands for their support, instead of giving them the ancestral shares to which they were entitled. Such appanages were also known as *sir*."

The passage quoted from the Fyzabad Settlement Report runs thus :—

"233. *Sir* is in most cases an appanage of proprietorship, the lands constituting the home-farm of a proprietor. It is the name, too, given to the lands assigned to the junior branches of a family in lieu to the ancestral share to which they ware entitled."

The Judical Commissioners did not overlook the fact that the passages which they quoted from the Oudh Gazetteer and the Fyzabad settlement Report had referenee to the District of Fyzabad and not to Oudh generally. They observed in their judgment : "The above quotations refer to the District of Fyzabad, but the meaning of the world *sir*, given therein, appears to us clarly to be a meaning which was applied generally" in Oudh. Nor did the Judicial Commissioners overlook section 108 of Act XXII of 1886, which enacted how the term "*sir*" should be understood officially in Oudh. In reference to that section they said: "The restricted meaning of the word *sir* given in Act XXII of 1886 is a meaning based, to some extent, upon the meaning of the word in the Province of Agra, and is largely the creation of the English Revenue Authorities. We consider that the learned Counsel for the appellant (Rani Bijai Raj Kunwar) is correct in his contention that the word *sir* used by an Oudh man would bear the meaning assigned to it by Mr. Sykes and would not be confined to the meaning which it bears in Act XXII of 1886." Their Lordships see no reason to disagree with that conclusion of the learned Judicial Commissioners.

Referring to the history of *taluqa* Mahewa, the Judicial Commissioners correctly stated in their judgment that *Mauza* Chhauch (excepting *Chak* Khakri, which belonged to another and distinct family) and cultivated plots in eight other villages af the *taluqa* were in the possession of Rani Bijai Raj Kunwar at the time of her husband's death ; that some of those plots had been handed over to her by her husdand, Rajindra Bahadur Singh, in 1907, and the remainder of them in 1908 ; that he had instructed the Patwari to have them entered in the Revenue Register in her name, and that those plots of cultivated lands had been entered into the first Regular Settlement as the "*sir*" of the widow of Girwar Singh. The Judicial Commissioners also state that the Counsel who appeared before them admitted that those plots of cultivated lands in the eight villages were *sirat maqbuza* and must be given to Rani Bijai Raj Kunwar under the terms of the Will, but he contended *Mauza* Chhauch could not pass to her under the description of that *Sirat maqbuza*. The Judicial Commissioners came to the conclusion that in 1911 Rajindra Bahadur Singh had given *Mauza* Chhauch (excepting *Chak* Khakra) to Rani Bijai Raj Kunwar as rent-free, and that the description *sir maqbuza* included *Mauza* Chhauch (less *Chak* Khakra), and that under the Will she took an estate for her life in the *taluqa* free of rent, and they gave her a decree declaring that she "is entitled to hold possession during her life of the village Chhauch, less *Chak* Khakra, *pargana* and district Kheri, under the Will dated the 14th June 1907, executed by Thakur Rajindra Bahadur Singh the late *Taluqdar* of Mahewa." From that decree Thakur Jai Indra Bahadur Singh has appealed to his Majesty in Council.

After a careful consideration of all the facts in these consolidated appeals, their Lordships have come to the conclusions that the words *sirat maqbuza* in the Will did apply to and cover not only *sir* lands which might be accurately described as *sir*. but also *Mauza* Chhauch(less *Chak* Khakra), and that Rajindra Bahadur Singh in confirmation of his gift of 1911 to his wife, Rani Bijai Raj Kunwar of *Mauza* Chhauch (less *Chak* Khakra) rent-free for her life, did by his Will intend to bequeath and did bequeath, to her *Mauza* Chhauch (less *Chak* Khakra for her life as a proprietor, and without any liability to have it assessed to rent ; and they also are of opinion that Thakur Jai Indra Bahadur Singh, who takes his interest in *taluqa* Mahewa under that Will, and whose only title to any part of *taluqa* Mahewa is under that Will, cannot repudiate the condition of the Will that *Mauza* Chhauch should be held by Rani Bijai Rani Kunwar for her life rent-free.

It has deen contended on behalf of Thakur Jai India Bahadur Singh in these consolidated

appeals that the decision of the Board in *Parbati Kunwar* v. *The Deputy Commissioner of Kheri* (1) governs this case. This contention was based on a misconception. In that case the plaintiff, who sued for an enhancement of rent, was the "proprietor" of the *mahal* there in question within the meaning of section 107 A of Act XXII of 1386, as amended by Act IV of 1901, and was suing a *thikadar* who held under a lease. In this case Thakur Jai Indra Bahadur Singh is not a proprietor of *Mauza* Chhauch or of any part of it, and will not be the proprietor while Rani Bijai Raj Kunwar continues to be the proprietor for her life, and Act XXII of 1836, as amended by Act IV of 1901, does not apply.

Their Lordships will humply advise His Majesty that the appeal in which Rani Bijai Raj Kunwar is the appellant should be allowed with costs, and the decree or order of the Board of Revenue of the United Provinces of Agra and Oudh of the 16th December 1916, be set aside and the decree of the Commissioner of the Lucknow Division of the 7th January 1916, be restored and affirmed, and that the appeal in which Thakur Jai Indra Bahadur Singh is the appellant be dismissed with costs.

In parting with this case their Lordships desire to add one further observation upon a matter which in other cases, has often before been animadverted upon, but apparently with small result, namely, the manner in which the record in Thakur Jai Indra Bahadur Singh's appeal has been prepared. When this record, which consisted of 1134 pages, was received by the Registrar of the Privy Council, it appeared to him that a large part of it, consiting of lists of property in tabular form, was unnecessary for the purposes of the appeal, and he communicated this view to the London Solicitors with a suggestion that Counsel should be consulted as to eliminating this portion of the printed book. As a result, the parties agreed between themselves, on the advice of their Counsel, to omit over 800 pages, which were taken out of the books and not referred to again, and this shows that they should never have been included. The persons primarily responsible for this reckless waste of money were no doubt Thakur Jai Indra Bahadur Singh and his advisers in India, and had he won the appeal he would certainly not have received any costs in respect of this part of the record. But, at the same time, their Lordships think that a duty lies upon the Court to exercise control upon the wholesale inclusion of irrelevant documents, a duty which in this case was certaintly not performed. A few weeks ago, in another appeal from the same Court, their Lordships drew attention to the fact that the record contained at least 781 unnecessary pages, and they do so again with the earnest hope that the Judges of the Court of the Judicial Commissioner will take such steps as will prevent in the future the continuance of what their Lordships consider a scandal and a hindrance to the proper administration of justice.

Messrs. *James Gray & Son*, Solicitors for the Appellant.

Messrs. *T. L. Wilson & Co.*, Solicitors for the Respondent.

K. S. D. *Appeal allowed.*

(1) 47 Ind. Cas. 394 ; 45 I. A. 111 ; 20 Bom. L. R. 1095 ; 5 O. L. J. 433 ; 24 M. L. T. 292; 35 M. L. J. 525; 16 A. L. J. 865 ; 8 L. W. 586 ; 5 P. L. W. 302; 28 C. L. J. 249 ; 41 A. 541 ; (1918) M. W. N. 880; 23 C. W. N. 125 (P. C.).

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 881 OF 1920.

July 10, 1922.

Present :—Mr. Justice Richardson and Mr. Justice Suhrawardy.

SARAT CHANDRA DAS—DEFENDANT —APPELLANT

versus

Sm. SARAJINI RUDRAJA—PLAINTIFF —RESPONDENT.

Registration Act (XVI of 1908), s. 17 (2) (vi)—Compromise deed—Agreement to lease—Agreement embodied in decree—Registration.

A compromise incorporating an agreement by way of lease is inadmissible in evidence unless registered even though it has been embodied in a decree. Such an agreement is not within the exception con-

tained in sub-section (2), cl. (vi) of section 17 of the Registration Act.

Hemanta Kumari Debi v. *Midnapore Zemindari Company Limited*, 53 Ind. Cas. 534; 46 I. A. 240: 47 C. 485; 24 C. W. N. 177; 37 M. L. J. 525; 17 A. L. J. 1117. (1920) M. W. N. 66: 27 M. L. T. 42. 11 L. W. 301; 31 C. L. J. 293; 22 Bom. L. R. 488 (P. C.); followed.

Pranal Annee v. *Lakshmi Annee*, 26 I. A. 101 3 C. W. N. 485; 22 M. 508; 1 Bom. L. R 394; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 863 (P. C.), distinguished.

Appeal against the decree of the Subordinate Judge of Sylhet, dated the 6th April 1920.

JUDGMENT.

Suhrawardy, J.—The facts of this case may be shoritly stated.

The owner of *Taluk* Kalim Raja granted a *patni* of certain lands in the *taluk* to Sachu Ram who went into possession. In 1905 Ichamoyi, the mother, and Mandakini, the daughter, of the *talukdar* brought a suit against Sachu Ram, alleging in effect that the grant nominally made to him was for their benefit and praying for an account of the profits of the *patni*. The suit ended in a compromise, dated 16th December 1905, under which Sachu Ram admitted that the *patni* right was in the plaintiffs and agreed to hold possession of the lands as their tenant at an annual rent of Rs. 42-8-0. Provision was also made for the payment of arrears of rent at that rate. A copy of the petition of compromise is on the present record, but no copy of the decree in the suit of 1905 has been filed, the record of that suit having, it is said, been destroyed by fire. The Courts below have referred, however, to an entry in the general Register of suits showing that the suit was decreed in accordance with the petition of compromise and are of opinion that the petition was incorporated in the decree. Regard being had to the usual practice in such cases, I see no reason to dissent from that opinion.

The plaintiff in the present suit has purchased Mandakini's share in the *patni* and claims arrears of rent at the compromise rate for the years 1322-1324 and part of 1325 (roughly 1915-1918). The representatives of Ichamoyi are impleaded as defendants. The claim was resisted by the principal defendant (Sachu Ram's son and successor) on several grounds, the main defence being that the relationship of landlord and tenant between the parties had not been established. The Courts below have rejected the defence set up and given the plaintiff a decree for his share of the rent at the rate claimed. The appellant before us is the principal defendant or the defendant, as I shall now call him.

The only other fact requiring mention is that the lower Courts have found that rent was paid by the defendant or his father at the compromise rate up to the year 1318 (1911).

The argument turned on the legal effect of the unregistered petition of compromise and the decree based thereon. For the plaintiff it is not disputed that the petition embodies an agreement operating as a demise and is, therefore, a lease within the meaning of the Registration Law. Being a lease reserving a yearly rent, it should have been registered under section 17 cl. (*d*) of the Registration Act of 1877. Under section 49 "no document required by section 17, to be registered shall," if not registered, affect any immoveable property comprised therein "or be received as evidence of any transaction affecting such property."

The defendant has throughout maintained that the agreement on which the plaintiff founds being inadmissible there is no evidence on which the Courts below could hold that he was a tenant under the plaintiff holding on the terms of that agreement.

For the plaintiff it was argued, firstly, that an agreement incorporated in a decree does not require registration, and, secondly, that the Courts below were right in holding, on the authority of their Lordships' decision in *Mahomed Muza* v. *Aghor Kumar Ganguli* (1), that the plaintiff was entitled in equity to the rent which he claims on the footing that the agreement, if not formally implemented, had been carried out and acted upon.

In reference to the first contention, *Pranal Annee* v. *Lakshmi Annee* (2), was cited for the

(1) 28 Ind. Cas. 930; 42 I. A. 1; 42 C. 801; 19 C. W. N 250; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621 (P. C.).

(2) 26 I. A. 101; 3 C. W. N. 485; 22 M. 508; 1 Bom. L. R. 394; 9 M. L. J 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. N. S. 863 (P. C.).

plaintiff and *Hemanta Kumari Debi* v. *Midnapore Zemindari Company* (3) for the Defendant.

In my opinion, the question is concluded by the reasoninig of their Lordships in *Hemanta Kumari's* case (3). In *Pranal Annee's* case (2) their Lordships were not dealing with the case of a decree incorporating an agreement by way of lease which, under cl (*d*) of section 17, and section 49 of the Act of 1877, and the present Act would not be admissible in evidence unless registered. Under the terms of section 17, as it stands in both those Acts, such an agreement is not within the exception now contained in sub-section (2), cl. (*vi*), which says that nothing in cls. (*b*) and (*c*) of section 17 [omitting therefore cls. (*a*) and (*d*)] applies to any decree or order of a Court.

The compromise agreement in the present case operated as a demise and should have been registered. Not having been registered it is *prima facie* inadmissible in evidence as a lease.

The decision of the Courts below in the plaintiff's favour purports, as I have said, to be based on the equitable doctrine to which their Lordships adverted in *Muhomed Musa* v. *Aghore Kumar Ganguli* (1), and *Malraju Lakshmi Venkayyama* v *Venkata Narasimha Appa Rao* (4). In this appeal reliance was placed on the defendant's behalf on the recent decision of Rankin, J., in *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri* (5).

If the present case, however, admits of a decision in the plaintiff's favour even on the assumption that the agreement in the suit of 1905 is not admissible either as a lease or as evidence of an oral agreement to the same effect, it is unnecessary to discuss the debated questions or to express any opinion in regard to them.

Here, if the agreement in question is inadmissible as a lease, it is still, in my opinion, admissible in evidence so far as it contains an express admission by the defendant in the suit of 1905 of the title of the plaintiff in that suit as *patnidars*. In respect of such admission, the agreement, if it comes at all within section 17 of the Registration Act, would fall within cl. (*b*) or cl. (*c*) and the exception in sub-section (2) (*vi*) would apply to it. The Courts below have found that rent at the rate now claimed was paid for a number of years to the plaintiffs in the suit by the present defendant or his father. It is true that there was no change of possession. The defendant was in possession before the suit and he continued in possession after the suit, but he attorned to the plaintiffs, one of whom is the predecessor of the present plaintiff.

These being the facts, the case of *Ameer Ali* v. *Yakub Ali Khan* (6), which was not referred to in the argument but to which my attention has since been called, would seem to be authority for saying that the relationship of landlord and tenant between the parties is established and that the rent due is that which the defendant has been paying.

I may add that I do not know whether the defendant appreciates his position. In view of the admission made in the agreement in the suit of 1905, if he is not a tenant, he would appear to be a mere trespasser liable as such to be ejected.

Without endorsing all the reasons given in the judgments of the Courts below, I am not satisfied that the conclusion which those Courts have reached is erroneous and, in my opinion, therefore, the appeal should be dismissed with costs.

The cross-objection of the plaintiff is not pressed and is, therefore, dismissed without costs.

Richardson, J.—I agree.

N. H. C. *Appeal dismissed.*

(3) 53 Ind Cas. 584 ; 46 I. A. 240 ; 47 C. 485 : 24 C. W. N. 177 ; 37 M. L. J. 525 ; 17 A. L. J. 1117 ; (1920) M. W. N. 66 ; 27 M L. T. 42 ; 11 L. W. 801 ; 31 C. L. J. 298 ; 22 Bom. L. R. 489 (P. C).

(4) 34 Ind. Cas. 921; 43 I. A. 138; 39 M. 509; 20 C. W N. 1054 ; 14 A. L J. 797 ; 31 M. L. J. 58 ; (1916) 2 M. W N. 53 : 20 M. L. T. 37 ; 4 L. W. 58 ; 18 Bom. L. R. 651 ; 24 C. L J. 279 (P. C.).

(5) 69 Ind. Cas. 877 ; 26 C. W. N, 329; 49 C. 507; (1922) A. I. R. C. 436

25 Ind. Cas. 509 ; 41 C. 347 : 19 C. L. J. 498.

MUHAMMAD SHAFI *v.* KALSUM BI

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2 OF 1922.

July 23, 1923.

Present :—Mr. Justice Abdul Raoof
and Mr. Justice Fforde.

MUHAMMAD SHAFI AND ANOTHER —DEFENDANTS—APPELLANTS
versus
Mt. KALSUM BI AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Muhammadan Law—Minor—Mother, sale by, of minor's property, validity of—Parda nashin *lady, transfer by—Fraud—Burden of proof.*

Under the Muhammadan Law a mother has no power to dispose of immoveable property belonging to her minor children, and a sale of such property by the mother is *ab initio* void.

Imambandi v. *Mutraddi*, 47 Ind. Cas. 513 ; 45 C. 878 : 35 M. L. J. 422 ; 16 A. L. J. 800 ; 24 M. L. T. 330 ; 28 C. L. J. 409 : 23 C. W. N. 50, 5 P. L. W. 276; 20 Bom. L. R. 1022 ; (1919) M. W. N. 91 ; 9 L. W. 518 ; 45 I. A. 73, followed.

If a transferee from a *parda nashin* lady comes into Court to enforce a deed executed by her, it lies upon him to prove that it was obtained from her fairly, that the terms of the deed were explained to her, that she had independent advice before executing the deed, and that she had benefited by it.

On the other hand, when a *parda nashin* lady comes into Court as a plaintiff with specific allegations of fraud and deception it lies upon her to make out a *prima facie* case before the transferee can be called upon to show that the deed had been properly obtained from her.

Nanshari Begum v. *Intizar Begum*, A. W. N. (1899) 25 ; *Kalee Perchad Tewarree* v. *Rajah Sahib Pershad Seer*, 12 M. I. A. 282 ; 12 W. R. 6 (P. C.) ; 2 B. L. R. 111 (P. C.); 2 Suth P. C. J. 225 ; 2 Sar. P. C. J. 429 ; 20 E. R. 345 ; *Behari Lal* v. *Haluba Bibi*, 8 A. 267 ; A. W. N. (1896) 91 ; 5 Ind. Dec (N. S.) 58 *Moonshee Buzloor Ruheem* v. *Shumsoon Nissa Begum*, 11 M. I. A. 551 ; 8 W. R. 3 (P. C.) : 2 Suth. P. C. J. 59 ; 2 Sar. P. C. J. 259 ; Marsh 286 ; 20 E. R. 208, (P. C.), relied on.

Shambati Koeri v. *Jago Bibi*, 29 C. 749 ; 29 I. A. 127 ; 6 C. W. N. 682 ; 4 Bom. L. R. 444 ; 8 Sar. P. C. J. 304, distinguished.

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 6th June 1921, decreeing the claim.

Dr. Sir *Muhammad Iqbal*, for the Appellants.

Messrs. *Aziz Ahmad*, *Ghulam Rasul* and *Mohsin Shah*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by *Musammat* Kalsum Bi and others for the cancellation of two sale-deeds executed by her and others in favour of the appellants Mahomad Shafi and Abdul Rashid. The parties to the suit belong to a class of *Musalmans* called *Punjabi* Mahommadans. They carry on trade and are well-known for their keen business instinct. Besides carrying on trade some of them own lands and houses also. The pedigree-table given in the judgment of the Trial Court shows the relationship between the parties concerned in this appeal. Abdul Rashid, Mahomad Shafi and Riaz-ud-Din were three brothers being the sons of Aziz-ud-Din. Riaz-ud-Din had married two wives. By his first wife *Mussammat* Mohd-ul-Nisa, who pre-deceased him, he had two sons and two daughters, namely, Bashir-ud-Din, Shuja-ud-Din, *Musammat* Sughra Jan and *Mussammat* Ashraf-ul-Nisa. By his second wife *Musammat* Kalsum Bi he had five children, namely, Iqbal Ahmad, son, and *Musammat* Mussart Begum, *Musammat* Kudsia Begum, *Musammat* Amat-ul-Basit and *Musammat* Zubaida Begum, daughters. Riaz-ud-Din died on the 9th of March 1914. In the year 1913, in his lifetime, he stood in need of money to pay off certain creditors. Under a deed, dated the 1st of July 1913 he borrowed Rs. 6,000, from his wife *Musammat* Kalsum Bi. The document was written in the shape of a conditional sale-deed. *Musammat* Kalsum Bi had to go to Lahore to her brother *Sheikh* Muhammad Naki, an Honorary Magistrate, to get money from him in order to pay her husband Riaz-ud-Din. On her arrival at Lahore she did not find her brother there but succeeded in raising Rs. 2,000 in his absence and returned to Delhi. Later on, *Sheikh* Muhammad Naki went to Delhi and handed over to his sister on the 11th of July 1913, six currency notes of Rs. 1,000 each out of which the balance of Rs. 4,000 was paid to Riaz-ud-Din. *Sheikh* Muhammad Naki obtained a written receipt from his sister, *Musammat*

MUHAMMAD SHAFI *v.* KALSUM BI

Kalsum Bi, who signed it with her own pen in Persian character. This is translated and printed at page 8 of the paper-book in First Appeal No. 2784 of 1915. Shortly after this, the joint property of the three brothers was partitioned and one-third was alloted to each of the brothers. On the death of Riaz-ud-Din the property conditionally sold to *Musammat* Kalsum Bi was mutated in her name, in spite of objections raised by her step sons. Thereupon Bashir-ud-Din and Shuja-ud-Din, the step-sons, brought a suit against her for the recovery of their share (28|96 ths.) of inheritance in the property left by their father. That suit was resisted by *Musammat* Kalsum Bi on the ground that the property had been sold to her absolutely for Rs. 6,000 by a sale-deed, dated the 1st of July 1913. Mr. Dundas, the District Judge, however, held that the property had been only conditionally sold as a security for the Rs. 6,000 lent by her to her husband Riaz-ud-Din. It was found by the learned District Judge that a sum of Rs. 7,400 was due to *Musammat* Kalsum Bi, namely, Rs. 6,000 paid by her under the conditional sale-deed and Rs. 1,400 which she had paid to *Musammat* Muhammadi Jan and *Musammat* Shamas-ul-Nisa to adjust the partition of the property in suit. A decree was passed in favour of the plaintiffs on the 29th June 1915 for joint possession by redemption of 28|96 ths. of the property in suit on payment of 28|96 ths. of Rs. 7,400, *i. e.*, Rs. 2, 158-5-4, together with the defendant's costs in this suit. Against this decree *Musammat* Kalsum Bi filed an appeal in the Chief Court which was registered as First Appeal No. 2784 of 1915. Under the conditional sale-deed of the 1st of July 1913, to which the litigation just referred to related, four properties were mortgaged, namely :—

(1) 1|3rd of a house called Jamanwala.

(2) 1|3rd of a house called Nibwala.

(3) 1|3rd of two plots of agricultural land in Chandrawal Chah Dhanishmand Khan.

(4) 1|3rd share in a garden called Dolawa in Ladhaura Kalan.

In addition to the first appeal pending in the Chief Court *Musammat* Kalsum Bi was carrying on litigation against her husband's brothers, both in the Civil and the Revenue Courts. She had brought two suits for accounts—one in the Revenue Court and the other in the Civil Court. On the 30th of August 1918 *Musammat* Kalsum Bi on her own behalf and as the guardian of her minor children, Iqbal Ahmad, *Musammat* Mussarrat Begum and *Musammat* Kudsia Begum, executed two sale-deeds in favour of Abdul Rashid and Muhammad Shafi in respect of their shares in the entire property left by Riaz-ud-Din. *Musammat* Amat-ud-Basit, *Musammat* Zubaida Begum, her adult daughters, Bashir-ud-Din. Shaja-ud-Din, and Mumtaz Ahmad also joined her in the execution of the deeds by which they transferred their shares in the estate. As the Mumtaz Ahmad had purchased the shares of *Musammat* Sughra Jan and *Musammat* Ashraf-ul Nisa, the step-daughter of *Musammat* Kalsum Bi, he as their representative-in-interest joined in executing the sale-deeds in respect of their shares. Thus Abdul Rashid and Muhammad Shafi acquired the whole of the estate left by Riaz-ud-Din. The list of the property sold to Abdul Rashid is translated and printed at page 5 of the paper book in Civil Appeal No. 2 of 1922 as list 'A' and the list of the property sold to Muhammad Shafi is translated and printed at page 4 of the paper-book as list 'B'. The consideration for the sale in favour of Abdul Rashid was Rs. 8,975 and that for the sale deed in favour of Muhammad Shafi was Rs. 5,475 as stated in the two sale-deeds. Under one of the conditions entered in the two sale-deeds *Musammat* Kalsum Bi accepted the correctness of decision of Mr. Dundas and undertook to present an application to the Chief Court for the withdrawal of the appeal.

The suit which has given rise to this appeal was instituted on the 19th of March 1919 by (1) *Musammat* Kalsum Bi, (2) Iqbal Ahmad, minor son, (3) *Musammat* Kudsia Begum, and (4) *Musammat* Mussarat Begum, minor daughters of Riaz-ud-Din, through Muhammad Sultan, (5) *Musammat* Amat-ul-Basit, and (6) *Mussammat* Zubaida Begum principally against the two vendees Abdul Rashid and Muhammad Shafi, and Shuja-ud-Din, Bashir-ud-Din, Mumtaz Ahmad, *Musammat* Shamshad Jan and *Musammat* Putli Jan as *pro forma* defendants. The last named two defendants here impleaded because they were said to have obtained

a contract for sale from Abdul Rashid and Muhammad Shafi in respect of a portion of the properties purchased by them. As already stated, the suit was for the cancellation of the two sale-deeds on the grounds mentioned in the petition of the plaint. Those grounds are set forth in paragraphs 4 and 5 of the plaint in the following words :—

"4. Defendants Nos. 1 to 5 deceived the plaintiffs saying that the property entered in paragraph No. 2 of the plaint, a plot of culturable land known as Lariwali, which is *muafi*, measuring *bighas* 5 8 entered at *khewat* No. 2, *khatauni* No 28, with a well situate at *Mauza* Sadhaura Kalan, are of a very small value, and that therefore all the disputes should be settled. Accordingly, the property entered in the list A was sold to Abdul Rashid for Rs. 8,975-13-0 and the property in the list B was sold to Muhammad Shafi for Rs. 5,475-13-0 under deeds dated the 30th August 1918.

"5. The plaintiffs and the minors were deceived. Defendants Nos. 5 and 6, having taken advantage of the fact that the plaintiffs were inexperienced and *parda nashin* ladies, got the property which was of very high value sold to them for a very low price and also got such conditions as were never accepted by the plaintiffs entered in the sale-deed. A heavy sum was shown as due to Mumtaz Ahmad. All these proceedings were fictitious. The plaintiffs were never informed of them."

In paragraph 10 the plaintiffs prayed that it might be declared that the documents in question had been got executed through fraud and were unauthorised and detrimental to the interests of the minors so far as they concerned them and that they be cancelled as against all the plaintiffs. The suit was resisted by the defendants on various grounds. The *jawab-i-dawa* of the defendants Muhammad Shafi and Abdul Rashid is printed at pages 6 and 67 of the paper-book and contains the following plea on the most material questions arising for decision in the case :—

"The plaintiffs were not deceived in any way. According to law the plaintiffs should state distinctly in the plaint what fraud was exercised on them and how it was exercised. The petition of plaint is liable to be amended. The plaintiffs may be directed to state the fraud mere in detail and also state the conditions which were not accepted by them (plaintiffs) and which were got entered in the deed according to their statement. Plaintiff No. 1 is a literate and an intelligent woman. She has often chances of litigation. She understands matters fully. There was conversation with plaintiff No. 1 and other plaintiffs who after duly consulting the matter and fully enquiring about the price got the sale-deed registered in favour of defendants Nos. 4 and 5. The receipt for the earnest-money was executed on the 13th August 1918. The sale-deeds were registered on the 31st August 1918. The receipt marked D. I. is attached to this *jawab-i-dawa*. Moreover, plaintiff No. 1 sent a notice marked D. II to defendant No. 4 on the 11th December 1918 and a notice marked D. III to defendant No. 5 making a demand for the money and the *hundis* executed in lieu of the earnest-money and recovered the amount of the *hundis* from defendant No. 4. The sale-deeds bear the signatures of the plaintiffs' advisers and relatives. The sons-in-law of plaintiff No. 1 and the husbands of plaintiffs Nos. 5 and 6 identified them at the time of registration."

It was also pleaded that the sale was for the benefit of the minors and that the other adult co-sharers had executed this sale-deed after due consideration for their own benefit as well as for the benefit of the other plaintiffs-minors who are their descendants and sisters and that they were bound thereby according to law. Defendants Nos 6 and 7 disclaimed all connection with the property in suit and it is admitted before us that they dropped out of the suit and had no concern with it. The other defendants supported the plea urged by Muhammad Shafi and Abdul Rashid. On the 8th of July 1919 the Court made the following order which is translated and printed at page 72 of the paper-book :—

"The plaintiff contends that she was deceived. But she has not stated what sort of fraud has been practised on her. It is, therefore, her duty to file correct and detailed plaint * * * *."

In compliance with this order *Musammat* Kalsum Bi filed a further statement of her claim setting out the points regarding which the fraud was alleged to have been practised:—

"(1) It was stated with regard to the property that it was of a very small value, that

the value for which it was being sold was much more than the market price.

"(2) No mention about the payment of any item to Mumtaz Ahmad was made to plaintiff No. 1.

"(3) Plaintiff No. 1 never agreed that she would withdraw from her appeal case pending in the Chief Court of the Punjab.

"(4) Every undue advantage was taken of the fact that plaintiff No. 1 was a *parda nashin* lady. She trusted the defendants and put her signature on the document. She did not understand all the conditions."

The defendants Muhammad Shafi and Abdul Rasihid filed an aditional *jawab-i dawa* to meet the case set up by the plaintiff *Musammat* Kalsum Bi in which they stated that the plaintiff, having herself fully ascertained from her sons-in-law, other reletives and advisers, the value of the property, had sold it for the highest market-value; that she knew all about Mumtaz Ahmad; that she had agreed to withdraw her appeal pending in the Chief Court, and that, although the plaintiff was apparently a *parda nashin* lady, she was literate she had been fighting cases ; she had in every way obtained full information from her advisers and relatives and that she fully understood all the terms of the sale-deed. Before issues were framed in the case the appeal of *Musammat* Kalsum Bi (Civil Appeal No. 2784 of 1915) came up for decision before the High Court on the 9th of February 1920, and it was urged on behalf of the respondents that, in consequence of a compromise, the terms of which were incorporated in the deeds of sale *Musammat* Kalsum Bi had agreed to withdraw the appeal and that, therefore, it could not be heard. *Musammat* Kalsum Bi's Counsel replied that the sale-deeds were being contested. Thereupon the learned Judges before whom the appeal had come up for decision directed the Court to take evidence, and decide whether a valid agreement had been arrived at betwen the parties under which *Musammat* Kalsum Bi had agreed to withdraw the appeal. By consent of parties evidence was recorded in the inquiry held according to the orders of the High Court and the evidence taken in the inquiry by consent of parties was to be read as part of evidence in this case. On the 13th of January the statement of Abdul Bashid, defendant No. 4, was recorded under O. X, rr. 2 and 3, Civil Procedure Code, and he made the following statement which is to be found printed at page 86 of the paper-book :—

"The price of the property at the time of the sale was the same for which it was purchased. I did not purchase property of a higher price in 1918. The price of the property has not risen as yet and is the same as before. The conditions given in the sale-deed were settled with *Musammat* Kalsum Bi. The same conditions as were settled were got written in the deed. The sale-deed was read over and her sons-in-law were present. Local Commissioner was appointed by *Kazi* Fazl-ul-Rahman, Revenue Assistant They got a settlement made. Muhammad Mian was also one of the persons who got the settlement made. An agreement was made to sell a plot of 5,000 yards to *Musammat* Chhamma Jan for Rs. 15,000, a receipt was executed, but she made a refusal. The planitiffs had a share according to Muhammadan Law before the sale. Raiz ud-Din had 1|3rd share."

Counsel for the plaintiff *Musammat* Kalsum Bi, on the same date, made the following statement which is to be found on the same page :—

"The defendants took advantage of the fact of *Musammat* Kalsum Bi and the other females, vendors, being *parda nashin* ladies and said that, in spite of the property being of a small value, they were giving the price asked for from them. The females agreed, being thus deceived. But such conditions as were not settled were got entered in the sale-deed. The sale is quite adverse to the rights of the minors. Hence it is prayed that it might be derlared null and void. *Musammat* Kalsum Bi is prepared to give back the money received by her."

The following issues wers framed by the Court, after recording the statements of the parties, namely :—

(1) Was the sale made for the benefit of the minors ?

(2) Was the sale got made after the plaintiff had been fully informed of its objects ?

(3) Was the property of a higher value ?

MUHAMMAD SHAFI *v.* KALSUM BI

Subsequently, when the case was taken up by Mr. Som Nath, Senior Subordinate Judge, Mr. Abdul Aziz, the plaintiff's Counsel, on being questioned as to the nature of the fraud which was alleged to have been committed by the defendants-vendees stated that the fraud was that the defendants gave *Musammat* Kalsum Bi to understand that the property in suit was of a very little value and it would be better to sell it to them and it would be beneficial to the plaintiffs. It was further represented that *Musammat* Kalsum Bi's sons-in-law were uselessly deceiving her. In consequence of this statement, the issues originally framed by Mr. Abdus Samad, Subordinate Judge, 2nd Class, were re-cast as follow :—

(1) Was the sale in suit for the benefit of the minor?

(2) Was it duly executed by *Musammat* Kalsum Bi after properly understanding its terms?

(3) Is it tainted with fraud and undue influence?

After considering the evidence produced on behalf of *Musammat* Kalsum Bi the lower Court held that the fraud and the deception pleaded by her were not established, but that being a *parda nashin* lady she was entitled to the protection afforded to *parda nashin* ladies under several Privy Council rulings. On the basis of this view, the learned Judge of the Court below proceeded to examine the evidence given on behalf of the defendants and came to the conclusion that the requirements of the rules laid down by their Lordships of the Privy Council were not satisfied. In the case of the minor plaintiffs the learned Subordinate Judge rightly held that the sale was *ab initio* void as a mother under the Muhammadan Law has no power to dispose of the immoveable property belonging to her minor children. This has been authoritatively settled by the latest Privy Council ruling in the case of *Imambandi* v. *Mutsaddi* (1). As regards the two major daughters of *Musammat* Kalsum Bi the learned Subordinate Judge held that they had exercised no independent judgment in selling their shares and that they had acted as told by their mother. There being no evidence on the record to show that the terms of the sale-deed were ever explained to them or that they had received any sums the learned Judge held that the sale could not be held to be binding upon them. In the opinion of the learned Subordinate Judge the decision of the whole case turned upon the point whether the sale-deeds should be upheld as against *Musammat* Kalsum Bi. Then having come to the conclusion that they were not binding even upon her the Court granted a decree in favour of the plaintiffs and against the defendants cancelling the sale-deeds as far as they related to the plaintiffs' share, on payment of Rs. 7,432-13-0 to Abdul Rashid and Rs. 232-13-0 to Muhammad Shafi.

Against this decision the present appeal has been preferred by the defendants Muhammad Shafi and Abdul Rashid and Dr. Sir Muhammad Iqbal has argued their case before us. He has very frankly admitted the correctness of the decision of the Court below as regards the minor plaintiffs. He has addressed a feeble argument as regards the adult daughters of *Musammat* Kalsum Bi, but as he is unable to point out any evidence on the record to prove that the terms of the sale-deeds were settled with them or that any one besides *Musammat* Kalsum Bi had looked after their interest, his argument cannot be accepted. The terms of the sale-deeds are not shown to have been explained to them nor is there any evidence to show that they were in any way benefited by the transaction. We must, therefore, hold that the sale-deeds, so far as they affect the shares of *Musammat* Kalsum Bi's children, have been rightly cancelled. The real question to be decided in this appeal is whether the sale-deeds should be cancelled as against *Musammat* Kalsum Bi also or whether they should be allowed to stand. A careful examination of the plaint makes it quite clear that *Musammat* Kalsum Bi attacked the sale-deeds on the grounds of fraud, deception and undue influence. Before the framing of the issues Counsel for the plaintiffs made it quite clear that the plaintiff's wanted to have the sale-deeds caacelled on the ground of fraud. In the supplementary statement of their claim, printed at page 72 of the paper-book, the particulars of the fraud

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. J. 330; 28 C. L. J. 409; 21 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

were set out. *Prima facie*, therefore, the claim of *Musammat* Kalsum Bi should stand or fall on her success or failure to establish the allegations made in the plaint and in the pleadings.

The only question that requires consideration is, whether a *parda nashin* lady who comes into Court with specific allegations of fraud can be relieved of the necessity of establishing those allegations on the mere ground that she is entitled to special consideration and protection if a document executed by her is sought to be enforced against her. There can be no doubt that if a transferee from a *parda nashin* lady comes into Court to enforce a deed executed by a lady it lies upon him to prove that it was obtained from her fairly, that the terms of the deed were explained to her, that she had independent advice before executing the deed, and that she had benefited by it. We are, on the other hand, clearly of opinion that when a *parda nashin* lady comes into Court as a plaintiff with specific allegations of frand and deception it lies upon her to make out a *prima facie* case before the transferee can be called upon to show that the deed had been properly obtained from her. This view is fully supported by the decision of the Allahabad High Court in the case of *Naushani Begum* v. *Intizar Begum* (2). That was a case in which the plaintiff, a *parda nashin* lady, sought to set aside a power-of-attorney executed by her on the 17th of November 1892, in favour of one Inayat Husen Khan and a sale-deed, dated the 21st of November 1892, which purported to have been executed on behalf of the plaintiff in favour of the vendee. The plaintiff alleged in her plaint that her attorney had led her to believe that a certain person was willing to purchase her share in *Mauza* Samaria Anup for a consideration in excess of the real value of the property; that the plaintiff believing this statement of the attorney to be true had agreed to sell the property ; that after she had agreed to effect the sale it was represented to her that a power-of-attorney was necessary for the purposes of registration and mutation proceeeings, and that thereupon she had executed the power-of-attorney, dated the 17th of November 1892. She averred that she neither understood the purport of the deed nor was it explained to her. She added that the attorney had executed a sale-deed of the property in favour of the vendee for a consideration of Rs 5,000 without the knowledge or consent of the plaintiff. She failed to prove the allegations made by her in the plaint, but the Trial Court holding that, the plaintiff being a *parda nashin* lady, the burden of proof lay upon the vendee to prove that the sale-deed was fairly obtained from the plaintiff and that she had understood the nature and effect of it, decreed the claim and set aside the document. On appeal Banerji and Aikman, JJ., reversed the decision of the Trial Court and made the following pertinent observations in their judgment:—

"His (the appellant's *Vakil*) main contention before us is that 'the burden of proof was improperly cast upon the defendant-appellant, and that it was the duty of the plaintiff to prove by some *prima facie* evidence the allegations made by her in her plaint. In our opinion this contention is well founded. No doubt, their Lordships of the Privy Council and the Courts in this country have been jealously watchful of the interest of *parda nashin* ladies, and it has been held that, where a transaction by a *parda nashin* lady is relied upon, it is the duty of the person who relies upon such transaction not only to prove that it was entered into by the *parda nashin* lady, but also that she understood the nature and effect of it. Where a plaintiff comes into Court and seeks to enforce a contract made by a *parda nashin* lady that principle would apply in all its force, but, as observed by their Lordships of the Privy Council in *Kalu Pershad Tewarree* v. *Raja Sahib Perhlad Sein* (3), a party who comes into Court to set aside a contract under which there has been possession and enjoyment is in a very different position from a person who comes into Court to enforce a deed. In the former case the burden of establishing at least a good *prima facie* title to the relief sought by the plaintiff lies on the plaintiff. In the case of a *parda nashin* lady the quantum of evidence which would be required from the plaintiff would, in

(2) A. W. N. (1899), 25.

(3) 12 M. I. A. 282; 12 W. R. 6 P. C.; 2 B. L. R. 111 P. C.; 2 Suth. P. C. J. 225 ; 2 Sar. P. C J. 429 ; 20 E. R. 345.

our opinion, not be the same as that required from any other plaintiff seeking to avoid his deliberate act, but that some *prima facie* evidence is necessary, even in the case of a *parda nashin* lady, is a proposition which cannot be disputed."

We entirely agree in every word of the passage quoted. In the present case, as found by the Court below, *Musammat* Kalsum Bi entirely failed to establish the allegations made in her plaint on the strength of which she had asked the Court to set aside the sale-deeds. It was not denied that the sale-deeds were executed by her with a view to settle all the disputes which had taken place between the parties. After referring to this matter in paragraph 4 of her plaint the plaintiff went on to state that,—

"Accordingly the property entered in the list A was sold to Abdul Rashid for Rs. 8,975-13-0 and the property entered in the list B was sold to Muhammad Shafi for Rs. 5,475-13-0 under deeds, dated the 30th August 1918."

It is admitted that the contract was carried out and the vendees, who were already in possession of the property sold, became the owners of those properties. Thus the object of the suit was to get rid of the sale-deeds which the plaintiff had deliberately executed and for which she had at any rate received the full price from Abdul Rashid. The grounds upon which she had sought the relief being deception and fraud, she was bound to produce some *prima facie* evidence to support them. Upon this ground alone her suit ought to have been dismissed and the Court ought not to have called upon the defendants to prove that the sale-deeds had been fairly obtained from her and that she had entered into the bargain after obtaining idependent advice, etc., etc. The learned Judge of the Court below has cited in his judgment the case of *Shambati Koeri* v. *Jago Bibi* (4) to justify the course adopted by him. That was a case brought against a *parda nashin* lady on a mortgage-bond which purported to be signed in her name "by the pen of Soondar Lal, son-in-law, and *ammukhtar*" which was not produced and secondary evidence to account for its non-production was held to be inadmissible, or at any rate insufficient to show that Soondar Lal had authority to execute the bond. Under those circumstances the lady was held not to be bound by the deed as it was not shown that it was explained to her or that she understood its conditions and effect. That was an entirely different case. The suit had not been brought by the lady to set aside the deed, and it was not proved in that case that the deed had been executed with her consent. That case, therefore, can have no bearing upon the facts of the present case. Moreover, as we shall presently show, the plaintiff in this case is not an ordinary *parda'nashin* lady and she thoroughly understood what she was about. She gave evidence in both the suits, namely, (1) brought by her step-sons against her, and (2) her own suit against the vendees-appellants. Her evidence shows remarkable intelligence and business capacity. She is admittedly literate and can read and write. According to her own evidence she can carry on correspondence with others. The receipt Exhibit D-1, printed at pages 6. 7 and 8 of the paper-book in Civil Appeal No. 2 of 1922 is admittedly signed by *Musammat* Kalsum Bi in her own hand in Persian character. There is another receipt, Exhibit D. W. 2, printed at page 8 of the paper-book in Civil Appeal No. 2784 of 1915 which is also signed by her in her own hand in Persian character. There is a letter, Exhibit D-3, printed at page 9 of the paper-book in Civil Appeal No. 2 of 1922, addressed by *Musammat* Kalsum Bi to *Sheikh* Muhammad Shafi which is also signed in her own hand in Persian character. There are two *Hundis*, Exhibits D 5 and D-6, printed at pages 14 and 15 of this paper-book, in which there is an endorsement in her own hand writing to the effect "that the amount of this *Hundi* is received. (Sd.) *Mussammat* Kalsum Bi, in her own hand in Persian characters and with her thumb mark." Besides these, there are other documents which have admittedly been signed by her to which it is unnecessary to refer in detail. We have looked at her hand writing which is in good *nastalik* (set hand) and appears to have been written by a practised hand. There is evidence to show that the lady has been carrying on litigation and has been entering into money transactions and is far from being inexperienced in such matters.

(4) 29 C. 749; 29 I A. 127; 6 C. W N. 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304.

MUHAMMAD SHAFI *v.* KALSUM BI

Mumtaz-ud-Din, plaintiffs' witness No. 4, at pages 110 and 111 of the paper-book in Civil Appeal No. 2 of 1922, has stated that he knew *Musammat* Kalsum Bi. He visited her house three or four years back and he had a mutation of the suit property attested in his presence. *Musammat* Kalsum Bi attended herself H. Abdul Aziz, her Counsel, was not persent. *Musammat* Kalsum Bi had herself attested mutation. At page 49 of the paper-book is to be found the mutation entry relating to one of the properties conditionally sold to her by her husdand, and the order of the *Naib-Tahsildar* effecting the mutation contains the following statement :—

"This case came on before me in a public meeting. Riaz-ud-Din, vendor, has died. *Musammat* Kalsum Bi, his widow, is the vendee. She having made an appearance verifies the sale. *Babu* Abdul Aziz, pleader for her, is also present. * *

* * Mumtaz-ud-Din, *Lambardar*, testifies to the fact that the revenue and the water rate are paid by *Musammat* Kalsum Bi, vendee, and that she is also in possesson."

There is a little discrepancy between the statement of Mumtaz-ud-Din and the mutation entry as regards the presence of *Babu* Abdul Aziz, *Musammat* Kalsum Bi's pleader, at the mutation proceedings ; but it is possible that the lady went there herself and *Babu* Abdul Aziz, pleader, joined her afterwards. One thing, however, is clear that, according to the mutation entry, the proceedings were carried on in a public meeting and the lady herself went there. This is not usual with *parda nashin* ladies. It is, however, explained that the mutation took place at the house of the *Naib-Tahsildar* and that, therefore, there was nothing strange if the lady went there accompanied by her relations and friends. But Revenue Officers at times do hold their Courts at their private residences. The meeting, though held at the *Naib-Tahsildar's* house, may yet be a public meeting as described in the order.

The principle to be deduced from the rulings of their Lordships of the Privy Council relating to documents executed by *parda nashin* ladies is thus stated at page 270 by Mr. Justice Mahmood in the case of *Behari Lal* v. *Habiba Bibi* (5),—

"It is an estimate which I, from my acquaintance with the facts of Muhammadan life to which it refers, accept as in keeping with the rulings of the Privy Council such matters, which have done for the *parda nashin* women what their life requires, which is, that they should be placed, by analogy, on a footing somewhat similar to that of persons *non compotes mentis*. The doctrines of equity which relate to such persons have been stated in section 228 of Story's work on Equity Jurisprudence, where it is laid down that Courts of Equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith (*uberrima fides*), or the contract of other act is not seen to be just in itself, or for the benefit of these persons, Courts of Equity will set it aside or make it subservient to their just rights and interests."

The learned Judge quoted a passage from the judgment of their Lordships of the Privy Council in the case of *Bazloor Ruheem* v. *Shumsoonnissa Begam* (6) in which the following observation is to be found :—

"In India the *Mussalman* woman of rank, like the Hindu, is shut up in the *zenana*, and has no communication, except from behind the *pardah*, or screen, with any male persons save a few privileged relations or dependants."

Now, can *Musammat* Kalsum Bi be said to come under this description ? Can she be placed on the same footing as persons *non compotes mentis*, and can it be said in her case that she was shut up in the *zenana*, had no communication, except from behind the *pardah* or screen, with any male persons, save a few privileged relations or dependants ? In view of the circumstances disclosed in the evidence, we are emphatically of opinion that *Musammat* Kalsum Bi does not come under the description given above. Even if she be taken to be a *parda nashin* woman of the kind contemplated by their Lordships of the Privy Council, we are of opinion that there is sufficient evidence on the record, which goes to show that she had

(5) 8 A. 267 ; A. W. N. (1886) 91 ; 5 Ind. Dec. (N. S.) 58.

(6) 11 M. I. A. 551; 8 W. R. 3 P. C. 2 Suth. P. C J. 59; 2 Sar. P. C. J. 259; Marsh. 286; 20 E. R. 208.

full knowledge of the nature and character of the transaction in which she had entered, that she had independent advice in the matter, and that she had executed the documents for very good reasons, fully understanding what she was doing. The vendees, Muhammad Shafi, and Abdul Rashid, had $\frac{2}{3}$rds share in the property. The lady had difficulty in getting her share of profits from them. She had filed suits for accounts and she had to prosecute an appeal in the High Court against her two step-sons. At this juncture *Sayad* Mohamed Mian, plaintiff's witness No. 5, intervened and brought about a settlement of the disputes between the parties. The account given by him is as follows :—

" Riaz-ud-Din, Mahomed Shafi, Abdul Rashid and Mumtaz Din were four brothers. Kalsum, wife of Riaz-ud-Din, had dispute with the brother of her husband. I was appointed sole arbitrator. Riaz-ud-Din was then living. I gave my award there. Later on, after the death of Riaz-ud-Din there were other cases between the parties. I suggested to them that they should come to a settlement. The parties met and the share in the property of Riaz-ud-Din was valued at about Rs. 15,000. Abdul Rashid agreed to purchase that share at Rs. 15,000. Kalsum Bi agreed to withdraw her cases pending in Court."

In his cross-examination he stated that —

" At first *Musammat* Kalsum Bi demanded Rs. 20,000 for her husband's share of the property. But she agreed to accept Rs. 15,000, after much consultation with her relations and friends."

Haji Fazl Rahman (P. W. 4) also had taken part in bringing about the settlement. This is what he stated : —

" I know Kalsum Bi by voice. Her husband Riaz-ud-Din was my collateral. The Revenue Assistant sent me to examine Kalsum Bi in a case by her against respondents for account of land produce. I took down the statement. Later on I intervened and a settlement was effected. One of the terms of the settlement was that all cases of *Musammat* Kalsum Bi and her children would be withdrawn, one of those cases was then pending in the Chief Court, and perhaps two in Delhi. The terms were settled in my presence, but the settlement was not reduced to writing in my presence because I left for Mahrauli. The property left by the husband of Kalsum Bi, excluding the Ranipur Factory, was valued at Rs. 15,000, and respondents agreed to purchase it all at this price."

Abdul Rashid (P. W. 7), one of the vendees, has also spoken as to the settlement. He has stated that Fazal Rahman (P. W. 4) was appointed Commissioner by the Revenue Extra Assistant Commisioner to take down the statement of *Musammat* Kalsum Bi, and that he (the Commissioner) had called him, Muhammad Shafi, Shuja-ud-Din, the two plaintiffs, *Musammat* Kalsum Bi, her two daughters, *Musammat* Amat-ul-Basit and *Musammat* Zabida Begam, Mumtaz Ahmad, son of Muzaffar Hussain, and Abdul Wahab. He has described the different stages of the consultation and the final settlement. He says that ten days after the first consultation the persons mentioned above, except Abdul Wahab, collected at *Musammat* Kalsum Bi's, Mahomed Sultan, another of her sons-in-law, was present. It was then that the final terms of the sale-deed were settled, and " *Musammat* Kalsum Bi agreed to withdraw from the appeal, and the other suits pending locally in the Courts of the Munsif and the Revenue Extra Assistant Commisisoner." As already mentioned, *Musammat* Kalsum Bi had filed two suits in Delhi Courts for accounts. The final proceedings in one of them are translated and printed at page 6 of the paper-book. The case was taken up on the 9th of August 1918 in the presence of *Hafiz* Abdul Aziz, Pleader for the plaintiff, and of Muhammad Shafi and Abdul Rashid, defendants. The parties stated that a compromise was going to be made between them and asked for time. The Court made the following order : —

" The case should, therefore, come off on the 15th August 1918. If no settlement is arrived at by the 15th August 1918, the account should be filed in the Court according to the previous order."

The receipt, Exhibit D.-1, dated the 13th of August 1918, translated and printed at pages 6 and 7 of the paper-book, shows that the settlement was made and Rs. 99 were paid as earnest-money. The principal terms of the sale were embodied in the receipt which is signed by *Musammat* Kalsum Bi for herself, and as the guardian of her minor children and

by the other vendors. This receipt is witnessed by Muhammad Shafi and Muhammad Sultan, the sons-in-law of *Musammat* Kalsum Bi. When the case came up before the Court on the date fixed (15th August 1918) the Court made the following order:—

"The case came off to-day in the presence of *Hafiz* Abdul Aziz, Pleader for the plaintiff. None of the defendants is present. The Pleader for the plaintiff states that a mutual settlement has perhaps been made, but that he will make a statement to-morrow after making an enquiry into the matter. He asks for time till to-morrow. The case should, therefore, come off to-morrow."

On the 16th of August 1918, when the case was again taken up none of the parties appeared. The Court, therefore, ordered the case to be consigned to the record-room in default. After reading this evidence no doubt is left on the point that the sale-deeds in question were the result of mutual settlement between the parties, and the statements of the witnesses, to which we have already referred, are strongly corroborated by this documentary evidence.

The following facts show that the sale-deeds were not obtained in a hurry and that *Musammat* Kalsum Bi had sufficient opportunity and time to consult her friends and relations, and after doing so had deliberately entered into the contract and had completed the sale-deeds. It has been pointed out that the receipt for the earnest-money was executed on the 13th of August 1918. The sale-deeds were executed on the 30th of August 1918. They were presented on 5th September 1918 for registration by *Musammat* Kalsum Bi at her residential house for herself and as guardian of her minor son Iqbal Ahmad and *Musammats* Musarrat Begam and Kudsia Begam, her minor daughthers. The registration endorsements at page 21 and 28 of the paper-book show that the contents of the two sale-deeds were read out and explained to *Musammat* Kalsum Bi, who, after hearing them, admitted them to be correct. She was identified by Muhammad Sultan and Muhammad Shafi, her sons-in-law, the husbands of her two adult daughters. Under each of the documents a *hundi* for Rs. 3,500, part of the consideration, was secured by *Musammat* Kalsum Bi. As some delay took place in getting the *hundi* money she served the vendees with notices, dated the 11th of December 1918, and pressed them for payment These notices are translated and printed at pages 8 and 9 of the paper-book. Payments were subsequently made as is shown by the endorsement made on the *hundis* by *Musammat* Kalsum Bi. These are translated and printed at pages 14 and 15 of the paper-book. The sale-deeds are written in an ordinary simple language. They do not contain any involved provisions or technical language such as would not be ordinarily understood by a *parda nashin* lady, especially by a lady of the intelligence and education of *Musammat* Kalsum Bi. From the endorsements on the deeds it is made clear that they were explained to her in her own language; that she fully understood them, and that she admitted the execution thereof. The endorsements further recited that *Musammat* Kalsum Bi was identified by her two sons-in-law, who were, themselves, interested in the transaction as their wives were among the executants. Under section 60 of the Registration Act, III of 1877, a certificate of the registering officer, like the one to which we have referred, is admissible to prove the facts mentioned in it. There is thus *prima facie* evidence that the sale-deeds were explained and understood by *Musammat* Kalsum Bi, and that she admitted the execution thereof. This *prima facie* evidence has not been rebutted by her by any evidence whatsoever. Thus, the execution of the sale-deeds by *Mussammat* Kalsum Bi, after consultation with relatives and friends, and after understanding their terms, has been satisfactorily established, beyond all reasonable doubt.

Now, let us see if the transaction was a fair transaction and adequate price had been paid for the property sold. In the sale-deed in favour of Abdul Rashid the detail of the consideration Rs. 8,975 (sale money) is given. The items therein given may be divided under two heads, namely:—

(*a*) Items which were to be paid to *Musammat* Kalsum Bi in her own right and on behalf of her children; and

(*b*) Items which were to be paid to creditors and Mumtaz Ahmad, the executant No. 9.

The total of the items to be received by her comes to Rs. 6,932-13-0, and

the total of the items to be paid to creditors, including Rs. 250 half of Rs. 500 kept in trust with *Sheikh* Abdul Wahab, sister's son, on account of pilgrimage expenses (*haj-i-badl*) for Riaz ud-Din comes to Rs. 2,042-3-0. Deducting this from the total amount of the consideration (Rs. 8,975) we get a balance of Rs. 6,932-13-0 which was the amount to be received by *Musammat* Kalsum Bi. Instead of this, sher eceived Rs. 7,432-13-0 as admitted in paragraph 8 of the plaint. Thus, she received (Rs. 7,432-13-0—Rs. 6,932-13-0) = Rs. 500 extra. The defendants alleged that Rs. 600 were paid on account of the expenses incurred in filing suits for accounts in Delhi Courts, and the appeal No. 2784 of 1915 in the Chief Court which she had undertaken to withdraw according to the settlement. To prove this extra payment of Rs. 600, the defendants filed a receipt, dated the 15th of August 1918, executed by *Musammat* Kalsum Bi, but objection was taken to its admission in evidence as it was produced at a late stage. We have compared her signature on the receipt with her signatures on documents which were admittedly executed by her and we have no doubt that the receceipt was executed by her. Even if the receipt be ruled out as inadmissible there is some other evidence to show that it was very likely that this amount was paid. Fazal Rahman (P. W. 4), whose evidence is translated and printed at page 105 of the paper-book has stated that the property left by the husband of *Musammat* Kalsum Bi, excluding the Rampur Factory, was valued at Rs. 15,050 and the respondents had agreed to purchase it all at this price. Now, the total of the price agreed upon under the two sale-deeds is Rs. 14,450. If we add Rs. 600, the total comes Rs. 15,050 This, in a remarkable manner, corroborates the case set up by the defendants. Another corroboration is to be found is the circumstance that though *Musammat* Kalsum Bi was entitled to Rs. 6,932-13-0 only she, as admitted in the plaint, actually received Rs. 7,132-13-0, *i.e.*, Rs. 500 extra. This is not exactly Rs. 600 but the payment of this Rs. 500 extra can be explained only on the hypothesis that she had received something extra on account of the expenses of the appeal. It has been shown above that one of the account suits pending in Delhi was abandoned on the 15th of August 1918 and the receipt relied upon is also dated the 15th of August 1918. This also in a way goes to show that there is truth in the defendant's allegation as to the payment of the costs of the suit.

It has been contended that the items of Rs. 1,192-3-0 payable to Mumtaz Ahmad, Rs. 500 payable to Jamil Ullah, Rs. 250 kept in trust for *haj-i-badl*, and Rs. 100 paid to *Musammat* Muhammadi Jan are fictitious and have not been proved. Now, as regards the the Rs. 1,192-3-0, the plaintiff stated in her plaint that a heavy sum was shown as due to Mumtaz Ahmad. In her statement later on she stated that nothing was due to Mumtaz Ahmad, and when she filed additional pleas, which are printed at page 72 of the paper-book, she stated in paragraph 2 that no mention about the payment of any items to Mumtaz Ahmad was made to her. She did not take any objection as the payment for existence of the other debts. If those items were fictitious she would have taken objection to those in her plaint, or in her further pleas, or in her statement in Court. In a way, she admitted those items, and it is too late now to object to them. Objection, no doubt, was taken in respect of the item of Rs. 1,192 paid to Mumtaz Ahmad. This gentleman appeared as a defendant and stated on oath that his *jawab-i-dawa* and pleas were the same as those of Muhammad Shafi and Abdul Rashid (page 90 of the paper-book) in which there was a clear statement that the whole consideration, including the amount due to Mumtaz Ahmad, was real. Again, at page 13 of the paper-book there is to be found an endorsement by Mumtaz Ahmed dated the 30th of August 1918 admitting the payment of the debt due to him under the mortgage, dated the 12th January 1915, executed by Bashir-ud-din and Shuja-ud-Din. The amount paid included the amount of Rs. 1,192. This was paid on the same date on which the sale-deeds were executed, *i.e.*, the 30th of August 1915.

A question as to the market-value of the property was raised and a Commission was appointed to report as to the market price of the property. He estimated the price to be at Rs. 19,350. It is not easy always to estimate the exact price of a property with reference to the market-value of other properties, but taking the estimate even to be tolerably correct the difference between the

price paid for the two sale-deeds and the price estimated by the local Commissioner does not come to much. The total of the price paid under the two sale-deeds is Rs. 14,450. Rs. 500 extra were paid to *Musammat* Kalsum Bi as admitted in her plaint, namely, these two items amount to Rs. 14,950. Deducting this Rs. 19,350 we get a balance of Rs. 4,400. This balance may be fairly set off against the following circumstances :—

(1) *Musammat* Kalsum Bi and her children were not in possession of the properties and they had difficulty in realizing their share of profits ;

(2) Litigation for profits was going on in the Delhi Courts ;

(3) An appeal by *Musammat* Kalsum Bi was pending in the Chief Court. The sum decreed in her favour in the decree passed by Mr. Dundas, namely, Rs. 7,400, was to be realized by her from her step-children. By executing the sale-deeds she was purchasing peace and getting all this money by one stroke.

As already stated, the sale-deeds were the result of a family settlement and must be looked upon as such. The difference of Rs. 4,400 was, therefore, not very great.

After carefully considering all the circumstances mentioned in our judgment we have unhesitatingly come to the conclusion that, so far as *Musammat* Kalsum Bi is concerned, the sale-deeds must stand. We, therefore, accept the appeal in part and dismiss the suit of *Musammat* Kalsum Bi with costs in all Courts. The decree in favour of the other plaintiffs will stand. The appeal against them is dismissed with costs.

Z. K. *Appeal accepted in part.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1793 OF 1920.

March 29, 1923.

Present :—Mr. Justice Chatterjea and Mr. Justice Cuming.

SURENDRA NATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJA RESHEE CASE-LAW AND OTHERS—PLAINTIFFS—RESPONDENTS.

Instalment-bond Provision as to default—Money, when becomes due—Acceptance of overdue instalment—Waiver.

When money is payable by instalments with a proviso that the whole of the money shall become due on default of payment of one of the instalments, the general rule is, that the money becomes due when the default is made in any of the instalments ; but, if the right to enforce payment of the whole sum due upon default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment, on the one hand, and receipt, on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred. [p. 272, cols. 1 & 2]

Mohesh Chandra Banerji v. *Prosanna Lal Singh*, 31 C. 83 ; 8 C. W. N. 66, distinguished.

Payment and acceptance of part of an overdue instalment does not amount to waiver, nor can the payment and acceptance of interest alone constitute waiver. [p. 273, col. 2.]

There is a distinction, however, between a waiver by payment and receipt of an overdue instalment and a mere omission to sue or take steps on the default, and although there can be a waiver by the payment and receipt of the overdue instalment, there can be none by the mere fact of doing nothing.

Appeal against the decree of the Additional Subordinate Judge of Bakergunj, dated the 29th March 1920.

Babus *Trailakhya Nath Ghose* and *Monmatha Nath Roy* (Jr.), for the Appellants.

Babus *Narendra Ch. Bose* and *Nalin Ch. Pal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit upon an instalment mortgage-bond, dated the 23rd *Bysak* 1308.

The bond provided for payment of the debt in twelve instalments, the first falling due in *Pous* 1303 and the others in the month of *Pous* of each of the next 11 years ending with 1319. It was further provided that on default in payment of any one instalment the creditor would be entitled to recover the entire amount due under the bond with interest thereon at 2 per cent. per mensem, without waiting for the future instalments falling due. The plaintiff alleged that the first instalment was duly paid and the instalments for 1309 to 1311 together with interest thereon were paid and accepted although the payments were made out of time and the suit was brought for the subsequent instalments.

The main defence was that the suit was barred by limitation. The Court of first instance disbelieved the case set up by the defence but also disbelieved the case of the plaintiff as regards payments made by the defendants, and, holding that there was no waiver, came to the conclusion that the suit was barred by limitation. On appeal the learned Subordinate Judge held that the plaintiff's case was proved and that there was waiver and accordingly gave the plaintiff a decree. The defendants have appealed to this Court.

The question for consideration is whether the suit is barred by limitation. The Article applicable to the suit is Article 132 which provides that for a suit to enforce payment of money charged upon immoveable property the period of limitation is 12 years from the time when the money sued for becomes due.

The question, therefore, is when did the money become due in the present case. A number of decisions has been cited before us mostly in connection with cases coming under Article 75 of the Limitation Act, or relating to instalment decrees

It is a general rule that, where money is payable by instalments with a provision that the whole of the money will become due on default of payment of one of the instalments, the money becomes due when default is made in any of the instalments. [See *Hurronath Roy* v. *Maherocla Moolah* (1) and *Hemp* v. *Garland* (2). But as pointed out by Wilson and O'Kinealy, JJ, in *Mon Mohan Roy* v. *Durga Charan Gooee* (3) an exception has been engrafted upon the general rule in certain cases, *viz.*, that if the right to enforce payment of the whole sum due upon default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in, if no default had occurred.] In the case of *Mohesh Chandra Banerjee* v. *Prosanna Lal Singh* (4), Rampini and Pargiter, JJ., appear to have taken a different view relying upon certain decisions of the Bombay High Court. But in that case no instalment was paid in full, and the learned Judges referring to the decisions of this Court pointed out that part-payment and acceptance of part of an overdue instalment has never been held even by this Court to amount to a waiver.

A distinction, however, has been taken between a waiver by payment and receipt of an overdue instalment and a mere omission to sue or take steps on the default, and although there may be a waiver by the payment and receipt of the overdue instalment, there could be none by the mere fact of doing nothing. It was held accordingly in *Girendra Mohan Roy* v. *Bocha Das* (5) (where the cases on the point are collected) that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due on the failure of payment of the instalments (as agreed upon in that case) did not amount to waiver. In the present case there was payment and acceptance of the overdue instalments.

As already stated, most of the decisions on the point relate to cases coming under Article 75 of the Limitation Act which provides for waiver of default in payment of instalments, or to cases relating to instalment decrees to which the principle has been applied.

Article 132 of the Limitation Act does not provide for cases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage-

(1) 7 W. R. 21 (F. B)
(2) (1843) 4 Q. B. 519 ; 3 G. & D. 402 ; 12 L. J. Q. B. 134 ; 7 Jur. 393 ; 62 R. R. 423 ; 114 E. R. 994.
(3) 15 C. 502 ; 7 Ind. Dec. (N. S.) 919.
(4) 31 C. 83 ; 8 C. W. N. 66.
(5) 1 Ind. Cas. 49 ; 36 C. 394 ; 13 C. W. N. 1001 ; 9 C. L. J. 226.

bonds payable by instalments. In the case of *Juggut Mohini Dassee* v. *Monohur Koonwar* (6), however, Mitter, J., observed that the principle indicated in Art. 75 might be adopted in determining "when the money sued for becomes due " within the meaning of Art. 132, but the learned Judge himself added that it was not necessary to express any decided opinion upon that point. And in *Sitab Chan Nahar* v. *Hyder Malla* (7), Banerjee and Rampini, JJ., applied the principle of the cases decided upon analogous questions relating to execution of decrees for money payable by instalments (rather the balance of authority in this Court upon the question before them) to a case coming under Art. 132. We think that in the absence of any provision in Art. 132, with respect to cases of waiver, and of any direct authority on the point, we may apply the principle indicated in Art. 75 in determining "when the money sued for becomes due " within the meaning of Art. 132.

Applying that principle, and having regard to the weight of authority in connection with cases under Article 75 and instalment-decrees, we think that the payment and acceptance of overdue instalments in the present case constitute a waiver, and that the plaintiff is entitled to recover the subsequent instalments.

It is contended, however, on behalf of the appellants that there was no waiver, because the acceptance of interest on the overdue instalments shows that penalty by way interest was realized and there was therefore no waiver. But the penalty, referred to in the decisions, does not refer to penalty by way of interest, but the penalty by way of suing for all the instalments. Reliance was placed upon the case of *Mohesh Chandra Banerjee* v. *Prosanna Lal Singh* (4) to show that payment and receipt of interest cannot amount to waiver. The learned Judges in that case referred to *Nanjappa* v. *Nanjappa* (8). In the latter case the bond provided for interest at 9 per cent., and on default at 15 per cent. The creditor accepted interest at a rate a little higher than 9 per cent. on default and it was held that he had not waived any right under the bond by accepting payment on account of interest. That decision, therefore, does not throw much light upon the question before us. Besides, payment and acceptance of interest alone cannot constitute waiver of default of an overdue instalment. In *Mohesh Chandra Banerjee's* case (4) there was payment of interest and part payment of overdue instalments. In the present case the entire overdue instalment together with interest thereon was paid and accepted by the creditor though out of time, and no authority has been shown to us that in such a case it would not constitute waiver.

On the whole, we are of opinion that the decree of the Court below is right and the appeal is accordingly dismissed with costs.

W. C. A. *Appeal dismissed.*

(6) 25 W. R. 278.
(7) 24 C. 281; 1 C. W. N. 229 ; 12 Ind. Dec. (N.S.) 854.
(8) 12 M. 161 ; 4 Ind Dec (N. S) 462.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 71 OF 1922.

March 27, 1922.

Present :—Mr. Justice Maung Kin.

U. WISEIKLA—APPELLANT
versus
U. PARAMA AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908)—Provisions, whether applicable to Buddhist monasteries—Burmese Buddhist monk—Right to monastery extinguished by adverse possession—Death of trespasser — Right, whether revived.

The provisions of the Limitation Act apply to suits for possession of Buddhist monasteries.

After the right of a Buddhist monk to a monastery has become extinguished by the operation of the law of Limitation, it cannot come into life again merely because the person who acquired adverse possession died without dedicating the monastery to anyone.

Mr. *Ba Dan*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for the recovery of a monastery site and the monasteries built thereon. The plaintiff-

appellant, who is a Burmese Buddhist monk, claims the site and the monasteries as his *poggalika* property. After having been in possession of the property for some time, the plaintiff went away and a *pongyi* named U Pyinnya took possession of the monasteries in 1254 B. E., and from that time until his death in 1280 B. E., that is, for 26 years, U Pyinnya remained in possession adverse to the plaintiff. After U Pyinnya's death, the defendant took possession of the monasteries, and the plaintiff sues for the recovery of the site and the monasteries thereon from the dafendant.

Under the Law of Limitation, U Pyinnya died after obtaining a good and complete title to the site and the monasteries as he had been in adverse possession for more than 12 years. The plaintiff's cause of action against U Pyinnya became extinguished after the lapse of 12 years from the date on which U Pyinnya went into possession. After his right has been extinguished it cannot, as it were, come into life again, because U Pyinnya died without having dedicated the Kyaungdike to anybody.

There is no doubt that the provisions of the Limitation Act apply to suits for possession of Buddhist monasteries.

There is no authority to the contrary.

The plaintiff might have a right to claim shelter in the Kyaungdike if it had become *saugika* property, but in the present suit he is not suing for such a right. However, it is extremely doubtful that he will be able to claim such a right, because, admittedly, he has already obtained shelter as he possesses a *Kyaung*.

The appeal is dismissed under O. XLI, r. 11 of the Code of Civil Procedure.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 122 OF 1922.

October 30, 1922.

Present :—Mr. Kanhaiya Lal, J. C.

MUHAMMAD ABBAS—PLAINTIFF—APPELLANT
versus
SHAHAMAT HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage—Transfer by mortgagee—Suit to redeem.

In a suit for redemption it appeared that the rights of the original mortgagor had lapsed by virtue of a transfer effected by the mortgagee the purchaser from the mortgagors in favour of the predecessors-in-interest of the contesting defendants. This sale-deed recited the earlier sale by the mortgagor in favour of the mortgagee:

***Held*, that Article 134 of the Limitation Act protected the purchasers from a claim of the mortgagor, and the suit having been brought more than 12 years from the date of the transfer was barred.**

Appeal against the decree of the Subordinate Judge, Bahraich, dated the 9th January 1922.

Mr. *Ali Muhammad*, for the Appellant.

Mr. *Har Dhian Chandra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption and the main questions for consideration were whether the rights of the original mortgagor had already passed to the defendants, and whether the claim was barred by limitation. The Courts below found that there was a mortgage effected by Syed Ali Hamid in favour of Tafazzul Husain, on the 6th October 1873, but the rights of the original mortgagor had lapsed by virtue of a transfer effected by a person who claimed to be a purchaser from the original mortgagor in favour of the predecessors-in-interest of the contesting defendants on the 23rd December 1876. They held that Article 134 of the Indian Limitation Act consequently barred the claim.

The sale-deed of the 23rd December 1876 recites that Syed Ali Hamid had sold his right

to Tafazzul Hussain on the 6th October 1876 by a registered sale-deed. Tafazzul Husain sold his rights in return to Gur Prasad, the father of the defendant No. 2, and Ori Lal, the ancestor of the defendants Nos. 5 to 7, on the 23rd December 1876. Owing to a fire the original documents of title are stated to have been lost. A certified copy of the latter sale-deed was admitted in evidence. If the recital therein of the earlier sale-deed made as far back as 45 years ago be taken into consideration there has been a complete transfer of the title of the original mortgagor by two successive sales to the predecessors-in-interest of the defendants and the plaintiff has no right to sue for redemption. If that recital be excluded from consideration as evidence of the transfer by the original mortgagor, Article 134 of the Indian Limitation Act would, at all events, apply and bar the present claim. There is nothing to indicate that the predecessors of the defendants had acted in bad faith and, as held in Sir *Muhammad Abbas* v. *M. Nasiban* (1), Article 134 protects a purchaser in the above circumstances from a claim by the mortgagor unless the claim is brought within 12 years from the date of the transfer.

The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 53 Ind. Cas. 168; 6 O. L. J. 384.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 348 OF 1916.

January 31, 1920.

Present.—Mr. Justice Shadi Lal and
Mr. Justice Wilberforce.

MOHAN LAL—DEFENDANT—APPELLANT
versus
THE NORTH-WESTERN RAILWAY CO-OPERATIVE STORES ASSOCIATION LTD., LAHORE—PLAINTIFF—RESPONDENT.

Accounts, suit for—Accounts rendered and accepted—Failure to produce relevant documents, effect of.

In a suit for accounts it was found that defendant had constantly rendered accounts which had been accepted by the plaintiff, that there was no allegation of fraud and that the plaintiff was unable to produce accounts and documents relating to the transactions in dispute which should be in his possession :

***Held*, that the suit was liable to dismissal as the defendant could not, under the circumstances, be called upon to render accounts.**

Andersson v. *Delhi Cotton Mills*, 69 P. R. 1903 ; 155 P. L. R. 1903, **distinguished.**

First appeal from the decree of the Senior Sub-ordinate Judge, 1st Class, Lahore, dated the 28th of December 1915.

Bakhshi *Tek Chand* and Lala *Madan Gopal*, for the Appellant.

Messrs. *Oertel* and *M. Obedulla*, for the Respondent.

JUDGMENT.—Lala Mohan Lal, defendant – appellant in this case, was in the employ of the North Western Railway Co operative Stores Association, plaintiff-respondent, as Manager from the 1st of February 1895 up to the 31st of March 1908 when he was dismissed. The plaintiff in this present action, which began on 20th February 1909, sued him for a settlement of accounts and to recover from him compensation for all loss sustained by reason of his negligence or misconduct in accounting for stocks sold or alleged to have been sold and shortages of any kind during his management. He is stated, under the terms of his employment, to have been responsible for the management of the Lahore shop and its accounts, and, in the same way, for the management and the accounts of Saharanpur Branch. The plaintiff stated that he had shown sales of goods amounting to Rs. 7,592 in regard to which no purchasers' vouchers were forthcoming, that he had further shown sales amounting to Rs. 10,504 for which the vouchers produced did not tally, that by reason of his neglect to keep correct personal ledgers of customers, and to submit monthly deduction statements, Rs. 4,254 had become irrecoverable owing to the death or retirement of members of the Railway, and, finally, that a further sum of Rs. 256 was due from him on account of shortage of stock when he was dismissed. Mohan Lal entirely denied the claim and instituted a cross-suit for return of his security, for commission due to him and other

items. He admitted that he was responsible for the management of the Lahore shop but denied any responsibility for that at Saharanpur. He alleged, however, that his liability only extended to accounting for the actual stock in hand, to depositing cash for amounts received and to handing any vouchers for credit sales to the Accounts Office with which lay the responsibility for recoveries. There is no complaint regarding the cash transactions, nor did plaintiff press the matter of an alleged shortage of stock in hand at the shop. The question at issue before us was whether Mohan Lal was responsible for the accounts of sales on credit and whether he was, therefore, liable for a rendition of the same.

The learned Senior Subordinate Judge, who was guilty of gross carelessness in delaying the delivery of his judgment for over a year, came to the conclusion, mostly on a letter written by defendant himself, that he was responsible for all the accounts as well as for the management of the shop. He held, therefore, that although regular accounts had been submitted, he was in no way absolved from liability to render accounts as claimed by the plaintiff, and, in this connection, he cited *Anderson* v. *Delhi Cotton Mills* (1). He, therefore, passed a preliminary decree as desired by the plaintiff.

Before we begin to deal with the arguments of the Counsel for each party, we may state that Mr. Oertel for the plaintiff-respondent, eventually withdrew any claim for a rendition of accounts of the Saharanpur Branch. This judgment, therefore, deals only with plaintiff's liability as regards the Lahore shop. Mr. Tek Chand for the appellant has first referred us to the action of the plaintiff himself which has made any compliance with the order of the Court for rendition of accounts impossible and infructuous. Plaintiff, it may be remarked, asked for a rendition of accounts for the period February 1895 to 31st March 1908. The defendant, in the course of the suit, made a request for the production of certain papers and accounts-books. On page 104 is contained the reply of the plaintiff.

This reply shows :—

(1) that even the bye-laws of the Association are not forthcoming – ;

(2) that the Sales Abstract Books are only forthcoming for one year of the defendant's incumbency;

(3) that many of the balance-sheets are lost;

(4) that the Return Stores Book which shows the stores advanced and balances returned is only available for a short period ;

(5) that no main ledgers exist before 1902 ;

(6) that stock ledgers exist only for a short period ;

(7) that quarterly balance-sheets of personal ledgers are not in existence for the years 1902-08 ;

(8) that the list of bad debts passed by the Board only exists for the year 1904-05;

(9) that the duty list of employees as passed by the Assistant Secretary is not forthcoming ;

(10) that petty cash vouchers are only available for a short period ; and finally

(11) that other vouchers are only available from the 1st of April 1907.

Mr. Tek Chand also referred to many other documents not produced which it is not necessary to mention in detail. He argued, therefore, that the accounts being in possession of the plaintiff and the particulars being admittedly defective, his client could not be called upon to render accounts. He cited as an authority in his favour the judgment printed in *Upendra Kishore* v. *Ramtara Debya* (2). In that case also all the accounts were with the plaintiff and he refused to place them or other necessary particulars before the Court and it was held that, in such circumstances, it was impossible to call upon a defendant to answer a charge regarding his liability on the accounts.

The main charge against the defendant is that vouchers are missing or that they do not tally with the accounts. Mr. Oertel for the respondent contends that under paragraph 6th of the agreement it was defendant's duty to preserve the necessary vouchers in support of his entries. It was, however, admitted that under the orders of the Association all vouchers previous to 1901 were destroyed. It is further urged that the defendant's liability for the preservation of vouchers ceased when they were made over to the Accounts Office on the conclusion of each day's work. Before coming, however, to any decision on the point

(1) 69 P. R. 1903 ; 155 P. L. R. 1903.

(2) 4 Ind. Cas. 542 ; 13 C. W. N. 696.

it will be necessary for us to examine the evidence regarding defendants' liability for the office accounts.

The whole dispute, as we have shown, centres round the sales on credit and the vouchers which were or ought to have been obtained from customers. According to the plaintiff, defendant was responsible for keeping all the accounts including those for sales on credit and the personal ledgers of such purchasers and also for the preparation of monthy lists showing the amounts to be deducted from the salaries of purchasers. According to the defendant, he was liable only for the actual stock in hand and the cash sales and to make over all credit vouchers to the Accounts Branch when his further liability ceased, provided that his sales were in accordance with the general conditions of the business. On the question of defendant's liability in respect of these credit sales and their accounts, there is much conflicting evidence. The plaintiff relied largely on the evidence of Mr. W. A. Grey, Chief Examiner, N.-W. Railway, who was Managing Director in the year 1907-08, and on the statement of Gobind Ram, Managing Director, when the suit was instituted. Their evidence was taken at great length and is briefly to the effect that there was no account office separate from the shop. They admitted that all credit vouchers were made over to the office with the Daily Sales Book but stated that all the account work in the office was under the responsibility of the Manager. On the other hand, the defendant relies upon the evidence of persons employed in the office such as Jaikishen Das, who worked for twelve years as Accountant and Head Clerk, and stated that he was in charge of the office and not subordinate to the Manager in any way. This evidence is also supported by Makhan Lal and Fateh Din, employees in the office. Defendant also relied greatly upon the evidence of Mr. Keatinge, a prominent Railway official, who held many honorary posts connected with the Stores for a period of some seven years and stated that the Manager had nothing to do with the Accounts Branch. The same is the evidence of Mr. Isaacs, who held the post of Assistant Secretary and stated that the office was under his charge. Mr. Tek Chand also refers to many documents showing the separation between the shop and the Accounts Branch dealing with the recovery of the money from purchasers on credit. He refers to a list of fourteen books which the Manager was required to keep up. These do not include the personal ledgers of customers. He next refers to an office order of 14th August 1899 (page 28) which states that the office will work directly under the Assistant Secretary. "The Manager will, however, have access to any book he may require." As Mr. Tek Chand remarks, such a provision is hardly applicable to a person responsible for these accounts. It is, moreover, as far as we understand, admitted that in the actual recovery of money from credit purchasers the Manager took no part. The amounts due were merely recovered by deductions from salary and other officials were responsible in this matter. For instance, in 1899, as shown by Resolution VI of Directors' Minute Book, the Honorary Secretary (not the Manager) had to press for the recovery of belated debts (page 7 of the printed paper-book). The following page of the printed paper-book also shows the Honorary Secretary taking similar action in the year 1900. Mr. Tek Chand finally refers to a Resolution printed at page 9 that the Honorary Secrtary explained that the Manager had no time to supervise the work of the office and that the arrangement in force might be altered if, after proper consideration, it was considered to place the entire control under the Secretary. This Resolution was passed at a meeting in 1899 and is said by plaintiff not to have been acted upon but it is noteworthy that at that time Mr. Keatinge was Honorary Secertary and Mr. Isaacs the Assistant Secretary and that they both gave evidence to the contrary. A careful consideration of all the evidence leads us to believe that the Manager's liability for credit sales ended when he had handed the vouchers to the office. If, therefore, the vouchers were in any way incomplete or did not tally with the Manager's account the responsibility rested with the office.

Mr. Tek Chand finally refers to evidence that his accounts were regularly rendered by the Manager and audited by expert accountants of the Railway, or by professional auditors, and found correct. For instance, Messrs. Meugens, King and Simson in 1905 stated that the accounts had been well kept and carefully balanced by the Accountant (it is noteworthy

'not by Manager') and found correct. On page 17 also there is a Resolution showing that the accounts for the following year were also audited and found correct, and on the following page there is a similar note for the year 1907. Mr. Tek Chand also points out to us that the items, in respect of which it is desired to make defendant accountable, were written off as irrecoverable before the institution of the suit, and that the present suit followed a suit by the Manager for refund of his security, payment of sales commission, etc. Mr. Tek Chand, therefore, urges that accounts having been regularly rendered and settled, the matter could only be re-opened on proof of fraud. He refers to Smith's Law of Master and Servants, 6th Edition, page 95 and Halsbury's Laws of England, Volume I, page 188. He also contends that the judgment relied upon by the lower Court, *Anderson* v. *Delhi Cotton Mills* (1) can have no application to this suit. In that case it was merely held that an agent having handed over the account-books of a Company to his successor was not thereby exonerated from his liability to render accounts. The plaintiff, however, apparently produced the complete account-books in Court and it is clear from the judgment that no settlement of accounts had taken place. This judgment, therefore is of little help to plaintiff's case.

Finally, we must refer to a letter, Ex. P. 7 of 30th November 1907, on which great reliance has been placed by the plaintiff and it has been considered as of great importance by the lower Court. At that time the Directors were dissatisfied with Mohan Lal regarding discrepancies in personal accounts and he wrote apologizing for this fault and attributing it to the incompetency of the ledger-keepers. He stated that the present shortcomings could be remedied by allowing him to arrange to recover the balances due by customers. Some six weeks later, however, when the dispute had become more acute, he wrote denying any liability connected with the personal ledgers and accepting liability only for the shortage of the stock and work of the shop proper.

He has since taken this attitude throughout. He stated in Court that he wrote his letter at the request of certain Directors and at their threats of dismissal if he did not write it. His explanation may be somewhat unconvincing but we do not think that a letter written by a a man obviously in fear of dismissal need be taken as conclusive against him.

On the whole, therefore, we doubt if Mohan Lal was in charge of the accounts in respect of which this suit has been instituted. We think, moreover, that in view of the constant rendering of accounts and their acceptance by the plaintiff and his present inability to produce accounts and documents which should be in his possession, the suit should have been dismissed.

We accordingly accept the appeal and dismiss the suit with costs.

Z. K. *Appeal accepted.*

(1) 69 P. R. 1903.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 120 OF 1922.

July 26, 1922.

Present :—Mr. Justice Duckworth.

MA MA GYI—APPELLANT
versus
MA NYO PO AND ANOTHER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI r. 2 (3)—Adjustment of decree—Certification, absence of—Court, whether can take notice of adjustment—Limitation Act (IX of 1908), Sch. I, Art. 113—Specific performance, suit for—Limitation, commencement of.

The prohibition contained in O. XXI, r. 2 (3) of the Civil Procedure Code, is limited to a Court executing the decree, and does not extend to a case where a Court which is not executing the decree is dealing with the matter. Under Article 113 of Schedule I to the Limitation Act, where a date is not fixed for specific performance time does not commence to run till specific performance has been demanded and the plaintiff has been refused.

New Beerbhoom Coal Co. v. *Bukram Mahata*, 2 C. L. R. 268 ; 4 Ind. Jur. 570 ; 2 Ind. Dec. (N.S.) 722 ; 5 Cal. 175. relied on.

Appeal against the decree of the Divisional Court, Bassein, in C. A. No. 29 of 1921.

Mr. *Doctor*, for the Appellant.

Mr. *Ray*, for the Respondents.

JUDGMENT.—On the law points decided by the learned Divisional Judge on appeal I think that there can be no doubt that he was in error. The making over of one-half of the granary in satisfaction of the decree may not have been certified but O. XXI, r. 2 (3), Civil Procedure Code, is quite clear, and the embargo under that rule is limited to a "Court executing the decree." There would be no prohibition in a case where a Court, which was not executing the decree was dealing with the matter. Again, the learned Judge was wrong when he decided that there was a time-bar under Article 113 of the First Schedule of the Limitation Act. There may or may not be, but the point is that under that Article, where a date is not fixed for specific performance, time does not commence to run till specific performance has been demanded, and the plaintiff has been refused. See *New Beerbhoom Coal Company* v. *Buloram Mahata* (1). Here, it is not suggested that plaintiff even made such a demand prior to suit, and *prima facie* she could still sue for specific performance of any *sale* to her by enforcing a registered conveyance. The facts in dispute have not been dealt with by the Divisional Court. The decree of the Divisional Court is set aside, and the appeal is remanded to that Court for decision on the merits. The costs of the appellant incurred in this Court and in the Divisional Court will be borne by respondents.

Z. K. *Appeal allowed.*

(1) 5 C. 175 ; 2 C. L. R. 268 ; 4 Ind. Jur. 570 ; 2 Ind. Dec. (N. S.) 722.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2569 OF 1917.

February 19, 1920.

Present :—Mr. Justice Broadway.

BALMOKAND—DEFENDANT—APPELLANT

versus

WAZIR CHAND—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908) *s.* 19, *Sch.* I, *Art.* 144 —*Adverse possession—Co-sharers—Acknowledgment of co-sharer's title—Demand for share of expenses of repairs.*

The possession of one co-sharer is, as a general rule, the possession of all the other co-sharers. The co-sharer in possession, in order to claim adverse possession, must show some clear and unmistakeable act on his part evidencing his intention to hold possession on his own account.

Plaintiff sued to recover his share in certain ancestral property from the defendants and produced in evidence a post-card written by one of them in which the plaintiff was called upon to pay his share of the monies expended on repairs or surrender his interest in the house ;

Held, (1) that the post-card amounted to an acknowledgment of the plaintiff's title ;

(2) that as the post-card indicated that, up to the date of writing, it the writer had not formed any intention to exclude the plaintiff from the joint property the acknowledgment could not be said to have been made beyond limitation ;

(3) that the acknowledgment contained in the post-card was not conditional, as the condition attached to the future and not to the past.

Rajah Kavali Arunachella Row v. *Rangiahappa Row*, 20 M. 519 ; 1 M. L. I. 318 ; 16 M. L. J. 563 ; *Maniram Seth* v *Seth Rupchand*, 88 C 1047; 4 C.L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T.199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 120 ; 33 I. A. 165 (P C.), distinguished.

Second appeal from the decree of the District Judge, Gujranwala, dated the 21st April 1917, reversing that of the Munsif, 1st Class, Wazirabad, District Gujranwala, dated the 17th January 1916.

SHAUNG NYAN *v.* KO MAUNG

Diwan *Mehr Chand*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—Briefly stated, the facts of the case out of which this appeal has arisen are these:—Shankar sued his cousins for a share in certain property which he claimed was ancestral. His suit was dismissed as barred by time and he preferred an appeal to the District Judge at Gujranwala.

It had been held that Shankar Dass's suit was time-barred as his cousins had held adversely for more than twelve years. Before the learned District Judge he produced a post-card which, he claimed, showed that his right as a co-sharer had been admitted by the member of the family in possession of the property, *viz.*, one Charanjit. As he had referred to this document in the course of the trial and had stated that he would produce it as soon as he could find it, the learned District Judge allowed its production and remanded the case under O. XLI, r. 25, Civil Procedure Code for evidence to be taken with regard to it. As a result, he has held that it was a genuine document and that it showed that Shankar Dass's title had been acknowledged in 1908 and that, therefore, the suit was within time. Shankar Dass was accordingly granted a decree for possession of one-fourth of the house in suit.

Against this decree the defendants preferred this second appeal to this Court through *Dewan* Mehr Chand and I have heard Mr. Nand Lal for the respondent.

Though the finding as to the genuineness of this post-card was attacked in the grounds of appeal, *Dewan* Mehr Chand did not address me on this point. It seems to me that the question whether or not Charanjit wrote this post-card is one of fact by which I am bound. The learned Vakil for the appellants contended (1) that there was no aknowledgment of title in the post-card, (2) that if there was, it was a conditional one and that it could not be availed of unless and until the condition had been complied with, (3) that an acknowledgment cannot be of any avail unless made within limitation. Reliance was placed on *Rajah Kavali Arunachella Row* v. *Rangiah Appa Row* (1) at page 525 and *Maniram Seth* v. *Seth Rupchand* (2) at page 1058. While admitting the proposition enunciated in these decisions I consider that they do not afford any assistance in this case. The post-card is reproduced in the judgment of the learned District Judge and a perusal of it shows that Charanjit clearly admitted that Shankar Das had a subsisting title in the property in 1908. It was to be borne in mind that the possession of one co-sharer is as a general rule the possession of all the other co-sharers. The co-sharer in possession, in order to claim adverse possession, must show some clear and unmistakeable act on his part evidencing his intention to hold possession on his own account. This post-card indicates that Charanjit who was in possession had, up to the writing of it in 1908, not formed any intention to exclude Shankar Dass. This acknowledgment of title was, therefore, not made beyond limitation nor was it conditional. The condition attached to the future and not to the past. He was called on to pay his share of the monies expended on repairs or surrender his interests in the house.

In these circumstances, I am of opinion that the view taken by the lower Appellate Court is correct and dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 29 M. 519 ; 1 M. L. T. 318 ; 16 M. L. J. 563.

(2) 33 C. 1047; 4 C. L. J. 94 ; 8 Bom. L. R. 501 ; 10 C. W. N. 874 ; 1 M. L. T. 190 ; 3 A. L. J. 525 ; 16 M. L. J. 900 ; 2 M. L. R. 130; 33 I. A. 165 (P. C.).

RANGOON HIGH COURT

CIVIL REVISION NO. 34 OF 1922.

August 3, 1922.

Present:—Mr. Justice Duckworth.

SHAUNG NYAN—PETITIONER
versus
KO MAUNG—RESPONDENT.

Contract Act (IX of 1872) s. 108, Excep. I,—Sale of goods—Hire by vendor—Sale, subsequent, whether passes title.

S made over his buffaloes to the plaintiff in settlement of a debt and then hired them from him. Sub-

sequently he made them over in settlement of a debt to the defendant. Plaintiff sued to recover the buffaloes from the defendant ;

Held, that Exception I to section 108 of the Contract Act was not applicable to the case and the plaintiff was entitled to recover the buffaloes from the defendant.

Civil Revision against the decree of the District Judge, Bassein in C. A. No. 73 of 1922.

Mr. *Maung Kun*, for the Appellant.

Mr. *Mg. Ba Tin*, for the Respondent.

JUDGMENT.—The facts are quite clear. There are concurrent findings in regard to them. Set Bo made over his buffaloes to Shaung Nyan in settlement of a debt, and then hired them from him. Later, he sold them, or rather made them over in settlement of a debt, to Ko Maung. The District Court misapplied section 108 of the Contract Act, and overlooked the case of *Maung Shwe Lun* v. *Nga Pe Bu* (1) in which the leading case of *Greenwood* v. *Halquette* (2) was relied upon. He also neglected the case of *Maung Po O* v. *Ma* I. (3). He held that the sale to Ko Maung was good.

The plaintiff-applicant, Shang Nyan, was of course entitled to recover his buffaloes and the District Court was wrong.

I set aside the decree of the District Court and restore that of the Township Court with costs in all Courts.

Z. K. *Revision allowed.*

(1) S. J. L. B., p. 311.
(2) 12 B. L. R. 42 ; 20 W. R. 467.
(3) P. J. L. B. 357.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 66 OF 1922.

August 3, 1922.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Abdul Qadir.

Haji MOHAMMAD TAQI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Haji ABDUL RAHMAN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 19—Construction of decree — Decree based on award—Execution—Set-off, whether can be claimed—Letters Patent (Lah.) cl. 10—Appeal—New point, whether can be urged.

A clause in a decree basd on an award which purported to settle all disputes between the parties ran as follows :—

" As to the amount of Income-Tax, Excess Profits Tax and Super-Tax for 1919-20 to be paid by party No. 1, after the tax has been deposited in the Government Treasury, the liability therefor will be shared by party No. 1 and party No. 2 among themselves in proportion to their share for nine months." Party No. 1 having paid the Exces Profits Tax for the year 1918-19, claimed, in execution of the decree, to have the share of the Exces Profits Tax for which party No. 2 was liable, deducted from the amount payable to the latter under the decree. It was objected that the decree being merely declaratory as to the liability of party No 2 as to the sum claimed, party No. 1 was not entitled to claim a set-off in execution proceedings, and that, in any case, the decree did not impose any liability on party No. 2 in respect of the Excess Profits Tax for 1918-19 ;

Held (1) that the object of the decree being to put an end to all disputes between the parties, party No. 1 was entitled to claim the set-off in execution proceedings under the provisions of O. XXI, r. 19 of the Civil Procedure Code ;

(2) that under the decree, as it stood, party No. 2 was under no liability in respect of the Excess Profits Tax for the year 1918-19.

In an appeal under the Letters Patent a party is not entitled to be heard on a point which was not raised before the Judge in Chambers.

Brij Bhukan v. *Durga Dat*, 20 A. 253 ; A. W. N. (1898), 41 ; 9 Ind. Dec. (N. S.) 527; *Debi Charan Lal* v. *Mehdi Hussain*, 35 Ind. Cas. 833 . 1 P. L. J. 485; 1 P. L. W. 209 ; 20 C. W. N. 1303, relied on.

MOHAMMAD TAQI *v.* ABDUL RAHMAN

Letters Patent Appeal from the order of Mr. Justice Chevis, in C. A. No. 814 of 1921, dated the 23rd March 1922.

Messrs. *K. Dalip Singh* and *Ghulam Rasul*, for the Appellants.

Messrs. *Moti Sagar* and *Prem Lal*, for the Respondents.

JUDGMENT.—This is an appeal under clause 10 of the Letters Patent from a judgment of Mr. Justice Chevis ; and the main question for determination is whether the appellants, who are described as party No. 1 are entitled to call upon the respondents described as party No. 2, to contribute towards the sum paid by the former as Excess Profits Tax for the year 1918-19. The facts of the case are simple and do not admit of any dispute. The parties were partners in a flourishing business for several years but eventually fell out, with the result that a suit for the dissolution of partnership and rendition of accounts was brought by one of the partners. On the 16th of April 1920, a decree was passed in accordance with an award which was based upon three deeds of compromise entered into between the parties on the 15th March, 16th March and 5th April 1920, respectively. The result of this settlement of dispute was that the assets of the firm were roughly valued at rupees 33 lakhs, out of which party No. 2 were to receive rupees 14 lakhs and party No. 1 were to take the remaining assets. The shares of the parties for certain purposes were fixed as follows :—

Share of party No. 1 .....8½ Annas.

Share of party No. 2.....7½ Annas.

Now, the clause which determines the respective liabilities of the parties to contribute towards the sum to be paid by party No. 1 on account of taxes, is contained in the agreement of the 15th March 1920, and, as its interpretation is the subject of controversy, it is necessary to set it out *in extenso*. It runs as follows:—

"As to the amount of Income-tax, Excess Profits Tax and Super- tax for 1919-20 to be paid by Bakhsh Elahi & Co. and Karam Elahi Muhammad Shafi, after the tax has been deposited in Government Treasury, the liability, therefore, will be shared by party No. 1, and No. 2, among themselves in proportion to their shares for ¾ of a year or 9 months." Now, it is beyond disputet hat party No. 1 paid in November 1920, a sum of Rs. I,22,500 as Excess Profits Tax for the year 1918-19; and they claim that party No. 2 should pay their share of this amount for 9 months ; in other words, they claim that they are entitled to recover from party No. 2 15-32nds of ¾th of Rs. 1,22,500 ; the party No. 2, however, resist this claim on the ground that the aforesaid sum was paid as Excess Profits Tax for the year 1918-19, and that the clause in question, which renders them liable for the payment of their share of the taxes for 1919-20, makes no mention of the Excess Profits Tax for 1918-19.

The learned District Judge, who heard the case in the first instance, and also the learned Judge of this Court who heard the appeal, have concurred in holding that the paragraph of the agreement relied upon by party No. 1 does not render party No. 2 liable for the payment of any portion of the above sum ; and the question for consideration is whether any adequate ground justifying our dissent from their conclusion has been made out.

Mr. Moti Sagar for the respondents raises, however, the objection that this matter cannot be determined by the Court executing the decree passed in favour of his clients, because, so far as the liability for the payment of the taxes is concerned, the decree merely declares the rights of the parties *inter se* and does not direct any act to be done and is, consequently, incapable of execution. The learned Advocate contends that a separate suit should be brought to enforce the rights declared by the decree. It appears that this contention, though vaguely mentioned in the written objections filed by the respondents in the Court of the District Judge, was not urged when the case was argued before him ; and it is beyond dispute that the matter was not even referred to before Mr. Justice Chevis. Now, it has been held by several High Courts, vide, *inter alia Brij Bhukan* v. *Durga Dat* (1) and *Debi Charan Lal* v. *Mehdi Hussain* (2), that in an appeal under the Letters Patent an appel-

(1) 20 A. 258 ; A. W. N. (1898) 41 ; 9 Ind. Dec. (N S.) 527.

(2) 35 Ind. Cas. 888 ; 1 P. L. J. 485 ; 1 P. L. W. 209 ; 20 C. W. N. 1303.

lant is not entitled to be heard on a point which has not been raised before the Judge from whose judgment he is appealing; and we doubt, therefore, whether this new point can be raised by the respondents for the first time in this Court. Further, we do not think that the objection is well-founded. There can be no doubt that both the parties claim to be entitled to recover sums of money from each other, and, under O. XXI, r. 19, Civil Procedure Code, execution can be taken out only for so much money as remains after deducting the sum due to the judgment-debtor. It must be remembered that both the claims spring from the compromise entered into between the parties, the object of which was to put an end to all disputes between them; and that it was never contemplated that another action should be brought in respect of any of the matters which formed the subject-matter of the settlement. We consider that the decree, when reasonably construed along with the documents which formed its basis, contemplates that the appellants should not be driven to a regular suit for the enforcement of their counter-claim. It was intended that they should obtain their redress from the Court executing the decree against them. We accordingly overrule the objection raised by the respondents.

On the merits, we are clear that the liability of the respondents is circumscribed by the terms of the paragraph quoted above, and that that paragraph, as it stands, does not make them liable for payment of any portion of the Excess Profits Tax for 1918-19. Mr. Dalip Singh, who has ably argued the case for the appellants, points out that the Excess Profits Tax was levied for one year only, namely, the year 1918-19, and that there was no Excess Profits Tax to be paid for the year 1919-20; and he accordingly contends that the provision in the paragraph in question with respect to the Excess Profits Tax cannot possibly apply to the tax for the year 1919-20 which was never levied. We recognize that there is considerable force in this argument, but we find that, if accepted, it would amount to this. In that paragraph for the words "Income-Tax, Excess Profits Tax and Super-Tax for 1919-20" we must read the following words :— "Income-Tax for 1919-20, Excess Profits Tax for 1918-19 and Super-Tax for 1919-20;" but we have no right to read into the paragraph something which is not to be found there.

It is to be observed that the partnership between the parties was dissolved on the 31st December 1919, and it is, therefore, clear that, while they were partners for the whole of the year 1918-19, their partnership continued for only 9 months of the year 1919-20. Now, if the paragraph was intended to refer to the Excess Profits Tax for the year 1918-19, one would have certainly expected that both the parties should have been made liable to pay their share of the tax for the whole of the year, whereas the paragraph clearly states, and indeed it is admitted by the learned Counsel for the appellants, that party No. 2 are liable for their share only for a period of 9 months. The reason for this limitation of period is not far to seek. As pointed out above, the partnership of the parties continued for only 9 months in the year 1919-20, and party No. 2 were accordingly made liable for their share of the tax for the period of their partnership. If the paragraph was intended to refer to the Excess Profits Tax of 1918-19, there is no reason whatsoever why the liability of party No. 2 should have been confined to 9 months and why they should not have been made liable for the whole of the year during which they were undoubtedly partners.

The provision confining the liability to a share of the Excess Profits Tax for 9 months is, in our opinion, fatal to the claim made by the appellants. Though the matter is not entirely free from doubt, we are not prepared to hold that the appellants, on whom the *onus* rested to establish the liability of the respondents, have succeeded in satisfying us that the conclusion concurrently reached by the Courts below is erroneous.

We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REVISION NO. 38 OF 1922.

August 3, 1922.

Present :—Mr. Justice Duckworth.

F. N. BURN—PETITIONER
versus
G. H. PAUL—RESPONDENT.

Limitation Act (*IX of* 1908), *ss.* 9, 17—*Execution of decree—Death of decree-holder—Application for execution by executor—Limitation, computation of.*

Where a decree-holder does not take any steps during his lifetime to execute the decree, section 9 of the Limitation Act will apply to an application for execution made by his executor and the latter will not be entitled to deduct the time spent in obtaining probate of the decree-holder's will.

Civil Revision against the order of the Rangoon Small Cause Court, in Civil Execution No. 197 of 1922.

Mr. *Burjorjee*, for the Petitioner.

Mr. *P. N. Chari*, for the Respondent.

JUDGMENT.—It is not denied by Mr. Chari that this application for execution was time-barred under Article 182 of the Limitation Act. There is no possible means of exemption under section 17 of that Act, which would fit the facts of the present case. Thompson did nothing to execute his decrees during a period of over one year at the end of his life —the last instalment having been paid on 19th June 1918, and Thompson dying on 21st August 1919. Paul obtained Probate in August 1921, and was substituted in Thompson's place on 5th January 1922. The period spent in proving Thompson's Will cannot be excluded, and, as a matter of fact, the Administrator-General had previously obtained Letters of Administration to Thompson's estate on 25th March 1920 and had never applied to execute the decree.

Section 9 of the Act seems to me quite clear, and I, therefore, hold that the application to execute the decree by Paul is barred by time.

The application is allowed, and the order of the Small Cause Court admitting the application for execution is set aside. Respondent will pay the applicant's costs with Advocate's fees of two gold mohurs.

Z. K. *Application allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2496 OF 1920.

May 7, 1923.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Lumsden.

Mt. BOONDU—PLAINTIFF—APPELLANT
versus
MOTI CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O.* I, *r.* 10—*Plaint presented in name of minor—Death of minor before suit—Next friend, whether can continue suit as representative* :

A plaint was presented on behalf of a minor by his mother as his next friend, and it afterwards turned out that the minor had died long before the presentation of the plaint :

Held, that the minor's mother could not be allowed to be substituted as plaintiff in the minor's place and to continue the suit.

Veerappa Chetty v. *Findal Ponnen*, 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12, relied on.

Second appeal from the decree of the District Judge, Hoshiarpur, dated 6th August 1923.

Mr. *Mehr Chand, Mahajan*, for the Appellant.

Mr. *Badri Das*, for Mr. *M. L. Puri*, for the Respondent.

JUDGMENT:—The question for decision is whether, when a plaint is presented on behalf of a minor by his mother as his next friend, and it afterwards turns out that the minor had died long before the presentation of the plaint, the Court has jurisdiction to substitute the mother of the deceased as plaintiff in order to allow her to prosecute the

suit. In *Veerappa Chetty* v. *Findal Ponnen* (1) a Division Bench of the Madras High Court held that in a suit brought against a deceased defendant the Court had no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased even when the suit was instituted *bona fide* and in ignorance of the death of the defendant. Now, in the present case, the Courts below have concurred in holding that it has not been shown that the institution of the suit on behalf of a deceased person was due to a *bona fide* mistake, and in view of this finding we are not prepared to allow an amendment of the plaint even if such amendment is permissible under O. I, r. 10 of the Civil Procedure Code. It may be that the Pleader who filed the plaint misunderstood the instructions given to him by the deceased's mother but as pointed out by the learned District Judge, there is no evidence on the record to that effect.

The result may be unfortunate, but on the finding recorded by the District Judge we have no alternative but to dismiss the appeal. The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONR'S COURT.

SECOND CIVIL APPEAL NO. 89 OF 1916.

July 7, 1916.

Present:—Mr. Kendall, A. J. C.

PARAG DIN—DEFENDANT—APPELLANT
versus
SHEO MANGAL—PLAINTIFF—RESPONDENT.

Landlord and tenant—Agricultural tenant, whether can sell house—Zemindar rights of.

A person, agriculturist or agricultural tenant, who is allowed by a *zemindar* to build a house for his occupation in the *abadi*, obtains if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, *i.e.*, prevents its falling down and so long as he does not abandon the house by leaving the village.

Sri Girdhariji Maharaj v. *Chote Lal*, 20 A. 248 ; A. W. N. (1898) 27 ; 9 Ind. Dec. (N. S.) 520, followed.

When, therefore, a tenant sold the house in which he lived and certain customers sued to set aside the sale.

Held, **that the plaintiffs were entitled to obtain possession of the land and the vendee could remove the materials of the house sold.**

Appeal against the order of the Additional District Judge, Lucknow, dated 28th January 1916, modifying the order of the Munsif, South Lucknow, dated the 23rd September 1915.

Mr. *Daya Kishan Seth*, for the Appellant.

Mr. *Gokul Prasad*, for the Respondent.

JUDGMENT.—Bhagwan Din, a tenant in village Paraith, sold a house in which he lived, and two trees, to Prag Din who lived in the village. The present suit has been brought by certain co-sharers in the village, and the decree of the Additional Judge on appeal is that the vendee may remove the materials of the house and the trees, plaintiffs being given possession of the land. The vendee has filed the second appeal.

It was decided in the well-known case of *Sri Girdhariji Maharaj* v. *Chote Lal* (1) that "according to the general and well-known custom of these Provinces, a custom so well established that it may be treated as the common law of the Province, a person, agriculturist or agricultural tenant, who is allowed by a *Zemindar* to build a house for his occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, *i. e.*, prevents its falling down and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the *Zemindar* as in the case, he has, unless he has obtained by special grant from the *Zemindar*, an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing, and

(1) 20 A. 248 ; A. W. N. (1898) 27 ; 9 Ind. Dec. (N. S.) 520.

wood-work of the house." The learned Judge went on to give good reason why such a custom should have grown up and should have been established. There can be no doubt that this custom, for those very reasons, equally applies in the Province of Oudh. For the appellant it is argued that the *Wajib-ul-arz* of the village where it refers to the rights of persons who build houses in the *abadi*, allows such persons to sell or mortgage these houses as they desire. I have carefully considered the provisions of the *Wajib-ul-arz* in question, and I cannot find that it sets out a custom by which a person who leaves the village can sell his house and the right of residence therein preparatory to so doing. It is argued that the custom as set out in the *Wajib-ul-arz* is inconsistent with the general custom of the provinces as set out in the case of *Sri Girdharji Maharaj* v. *Chote Lall* (1). The custom, however, does not appear to me to be inconsistent.

It is finally argued that the respondents were estopped from bringing the present suit as the house and the trees were purchased with their consent. This is a pure question of fact. It has been found by the Court below that the consent of the respondents was not obtained to the transfer of the house and trees. The appeal is, therefore, dismissed. Respondents may have their costs.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1833 OF 1919.

April 16, 1920.

Present :—Mr. Justice Shadi Lal and
Mr. Justice Broadway.

Musammat DAULAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
ABDUL HAQ—PLAINTIFF—RESPONDENT.

Restitution of conjugal rights—Marriage in exchange—Delay in instituting suit, explanation of—Discretion of Court—Appeal, second, interference in.

A suit for restitution of conjugal rights by a husband against his wife was decreed by the lower Appellate Court on the findings that the defendant's marriage with the plaintiff had been in exchange for the marriage of plaintiff's sister with the defendant's brother, and that the delay in bringing the suit was due to several deaths having taken place in the families of the parties and to the minority of the defendant and the illness of the plaintiff :

***Held*, that it could not be said that the discretion exercised by the lower Appellate Court was either arbitrary or illegal and that, therefore, the decree of the lower Appellate Court should not be disturbed by the High Court.**

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 16th July 1919, reversing that of the Subordinate Judge, 1st Class, Jhang, dated the 22nd April 1919.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Ghulam Mohy-ud-Din*, for the Respondent.

JUDGMENT.—This case has come up to this Court under the following circumstances :—

The respondent Abdul Haq instituted a suit against *Musammat* Daulan alleging that she was his lawfully married wife and praying for a decree for restitution of conjugal rights on the ground that she would not live with him and was prevented from doing so by her relatives, who were made co-defendants and against whom an injunction was asked directing them not to prevent *Musammat* Daulan to go and live with her husband. The marriage was denied, but the Trial Court held that it had been proved. The plaintiff's suit, was however, dismissed as it was found that *Musammat* Daulan was a minor when the marriage took place and that the plaintiff had been very dilatory in enforcing his right, reliance being placed on *Ziada* v. *Jowai* (1). On appeal by the plaintiff the learned District Judge, while agreeing with the Trial Court as to the factum of marriage, came to the conclusion that the plaintiff had sufficiently explained his delay in bringing the suit and granted him a decree.

(1) 34 Ind. Cas. 538 ; 46 P. R. 1916; 134 P. W. R. 1916; 148 P. L. R. 1916.

Musammat Daulan and the other defendants thereupon preferred this second appeal to this Court through Mr. Nanak Chand and we have heard Mr. Ghulam Mohy-ud-Din for the plaintiff-respondent. It appears that the marriage took place some time in 1902 when the girl *Musammat* Daulan was said to be 12 years of age. This suit was filed on the 3rd October 1918 and it thus appears that the plaintiff has taken considerable time in coming into Court. His explanation of this delay, which has been accepted by the learned District Judge, is that during the period when *Musammat* Daulan was under the age of puberty no suit was possible, that when she arrived at the age of puberty some time about 1909, he endeavoured to get her into his house, but the plaintiff then became ill and continued ill for some three years, that after that *Musammat* Daulan's father fell ill and ultimately died, and that subsequent to that his own sister *Musammat* Daulat Bibi, who had been married to *Musammat* Daulan's brother Amir Muhammad in exchange, contracted consumption which further postponed the consummation of the marriage. There can be no doubt that this marriage between the plaintiff and *Musammat* Daulan was in exchange for the marriage of Amir Muhammad with *Musammat* Daulat Bibi and, having regard to all the circumstances, we find it impossible to hold that the discretion exercised by the learned District Judge was arbitrary or illegal. The suit has been contested chiefly by *Musammat* Daulan's relatives and she herself has not come into the witness-box. There is nothing on the record to lead us to believe that she is really unwilling to go to the plaintiff. Having regard to all the circumstances, we feel constrained to maintain the decree appealed against and accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL
NO. 147 OF 1922, IN SUIT NO. 2586 OF 1919.

May 3, 1923.

Present :—Mr. Justice Mookerjee and
Mr. Justice Rankin.

SATCHIDANANDA DUTT—
APPELLANT
versus
NRITYA NATH MITTER—
RESPONDENT.

Principal and Agent—Transaction negotiated by agent—Remuneration, when payable—Contract for remuneration to be strictly **meruit**– Quantum **meruit** *principle of, whether applicable.*

Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and, except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed, falls through provided that it does not fall through in consequence of any act or default of the agent. [p. 289, col. 1.]

Where the parties have made an express contract for remuneration, the amount of the remuneration and the condition under which it becomes payable must be ascertained by a reference to the terms of that contract and no implied contract can be set up to add to, or deviate from the original contract through it can be interpreted by a reference to custom, not inconsistent with it. [p. 289, col. 2.]

Beningfield v. *Kynaston*, (1887) 3 T. L. R. 279; *Brood* v. *Thomas*, (1831) 7 Bing. 99; 33 R. R. 399; *French & Co.*, v. *Leeston Shipping Co.*, (1922) 1 A. C. 451; 91 L. J. K. B. 655; 127 L. T. 169; 27 Com. Cas. 257; 38 T. L. R. 459, followed.

The defendant *S* gave a letter of authority to one *G* to negotiate the lease of the premises belonging to him and on the strength of this letter one *K* intimated to *S* his willingness to the lease on certain conditions. Subsequently, *S* granted another authority to the plaintiff to negotiate the lease of the properties on specified terms. This letter stipulated that the remuneration due to *M* will be paid only after the negotiation of the lease. On the following day *S* sent another letter to *M* promising to pay an additional ramuneration provided the transaction was completed on the terms mentioned in the previous letter. As a result of this letter one *K. D.* intimated

to *S* his willingness to accept the terms of the lease subject to certain qualifications, thereupon *K.D.* published a notification warning anyone against dealing with *S* in respect of the properties, as he, *K. D.*, had accepted a lease thereof. Later on, *K.* contended that he had got a concluded agreement from *S.* who repudiated the allegations of both *K* and *K. D. M.* then instituted the present suit for his commission alleged to have been earned by him in respect of the lease.

(1) *Held*, that on the true construction of the contract between the parties the plaintiff could not succeed ; [p. 290, col. 1.]

(2) that the plaintiff was not ever entitled to have a decree in his favour on the basis of *quantum meruit*.

It is competent to the Court to allow a plaint to be amended even after the expiry of the period prescribed for the institution of a new suit. [p. 291, col. 1.]

Kisandas Rupchand v. *Bachappa Vithoba Shilwant* 4 Ind. Cas. 726 ; 33 B. 644 ; 11 Bom. L. R. 1012 ; *Sivagan Chetty Krishna Aiyangar*, 13 Ind. Cas 268 ; 36 M. 378 ; 10 M. L. T. 587 ; 22 M. L. J. 139 ; *Muhammad Sadiq* v. *Abdul Majeed*, 10 Ind. Cas. 478 ; 33 A. 616 ; 8 A. L. J. 636, relied on.

Mr. *S. L. Bose*, (with him Sir *B. C. Mitter* and Mr. *Sudhi R. Das*), for the Appellant.

Mr. *J. N. Mitter*, (with him Mr. *A. N. Basu*), for the Respondent.

JUDGMENT.

Mookerjee, J.—This is an appeal against a judgment of Mr. Justice Pearson by the defendant in a suit instituted by a broker for commission alleged to have been earned in respect of the lease of premises belonging to the defendant. On the 23rd August 1918, the defendant Satchidananda Dutt gave a letter of authority to Gosthabehari Saha to negotiate the lease of the properties in question. On the strength of this letter, apparently, one Kirtichandra Dawn, on the 26th August 1918, intimated to Dutt through his Solicitor that he was prepared to take the lease, provided the title was approved and the area of the land was not less than two *bighas* as had been assured by the agent. What followed on this has not transpired, but we find that on the 5th November 1918, Satchidananda Dutt granted another authority to Nrityanath Mitter to negotiate the lease of the properties on terms specified. The terms were as follows:

" Lease for ninety-one years.

" *Salami* Rs. 25,000 (twenty-five thousand) only.

" Rent Rs. 312 (three hundred and twelve) monthly, for the first five years *plus* taxes: Rs. 455 (four hundred and fifty-five) *plus* taxes for the next five years and thereafter Rs. 600 (six hundred) monthly *plus* taxes for the remaining period.

" Three-storied building to be erected over the plot with first class materials.

" Remuneration Rs. 1,800 (one thousand and eight hundred) only to be paid after the registration of this lease.

" This letter will be void after five days this date.

" The party should be a respectable one."

On the day following, Dutt addressed another letter to Mitter in which he promised to pay an additional remuneration of Rs. 1,700 only provided the transaction was completed on the terms mentioned in the previous letter. The result of the letter to Mitter was that one Krishnachandra Dey intimated to Dutt his willingness to accept the terms of the lease. The letter, however, contained the following qualifications :—

" It is of course distinctly understood from your verbal representation to the broker (*a*) that the existing rent realised from the tenants is not less than Rs. 380 per month, and (*b*) that no tenant holds any lease for a period of more than three years yet to run, and (*c*) that the area of the leasehold premises is not less than 44 cottahs."

Thereafter, a notification was published on the 26th November by the Solicitor of Krishnachandra Dey to give caution that as Dey had accepted a lease from Dutt anyone dealing with the owner in respect of the premises would do so at his own risk and peril. Later on, Kirti Chandra Dawn appeared on the scene and contended that he had got a concluded contract in his favour. On the 9th December 1918, Dutt took up the position that there was no concluded contract, in fact either with Dawn or with Dey, inasmuch as neither of them had accepted unconditionally an unqualified offer of the lease. On the 11th December 1919, the present suit was instituted by the broker against Dutt for recovery of rupees three thousand and five hundred (3,500). The plaint was subsequently amended on the 8th August 1922 by the

insertion of an alternative prayer in the following terms :

"In the alternative, the plaintiff claims the said sum of Rs. 3,500 or such other amount as this Honourable Court may award as damages sustained by reason of the defendant's wrongful refusal to complete the said transaction with the said Krishna Chandra Dey and thus preventing the plaintiff from earning his remuneration."

We may state, incidentally, that Dey instituted a suit against Dutt, which was dismissed on the 13th February 1923 ; and no foundation has been laid for a possible theory that the contract failed by reason of the wrongful conduct of the vendor-defendant. Dutt defended the present action substantially on the ground that on the terms of the agreement between him and Mitter the latter was not entitled to the remuneration as claimed in the plaint. Mr. Justice Pearson has overruled this contention and has decreed the suit.

The principle applicable to cases of this description is well-established. Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and, except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed, falls through, provided that it does not fall through in consequence of any act or default of the agent.

On behalf of the appellant, reliance has been placed upon the decisions in *Alder* v. *Boyle* (1), *Beningfield* v. *Kynaston* (2), *Battams* v. *Tompkins* (3), *Didcott* v. *Friesher* (4), and *Howard Houlder* v. *Manx Isles Steamship Co.* (5). On behalf of the respondent reliance has been placed upon the decisions in *Greer* v. *Bartlett* (6), *Prickett* v. *Badger* (7), *Fisher* v. *Drewett* (8), *Green* v. *Lucas* (9), *Roberts* v. *Bernard* (10), *Martyrose* v. *Courjan* (11), *Elias* v. *Govind Chunder Khatick* (12) and *Annaswami Iyer* v. *Zemindar of Ayakud* (13). These cases were analysed and reviewed in the judgment of this Court in *Kishan Prashad Sinha* v. *Purnendu Narain Singha* (14). Our attention has been invited on behalf of the respondent also to the decision in *Turner* v. *Goldsmith* (15) and *Municipal Corporation of Bombay* v. *Cuverji Hirji* (16) which was explained in *Stokes* v. *Soondernath* (17). We have been finally pressed with the decision of Mr. Justice Chaudhuri in *Raghu Nandan Lal Sarma* v. *Madan Mohan Das* (18).

No useful purpose will be served by an analysis of the facts of each of the decisions cited before us. It cannot be disputed that where the parties have made an express contract for remuneration, the amount of the remuneration and the condition under which it becomes payable must be ascertained by a reference to the terms of that contract and no implied contract can be set up to add to, or deviate from the original contract though it can be interpreted by a reference to custom not inconsistent with it. [See observations of Lord Justice Bowen in *Beningfield* v. *Kynaston* (2), *Broad* v. *Thomas* (19) ; *French & Co* v. *Leiston Shipping Co.* (20)].

The general principle is thus explained in

(1) (1847) 4 C. B. 635 ; 16 L. J. C. P. 232 ; 11 Jur. 591 ; 136 E. R. 657.
(2) (1887) 3 T. L. R. 279.
(3) (1892) 8 T. L. R. 707.
(4) (1895) 11 T. L. R. 187.
(5) (1923) 1 K. B. 110 ; 92 L. J. K. B. 233 ; 128 L. T. 347 ; 28 Com. Cas. 15 ; 66 S. J. 682 ; 38 T. L. R. 757.
(6) (1863) 14 C. B. (N. S.) 681 ; 32 L. J. C. P. 261; 8 L. T. 503 ; 11 W. R. 834 ; 2 N. R. 279 ; 135 R. R. 688 ; 143 E. R. 613.
(7) (1856) 1 C. B. (N. S.) 296 ; 107 R. R. 668 ; 26 L. J. C. P. 33 ; 3 Jur. (N. S.) 66 ; 5 W. R. 117 ; 140 E. R. 123.
(8) (1878) 48 L. T. Ex. 32 ; 39 L. T. 253 ; 27 W. R. 12.
(9) (1875) 31 L. T. 731 on Appeal (1876) 33 L. T. 584.
(10) (1884) 1 Cab. & El. 336.
(11) 14 Ind. Cas. 981 ; 15 C. L. J. 312.
(12) 30 C. 202 ; 7 C. W. N. 297.
(13) 6 Ind. Cas. 740 ; (1910) M. W. N. 199 ; 8 M. L. T. 40.
(14) 11 Ind. Cas. 820 ; 15 C. L. J. 40 ; 16 C. W. N. 753.
(15) (1891) 1 Q. B. 544 ; 60 L. J. Q. B. 247 ; 64 L. T. 301 ; 39 W. R. 547.
(16) 20 B. 124 ; 10 Ind. Dec. (N. S.) 641.
(17) 22 B. 540 ; 11 Ind. Dec. (N. S.) 941.
(18) 76 Ind. Cas. 333 ; 38 C. L. J. 189.
(19) (1831) 7 Bing. 99 ; 33 R. R. 399.
(20) (1922) 1. A. C. 451 ; 91 L. J. K. B. 655 ; 127 L. T. 169 ; 27 Com. Cas. 257 ; 38 T. L. R. 459.

Howard Houlder and Partners Ltd. v. *Manx Isles Steamship Co.* (5)

"It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no half-way house, and it matters not that the plaintiff proves expenditure of time, money and skill. This rule is well illustrated by *Alder* v. *Boyle* (1) (where commission was not payable until an abstract of conveyance was drawn out); *Bull* v. *Price* (21) (where the commission was only payable on money actually 'obtained') *Battamas* v. *Tompkins* (3) (commission payable on 'completion' of purchase), *Clack* v. *Wood* (22) (commission payable subject to the title being approved by my Solicitor); and by such illustrative decisions as *Mason* v. *Clifton* (23) (commission to be paid if money is raised on specified terms), and *Martin* v. *Tucker* (24) (commission to be paid on the 'amount of the capital brought into the business')."

We have, consequently, to consider the actual terms of the contract between the parties in the present case. As we have already pointed out, the letter of authority, dated the 5th November 1918, states in specific terms that the remuneration of Rs. 1,800 is to be paid after the registration of the lease. The letter of the 6th November 1918, emphasises this and states that an additional remuneration of Rs. 1,700 will be paid provided that the broker completes the transaction on the terms mentioned in the previous letter. We are of opinion that the contract could not have been expressed in clearer terms and that, on the true construction thereof, the plaintiff cannot possibly succeed in this litigation.

We have been finally pressed by the respondent to hold that the plaintiff ought to have a decree in his favour on the basis of *quantum meruit*. We are of opinion that this contention cannot possibly be sustained, and in support of this view, reference may be made to the decision in *Howard Houlder and Partners Ld.* v. *Manx Isles Steamship Co. Ld.* (5) where McCardie, J., deals with the question in these terms—

"I must point out that the commission note before me represented the result of discusssion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatsoever. The rights of the plaintiffs are to be found in the commission note alone, and so the parties intended. If this be so, then it follows, as Mr. Neilson so forcibly indicated, for the defendants, that the rule *Expressum facit cessare tacitum* here applies. There is no scope on the present facts for the operation of the *quantum meruit* principle. If I were to rule in the plaintiffs' favour, I should ignore the well-established rule and a substantial body of authoritative decisions. In *Mason* v. *Clifton* (23), Cockburn, C. J., when summing up to the Jury said, "If. . . . *B* is employed to procure money upon certain terms, and does not procure it upon those terms, but upon other and different terms, then *A* will not be liable to him for commission. Nor can *B* in such case claim to recover a reasonable remuneration for trouble and labour, for he has not done what he was employed to do." So, too, in *Green* v. *Mules* (25), Willes, J., in speaking of the commission agreement there in question said: "The substance of the matter was, 'If the letter is effectual, I (the defendant) will pay you £100 though not liable; if it is not effectual, I will pay you nothing." The matter was clearly put in *Martin* v. *Tucker* (24) in the judgment of Lord Coleridge, C. J., when he said that the plaintiffs "could not claim on a *quantum meruit* because they had chosen to tie themselves down by the express terms of the agreement." Much the same view was expressed by the Court of Appeal in *Barnett* v. *Isaackson* (26), where Lord Esher, M. R., said that the plaintiff was only to be paid in case of success, no matter what labour and trouble

(21) (1831) 7 Bing. 237; 5 Moo. & P. 2; 9 L. J. C. P. 10; S. J. 78; 131 E. R. 91.
(22) (1882) 9 Q. B. P. 276; 47 L. T. 144; 30 W. R. 931.
(23) (1863) 3 F. & F. 899 at p. 901; 130 R. R 907.
(24) (1885) 1 T. L. R. 655.
(25) (1861) 3 L. J. (C. P.) 343 at p. 345; 126 R. R. 894.
(26) (1883) 4 T. L. R. 655.

he had devoted to the matter. Finally, I may mention *Lott* v. *Outhwaite* (27) where Lord Lindley, L. J. stated: "It was said that there was an implied contract to pay the agent a *quantum meruit* for his services. The answer was that there could be no implied contract where there was an express contract."

This was precisely the position adopted by this Court in the case of *Kishan Prosad Sinha* v. *Purnendu Narayan Sinha* (14). We are consequently of opinion that in either aspect of the case the plaintiff cannot possibly succeed.

We may add finally that the appellant urged before us that the plaint was allowed to be amended at too late a stage and in support of this argument relied upon the decision of *Weldon* v. *Neal* (28). We must not be taken to accept this contention of the appellant as well founded because, as pointed out in *Kisandas Rupchand* v. *Bachappa Vithoba Shilwant* (29), *Sivugan Chetty* v. *Krishna Aiyangar* (30), and *Muhammad Seediq* v. *Abdul Majed and Musammat Hakiman* (31), it is competent to the Court to allow the plaint to be amended even after the expiry of the period prescribed for the institution of a new suit.

The result is that this appeal is allowed, the judgment of Mr. Justice Pearson set aside, and the suit dismissed with costs throughout.

Rankin, J.—I agree.

Attorney for the Appellant, *Ramesh Chandra Basu.*

Attorney for the Respondent, *Jogendra Krishna Dutt.*

K. S. D. *Appeal allowed.*

(27) (1893) 10 T. L. R. 76.
(28) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; W. R. 820.
(29) 4 Ind. Cas. 726; 33 B. 644; 11 Bom. L. R. 1042.
(30) 13 Ind. Cas 268; 36 M. 378; 10 M. L. T, 557; 22 M. L. J. 139.
(31) 10 Ind. Cas. 476; 33 A. 616; 8 A. L. J. 636.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 140 OF 1923.

May 1, 1923.

Present:—Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Beasley.

Y. A. SHAKOOR & Co.—DEFENDANTS—APPELLANTS

versus

FINLAY FLEMING & CO.—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872) s. 73—Interest Act (XXXII of 1839) s. 1—Sale of goods—Breach of contracts—Damages—Exchange, rate of, when to be calculated—Interest, whether can be awarded.

In a suit to recover the value of goods which were agreed to be paid for "as per home invoice," the rate of exchange for the conversion of sterling into rupees should be that prevailing on the date on which payment was to be made under the contract, and not that prevailing on the date of judgment.

Case law discussed.

Interest may in such a suit, be awarded to the plaintiff, as damages under section 73 of the Contract Act, where it is proved that loss has been caused to him owing to the defendant's default in not making the payment on the due date.

In the case of an old contract interest may be awarded under the Interest Act, from the time when a demand for payment is made in writing so as to give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

Case law discussed.

Mr. *Burjorji*, for the Appellant.

Mr. *Paget*, for the Respondent.

JUDGMENT.

Robinson, C. J.:—The fact in this case are not in dispute. The defendant-appellant bought two lots of sateens through the plaintiffs-respondents by verbal arrangements which were subsequently embodied in indents. The agreement was that the price was to be as per Home invoice plus 5 per cent. commission and usual charges; payment to be made 83 days after the date of invoice, interest to be paid by the buyers at the rate of 8 per cent. annum from the date of invoice to due date. To this

plaintiffs add that thereafter the rate of interest was to be 12 per cent. per annum. This was denied by the defendants, but the learned Judge has allowed them 8 per cent. instead of 12 per cent. from due date.

Two questions that arise in this appeal are,—

(1) What is the date at which the exchange is to be calculated ? and

(2) Whether plaintiffs are entitled to interest after due date and, if so, at what rate ?

As regards the question of the date at which the exchange is to be calculated, there are certain English authorities which may be taken to decide the question.

In *Di Fordinando* v. *Simon, Smits & Co., Ltd.* (1), the defendants contracted to carry goods for the plaintiff from England to Italy and to deliver them there on the 10th February 1919. They failed to do so, and converted the goods. The Trial Court fixed the damages as the value of the goods in Italy on the 10th February, and it was held that, in arriving at the proper equivalent in British currency for the purposes of assessing these damages, the rate of exchange prevailing between the two countries on February 10, 1919, when the breach was committed, and not that prevailing at the date of the judgment, should be adopted. This was a rule that had been laid down in *Scott* v. *Bevan* (2). The rule was followed in *Manners* v. *Pearson* (3). In that case Vaugham Williams, L. J., said:—"It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." It is pointed out that that view was followed in various other cases. In *Societe Des Hotels Le Touquet Paris-Plage* v. *Cummings* (4), the same view was taken by Avory, J., the rulings I have referred to above and others being cited. In that case there was an undertaking to pay a debt on the 31st December 1914. The debt had been incurred in France, and the amount was settled in France. The suit was brought in England, and it was, therefore, necessary to arrive at a proper equivalent in English currency. The rate of exchange prevailing between the two countries on the 31st December 1914 when the debt became due was adopted, and it was held that that and not the rate at the date of the judgment was the proper rate. That case was taken up on appeal, but the only point considered was whether the payment made by the debtor in France after the suit had been filed amounted to accord and satisfaction of the debt. On that point the judgment of Avory, J., was reversed, but the date on which the rate of exchange was to be taken was left untouched. The only point to be noticed further is that in his judgment Aitkin, L. J., said: "For the purpose of this action I have not thought it necessary to decide at what rate the exchange should be calculated had the plaintiffs succeeded. The same result follows, though the exchange should be calculated as at the date when payment became due. But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the Courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve."

As regards breach of contract, however, there is a consistent series of decisions fixing the date of the breach as the date on which the exchange should be calculated. In the present case payment was to be made of a sum certain fixed in English currency on a certain date, *i.e.*, 83 days after the date of the invoice. The failure to pay on that date may be regarded either as a failure to pay the debt or, and I think more properly, a breach of the contract. The date at which damages for a breach of contract are to be calculated is the

(1) (1920) 3 K. B. 403 ; 89 L. J. K. B. 1039 ; 26 Com Cas. 37 ; 36 T. L. R. 797 ; 2 Bom. L. J. 130, 1 R. 339, (1923) A. I. R. (Rangoon) 265.

(2) (1831) 2 B. & Ad. 78 ; 9 L. J. (O S.) K. B. 152 36 R. R. 482 ; 109 E. R. 1073.

(3) (1898) 1 Ch. 581 ; 67 L. J. Ch. 301 ; 78 L. T. 432 ; 46 W. R. 498.

(4) (1922) 1 K. B. 451; 91 L. J. K. B. 288; 126 L. J. 513 ; 66 S. J. 269 ; 38 T. L. R. 221

date of the breach and, following the English authorities, it is to my mind clear that the date on which the rate of exchange is to be taken for the purpose of converting the amount in English currency into rupees is the date on which, under the agreement, the money was to be paid and on which a breach occurred by its not being so paid. On this ground, therefore, in my opinion the appeal clearly fails, and the decree of the Court below should be confirmed.

As to whether plaintiffs are entitled to interest and, if so, at what rate, we have the following facts.

As a concession, plaintiffs agreed to allow defendants to pay 83 days after the date of the invoice; they would have had to pay the English manufacturers on shipment and they, therefore, naturally demanded interest on the sum for the period of the 83 days granted. This was agreed to. On the expiry of the 83 days, in the case of each shipment, bills for the amount due, the exchange having been calculated according to the rate prevailing on that day, were presented to the defendants for payment. It seems clear that failure to pay would cause loss to the plaintiffs. For the use of their money for the 83 days they had been promised interest, and there is no reason whatever for holding that to be kept out of their money did not cause them the loss not only of that interest but a loss which follows from their not having control of their money to use in their business.

It has been urged that interest cannot be awarded by way of damages under section 73 of the Contract Act and that, in any case, interest cannot be awarded unless the matter falls within the terms of the Interest Act XXXII of 1839.

For the former proposition reliance is placed on the case of *Kamalammal* v. *Peeru Meera*(5). In that case the plaintiff sued to recover a sum of money due to her on an oral contract together with interest. There was no agreement to pay interest. There was no written demand or notice under the Interest Act. That case was followed in *Subramania Aiyar* v. *Subramania Aiyar* (6). The Calcutta High Court has, however, taken the opposite view in *Surja Narain Mukhopadhaya* v. *Pratap Narain Mukhopadhaya* (7). The defendant in that case by a letter agreed to contribute Rs. 900 towards the expenses of retaining Counsel for a certain case and consented to pay the amount within ten days. Counsel was engaged but no payment was made as promised. It was held that the plaintiff was entitled to get interest, inasmuch as the debt was not uncertain, the date of payment was defined, and the defendant knew that the contingency upon which he became liable had occurred. The case, it was held, fell within Act XXXII of 1839. Maclean, C. J., held that it was not on the facts of that case necessary to consider the Madras decision in Kamalammal's case. But Banerji, J., distinctly dissented from it and held that damages could be awarded in the shape of interest under section 73 of the Contract Act, provided that the creditor can show that actual loss or damage had been caused to him. He says: "No doubt the law presumes the withholding of payment of money as carrying with it loss to the person to whom such money is due, the compensation for which loss is interest at the market rate. Such damage I may, without any straining of language, call damage in law, as distinguished from damage in fact, or actual loss, which a person from whom payment of money due is withheld may sustain in certain cases as the plaintiff is found to have sustained in this." And later he says that if *B* had not actually to borrow any money, and to pay any interest, he would not in such a case be entitled to recover interest by way of damages under section 73 of the Contract Act, though if the case came within the provisions of Act XXXII of 1839, he would be entitled to such interest.

In the present case plaintiffs had to provide money to pay the manufacturers in England, and they would have suffered the loss of interest on that money if they had not been recouped by the express agreement to pay interest at the rate of 8 per cent. during the period of the 83 days. After the expiry of the 83 days, they being still kept out of their money naturally suffer a loss, and their damage arises from the breach of the contract

(5) 20 M. 481 ; 7 M. L. J. 263 ; 7 Ind. Dec. (N. S.) 341.

(6) 31 M. 250 ; 3 M. L. T. 273 ; 18 M. L. J. 245.

(7) 26 C. 955 ; 13 Ind. Dec. (N. S.) 1211.

to pay on due date, and, in my opinion, therefore, they would be entitled to interest as damages under section 73 of the Contract Act. But it is not necessary to decide that in this case, for it is clear that on due date a demand for payment was made in the case of each invoice and notice was thereby given to the defendants by reason of the well-known custom of the importing firms to demand interest. It has not been proved, it is true, that the defendants were actually, aware of this practice, but there can be no doubt that they were so aware. The contract being an oral one, under Act XXXII of 1839 interest may be awarded from the time when a demand for payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. I am of opinion, therefore, that the learned Judge of the Court below was justified in allowing interest from due date or from the date when defendants ceased to pay interest. As to the rate of interest that should be fixed so as to save plaintiffs from loss, the loss which they incurred by the rate of interest fixed for the 83 days. It is further clear that it would be extremely difficult, if at all possible, for them to borrow money at anything less than 8 per cent. which has been awarded.

In my opinion, therefore, the decree of the Court below allowing them interest at 8 per cent. should be confirmed, and I would dismiss this appeal with costs throughout.

Beasley, J.:—I concur.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2272 OF 1916.

May 13, 1920.

Present:—Mr. Justice Broadway and Mr. Justice Dundas.

MUHAMMAD IBRAHIM, ETC.—DEFENDANTS—APPELLANTS

versus

MUHAMMAD ISMAIL, ETC.—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Suit by mortgagee to recover from co-mortgagee share of mortgage-money received by latter—Limitation, commencement of.

A suit by a mortgagee to recover from his co-mortgagee his share of the mortgage-money received by the latter from the mortgagor is governed by Article 120 of Schedule I to the Limitation Act and limitation begins to run from the date on which the money was received by the defendant.

Second appeal from the decree of the Additional District Judge, Delhi, dated the 18th May 1916, modifying that of the Subordinate Judge, 1st Class, Delhi, dated the 17th March 1916.

Hon'ble Khan Bahadur Mian *Fazl-i-Hussain* and Rai Sahib Lala *Mul Chand*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.

Broadway, J.:—Muhammad Ismail and three others sued Muhammad Ibrahim, Muhammad Yakub and *Musammat* Aisha Khanam, sons and daughter of Abdur Rahman, for Rs. 3,500, alleging that this amount was due to them from the defendants' father Abdur Rahman. The Trial Court granted the plaintiffs a decree for Rs. 2,569. On appeal the learned Additional District Judge, Delhi, modified the decree by reducing the decretal amount to Rs. 979-2-0. Against this decision both parties have preferred separate appeals. The defendants have been represented before us by Mr. Mul Chand and the plaintiffs by Mr. Tek Chand.

MUHAMMAD IBRAHIM *v.* MUHAMMAD ISMAIL

Briefly stated the facts of this case are that on the 4th June 1906 plaintiff, Muhammad Ismail, defendant, Muhammad Ibrahim and one Muhammad Ishak, nephew of Muhammad Ismail, (*vide* pedigree table at page 11) advanced Rs. 5,000 to one *Musammat* Kabira Begum who executed a mortgage in their favour. Of the money so advanced half belonged to Muhammad Ismail and the remainder to Muhammad Ibrahim and Muhammad Ishak. Abdur Rahman was the uncle of Muhammad Ismail and grand uncle of Muhammad Ishak. He died in 1914 and on the 30th March 1915 the present plaintiffs brought a suit against the present defendants for rendition of accounts and for the recovery of such money as might be found due after the accounts had been taken. It was alleged that Abdur Rahman had invested this Rs. 5,000 in the mortgage aforesaid and had realised the same from *Musammat* Kabira Begum by the 8th February 1910 and that the defendants, in spite of repeated demands, refused to submit any accounts or pay any money. That suit was dismissed on the 1st June 1915, it being held that Abdur Rahman had not been the agent of the plaintiffs and that, therefore, neither he nor his heirs were liable to render any accounts. The plaintiffs, apparently, accepted this decision without demur, and on the 15th July 1915 they instituted the present suit in which they claimed Rs. 3,500. Of this sum Rs. 2,500 was said to be the principal amount due and Rs. 1,000 the interest or *munafa*. The defendants raised various pleas and contended that the suit was barred by limitation. The learned Additional District Judge held that Article 120 applied and that, therefore, the suit was within time. Before us Mr. Mul Chand has contended that the correct Article was Article 62 and that the claim was barred. He further contended that even if the proper Article was Article 120, the claim was liable to be dismissed. He pointed out that *Musammat* Kabira Begum had repaid Rs. 5,000 on four separate dates, each of the payments being endorsed on the mortgage-deed. The first of these payments was made on the 23rd March 1908 when Rs. 1,000 was paid, in accordance with the endorsement to the three mortgagees. The second payment was made on the 2nd December 1908 when Rs. 1,600 were endorsed as having been paid to Abdur Rahman. The third payment of Rs. 200 was made on the 7th December 1908 to Abdur Rahman and Ahmad Hasan. The last payment was made on the 8th February 1910 to the three mortgagees, the entry being attested by Abdur Rahman as a witness. It was entered that Rs. 2,200 had been paid as principal and Rs. 90 as *munafa*, and that the whole debt due had been realised. Mr. Mul Chand contended that, inasmuch as there were four distinct payments, even if Article 120 applied, the first three items were barred.

Mr. Tek Chand strongly urged that Abdur Rahman must be regarded as having been the agent of the mortgagees and that, therefore, after his death the plaintiffs could claim the balance of the sum due. As stated above, however, in the former suit it was distinctly held that Abdur Rahman was not an agent, and after hearing Counsel at length on this point we are satisfied that no agency has been established. In this view of the case it is not necessary for us to discuss *Narain Das* v. *Faiz Shah* (1); *Seth Chand Mal* v. *Kalian Mal* (2); *Fatima* v. *Imtiaz Jan* (3) and *Rao Girraj Singh* v. *Rani Raghubir Kunwar* (4) referred to by Mr. Tek Chand. Abdur Rahman not being an agent the plaintiffs were entitled to recover their share when Abdur Rahman received the first three payments from the mortgagors. As these payments were made more than six years before suit, Mr. Mul Chand's contention is correct and the claim *qua* them must be regarded as barred and we hold accordingly. It is, therefore, not necessary for us to consider the applicability of Article 62. With regard to the payment of Rs. 2,290 made on the 8th February 1910, Article 120 would be no bar. Plaintiffs are, however, entitled to a half of that sum, *viz.*, Rs. 1,145. The learned Additional District Judge has held that a sum of Rs. 1,200 was paid out of this Rs. 2,290 to *Musammat* Basti Khanam, mother of Muhammad Ismail, plaintiff, and, therefore, it is clear that the defendants cannot be held liable for any further sum. Mr. Tek Chand contended that this finding of the learned Additional District Judge was not based on any evidence and that, therefore, it

(1) 157 P. R. 1889.
(2) 96 P. R. 1886.
(3) 13 Ind. Cas. 930 ; 1 P. R. 1912 ; 33 P. W. R. 1912 ; 59 P. L. R. 1912.
(4) 2 Ind. Cas. 118 ; 31 A. 429 ; 6 A. L. J. 667.

could be examined in second appeal. In this connection, it has to be borne in mind that Abdur Rahman is dead. Admittedly, being an elderly man and the head of the family it was he who was carrying on the affairs of the family. The defendants can scarcely be pinned with any knowledge of the details of the various transactions. This is evidenced by the fact that in their written statement in the suit for accounts they at first pleaded ignorance of the mortgage itself, than at a later stage, apparently having made enquiries, they admitted that such a mortgage had taken place. The learned Additional District Judge has given very cogent reasons for the conclusion arrived at by him —reasons which we consider adequate—and we, therefore, hold that this payment of Rs. 1,200 has rightly been held to be a payment made out of the money received from *Musammat* Kabira Begum and for the plaintiffs. In this view of the case, it is not necessary to examine the other points argued at the bar.

We accordingly accept the defendants' appeal and dismiss the plaintiffs' suit with costs throughout.

Having regard to the above decision it follows that the plaintiff's appeal No. 2475 of 1916 must be dismissed and we dismiss it accordingly but in this case without costs.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1553 OF 1922.

March 6, 1924.

Present :—Mr. Justice Daniels.

ISHDAK TEWARI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TAMESHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Partition—Right of afterborn son to challenge alienation—Old transaction—Adult members, consent of—Necessity—Presumption—Limitation Act (IX of 1908), ss. 6, 7—Minor son, right of, to challenge alienation by father—Majority of other sons, effect of.

Where there is a partition of joint family property, the only property in which an afterborn son of a separated member acquires an interest is his father's property as it stands on the date of his birth, and he has no right to challenge an alienation of joint family property effected before partition by the coparceners, so far as the shares of members other than his father are concerned.

Bhup Kunwar v. *Balbir Sahai*, 64 Ind. Cas. 885 ; 44 A. 190 ; 19 A. L. J. 978 ; (1923) A. I. R. (A) 342, distinguished.

The right of a minor Hindu son to challenge an alienation of family property effected by his father is not affected by the fact that his elder brother who presumably became manager of the family and capable of giving a discharge on attaining majority, had attained majority more than three years before suit and a suit by him to challenge the alienation would be barred by time.

Ganga Dayal v. *Mani Ram*, 1 Ind Cas. 824; 31 A. 156 ; 6 A. L. J. 62, followed.

In the case of old transactions full and detailed evidence of necessity is not to be expected and it is permissible to fill in the details by reasonable presumptions.

Chintamani Bhatla Venkata Reddi v. *Rani Saheb of Wadhwan* 55 Ind. Cas. 538 ; 47 I. A. 6 ; 38 M. L. J. 393 ; 11 L. W. 451 ; 18 A. L. J. 267 ; (1920) M. W. N. 315 ; 22 Bom. L. R 541 ; 2 U. P. L. R. (P. C.) 77 ; 43 M. 511 ; 28 M. L. T. 457 ; *Peare Lal* v. *Sundar Singh*, 68 Ind. Cas. 805 ; 20 A. L. J. 658 ; 44 A. 756; (1922) A. I. R. (A) 486, followed.

The fact that all the adult members of the family accept responsibility for an alienation is sufficient to raise a presumption that the transaction is valid.

Second appeal against the decree of the District Judge, Gorakhpore, dated 26th of June 1922.

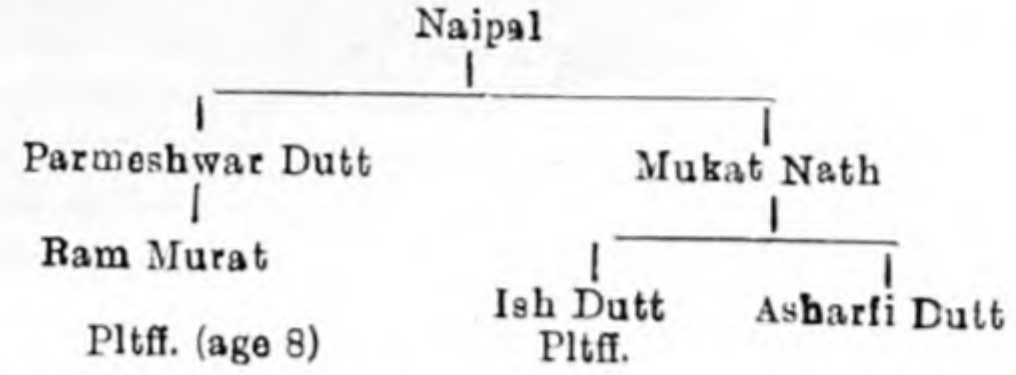
Mr. *U. S. Bajpai*, for the Appellants.

Messrs. *B. L. Dewe* and *N. Upadhia*, for the Respondents.

JUDGMENT.—In this case the plaintiffs appellants, Ish Dutt and Ram Murat, seek to set aside a sale-deed of joint family property executed by their respective fathers Mukat Nath and Parmeshwar Dutt on 28th May 1901 as having been made without legal necessity.

ISHDAT TEWARI *v.* TAMESHAR

The following pedigree will assist in the understanding of the case :—



The Trial Court dismissed the suit altogether. The lower Appellate Court dismissed the appeal of Ram Murat but allowed that of Ish Dutt in respect of one item of the sale consideration. The plaintiffs appeal and the defendants have filed cross-objections. The lower Court's findings of fact are :—

(1) that the family was joint when the sale was executed ;

(2) that a separation took place on the very next day after the date of the sale-deed ;

(3) that Ish Dutt's age was 20 at the time of suit.

The third finding is interpreted by both parties as meaning that Ish Dutt was alive at the execution of the deed but that the suit was filed within three years of his attaining majority and is, therefore, within time. From the second finding it follows that, there being no longer any joint family in existence, each plaintiff can only sue to recover his own separate share. This is clearly the case, and the ground of appeal which was taken on this point has not been pressed. The Appellants contest the finding of the Court below that Ram Murat has no cause of action to contest the sale, but this result follows clearly from the second finding referred to above. Ram Murat was only eight years of age when the suit was filed in 1921. He was, therefore, born in the year 1913. At that date there was no community of interest between Parmeshwar Dutt and the branch of Mukat Nath, and the only property in which the plaintiff could acquire an interest by birth was the separate and ancestral property of his father Parmeshwar Dutt as it stood on the date of his birth. The plaintiff could not claim the benefit of any cause of action Ish Dutt might have, seeing that Ish Dutt belonged to a family which had separated from that of the plaintiff's father ten years before. The principle laid down in *Bhup Kunwar* v. *Balbir Sahai* (1) does not apply, and the ordinary rule applies that he is not entitled to challenge a transaction made before his birth. The only property in which he acquired interest was his father's property as it stood on that date.

It remains only to consider the case of Ish Dutt. The respondents in their grounds of objection challenge the finding as to Ish Dutt's age but at the hearing this plea has been abandoned. They have, indeed, contested Ish Dutt's right to sue on the ground that his elder brother Asharfi Dutt attained majority more than three years before the suit and, therefore, presumably became manager of the family and capable of giving a valid discharge. There is authority of other High Courts in support of this view, but the Courts below followed, as they were bound to do, and as I sitting as Single Judge must also do, the reported ruling of this Court in *Ganga Dayal* v. *Mani Ram* (2) I may remark, however, that the authority of this case is somewhat shaken by the ruling in *Achhaibar Singh* v. *Ram Sarup Singh* (3). The consideration for the sale-deed in suit was Rs. 1683, consisting of,—

(1) Rs. 396-12-0, due on a hypothecation-bond of 17th January 1895 executed by Mukat Nath.

(2) Rs. 1,085-6-9, due on a hypothecation-bond of 26th August 1897 executed by Mukat Nath.

(3) Rs. 201-4-0, due on a hypothecation-bond of 2nd May 1901 executed by Parmeshwar Dutt.

The third item was borrowed for the expenses of a suit brought by the mortgagee on the basis of the hypothecation-bond which forms item No. 1. As the first two debts were incurred by Mukat Nath long before the transaction is suit, and indeed long before the plaintiff's birth, they constituted antecedent debt and the plaintiff Ish Dutt has no right to challenge them. On this point there can be no controversy. As regards the third item, the learned Judge holds that as the debt was incurred by the plaintiff's uncle Parmeshwar Dutt it is for the defendants to establish legal necessity which they have not done.

(1) 64 Ind. Cas. 885 ; 44 A. 190 ; 19 ; A. L. J. 978 ; (1922) A. I. R. (A.) 342.
(2) 1 Ind. Cas. 824; 31 A. 156; 6 A. L. J. 62.
(3) 19 Ind. Cas. 645; 35 A. 380; 11 A. L. J. 463.

This part of the finding is challenged by the defendants in their cross-objections. They urge that the fact of Parmeshwar Dutt executing a hypothecation-bond to pay off a previous mortgage executed by Mukat Nath, and then both brothers joining in a sale-deed to finally clear off the transaction is sufficient to raise a strong presumption that the transactions were really entered into by both brothers for purposes which would justify the alienation. The two brothers were the only adult male members of the family at the time and there was no one else in the family except Mukat Nath's two sons, one of whom was only nine years old and the other must have been an infant in arms. The original debt was incurred in 1895, 27 years before the suit. This is a case for the application of the principle laid down by their Lordships of the Privy Council in *Venkata Reddi* v. *Rani Saheba of Wadhwan* (4) and applied by this Court in *Peare Lal* v. *Sundar Singh*, (5) that in the case of old transactions full and detailed evidence is not to be expected, and that it is permissible to fill in the details by reasonable presumptions. It is true that in the Privy Council case the transaction was 82 years old but in the case of a transaction nearly 30 years old it is also true that full and detailed evidence as to the circumstances is not to be expected, and the fact that both brothers accepted responsibility for the debt was sufficient, in my opinion, to raise a presumption that the transaction was valid. There is absolutely nothing to rebut that presumption. In this view I need not consider the last ground of appeal which is that the decree framed by the Court below is unintelligible.

I accordingly dismiss the appeal and, allowing the cross-objections, modify the decree of the Court below and dismiss the suit with costs in all Courts. The respondents will get their costs in this Court both of the appeal and of the cross-objectsons. Costs in this Court will include fees on the higher scale.

Z. K. *Appeal dismissed.*

(4) 55 Ind. Cas. 538 ; 47 I. D. 6 ; 28 M. L. J. 393 ; 11 L. W. 451; 18 A. L. J. 367 ; (1920) M. W. N. 315; 22 Bom. L. R. 541; 2 U. P. L. R. (P. C.) 77 ; 43 M. 511; 28 M. L. T. 457.

(5) 68 Ind. Cas. 805; 20 A. L. J. 658; 44 A. 756; (1922) A. I. R. (A) 436.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 55 OF 1923.

February 28, 1923.

Present :—Mr. Justice N. R. Chatterjea and Mr. Justice Cuming.

BHAIRABENDRA NARAIN DEB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UDAI NARAIN DEB AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. I, rr.* 2, 10—*Security for costs—Transfer of one of several plaintiffs to category of defendants—Future costs—Court, inherent power of.*

In the absence of special circumstances the mere fact that one of the plaintiffs is transferred to the category of defendants does not entitle the defendants to call upon the co-plaintiff to furnish security for future costs. It is really a case of amendment and costs in such cases are allowed up to the date of amendment. [p. 301, col. 1].

In re Mathews, Oates v. *Mooney* (1905) 2 Ch. 460; 71 L. J. Ch. 656 93 L. T. 158; 54 W. R. 75 discussed.

Massey v. *Allen* (1879) 12 Ch. P. 807; 48 L. J. Ch. 692 ; 41 L. T. 788; 28 W. R. 248. *Wilmott* v. *Freehold House Property Co.* (1885) 33 W. R. 554; 52 L. T. 743, *Brocklebank* v. *Kings Lynn Steamship Co.*, (1878) 3 C. P. O. 365 ; 47 L. J. C. P. 321 ; *Ramsing Bhagwan* v. *Balubai*, 5 Bom. L. R. 661 *Chandra Kanta Ganguly* v. *Sarojini Debi* 32 Ind. Cas. 786 *Hari Nath Singh* v. *Ram Kumar Bagchi* 20 Ind. Cas. 703; 18 C. W. N. 119 ; 19 C. L. J. 59 *Ram Coomar Coondoo* v. *Chunder Canto Mukerjee* 22 C. 233 at p. 259 4 I. A. 23; 1 Ind. Dec. (N. S.) 442 ; *Anandamoyee Chundhurani* v. *Gokulchandra Roy* 14 Ind. Cas. 290 16 C. W. N. 768, distinguished ;

Per Cuming, J.—**It is very doubtful if the inherent power of the Court can be called in aid in such a case. [p 302, col. 2].**

Dr. *S. C. Basak*, (with him Babu *Prohash Chandra Pakrasi*), for the Appellants.

Babu *Dwarka Nath Chakravarti*, (with him Babu *Surendra Nath Guha* and Babu *Atul Chandra Dutt*), for the Respondents.

JUDGMENT.

Chatterjea, J.—The question involved in this Rule relates to security for costs, and arises in this way,—

The petitioner before us was the plaintiff No. 1 in a suit relating to succession to the

BHAIRABENDRA NARAIN DEB *v.* UDAI NARAIN DEB

Bijni Estate which is pending in the Subordinate Judge's Court at Alipore. The opposite party No. 1 was originally the plaintiff No. 2 in the suit. The plaintiff No. 1 and the plaintiff No. 2 claimed the estate under different rights. It appears that there was an agreement between them that in the event of success of the one, the other would participate in it. The suit was conducted jointly by both the plaintiffs until the 14th February 1922 when the plaintiff No. 2 transferred his interest to Prince Victor Nityendra Narain of Cooch Behar. Since then the two plaintiffs fell out. An application was made on behalf of Prince Victor Nityendra Narain to be substituted in place of the opposite party No. 1, which, however, was ultimately withdrawn. There were various other proceedings which need not be stated.

In September 1922, there was an application by the plaintiff No. 1 that he might be allowed to proceed with the suit and that the plaintiff No. 2 might be made a defendant. There was a similar application on the part of the plaintiff No. 2 that he might be allowed to prosecute the suit, and the plaintiff No 1 might be made a defendant. The question was decided in favour of the plaintiff No. 1, and the plaintiff No. 2 was transferred from the category of plaintiffs to that of defendants on the 19th September 1922. The concluding portion of the order was as follows :—"Considering all the circumstances of the case, I think I should give the conduct of the action to the plaintiff No. 1 and make an order that the name of plaintiff No. 2 should be struck out and added as defendant upon security being given by plaintiff No. 1 for the costs of the original defendants within six weeks from this date."

On the 26th October 1922 the plaintiff No. 1 applied for fixing the security. The principal defendant stated that the security for his costs should be for one lac of rupees, and the three other sets of defendants between them wanted security for another lac of rupees. The learned Subordinate Judge on the 3rd January 1923 directed the plaintiff No. 1 to furnish security to the extent of Rs. 40,000 with liberty to the defendants to apply to the Court for increasing the amount of security. As against the orders of the 19th September 1922 and the 3rd January 1923, the present Rule was obtained by the plaintiff No. 1.

Now, the case does not come under O. I, r. 10, Civil Procedure Code, as the plaintiff No. 2 was not struck out on the ground that he had been improperly joined. The order transferring the plaintiff No. 2 to the category of defendants must, therefore, be taken to have been made under the inherent power of the Court. The order for security does not come under O. XXV, r. 1, which no doubt provides for security being taken for costs incurred as also those which are likely to be incurred by any of the defendants. That rule refers to a case where the plaintiff is out of the jurisdiction of the Court or where the plaintiff does not possess any sufficient property within British India other than the property in suit.

As stated above, O. I, r. 10 does not apply to the present case. There are no other provisions in the Civil Procedure Code for taking security for costs. Order XLI, r. 10 applies to the power of the Appellate Court to take security for costs when an appeal has been preferred.

It is accordingly contended on behalf of the petitioner that the Court had no power to direct security to be given for future costs.

The opposite party contends that the Court can do so in the exercise of its inherent power, and that the discretion exercised by the Court below cannot be interfered with by this Court.

The learned Subordinate Judge in making the order relied upon the case of *In re Mathews, Oates* v. *Mooney* (1), where it was observed that in the case of a difference between co-plaintiffs, the proper course is to make an order that the name of one of them be struck out as plaintiff and added as a defendant, but that such an order "will be made only on security being given for the defendants' costs." It is upon this observation that the Court below relied in ordering the plaintiff No. 1 to furnish security for future as well as past costs.

From the passage quoted above it does not appear that it was meant to apply to future as well as past costs, as the learned Judge

(1) (1905) 2 Ch. 460 ; 74 L. J. Ch. 656 ; 93 L. T. 158 ; 54 W. R. 76.

referred to the case of *Brown* v. *Sawyer* (2), where there was no order for security for future costs. In that case two plaintiffs duly instituted a suit, and one of them by notice to his Solicitor withdrew from the suit, and the other co-plaintiff moved for liberty to amend the plaint by striking off the name of the co-plaintiff who had revoked his authority as plaintiff, and to add him as a defendant. The Master of the Rolls allowed the amendment on security being given for the original defendants' costs but there was no order for future costs. On the contrary, it was stated that the amendment should be allowed by "securing the costs of suit already incurred."

In *Lloyd* v. *Makeam* (3), an application to amend the bill by striking out the names of two out of four plaintiffs who had executed releases to the other plaintiffs was allowed upon giving security for costs, but it does not appear whether it was for past costs only or also for future costs. It appears, however, that certain cases were brought to the notice of the Court where security for costs up to the time of striking out the names (of some of the plaintiffs) was allowed.

In *Drake* v. *Symes* (4), it appears that one of several co-plaintiffs obtained an order giving the plaintiffs leave to amend their bill by striking out his name on his giving security for the costs of the suit up to and including the summons. It is to be observed that in that case it was the plaintiff, whose name was struck out, and who was ordered to pay the costs.

The authorities relied upon by the opposite parties do not refer to cases of transfer of the plaintiff to the category of defendants.

In *Massey* v. *Allen* (5), the plaintiff went out of the jurisdiction of the Court, and security for past as well as future costs was allowed. But in such a case O. XXV, r. 1, of the Civil Procedure Code, also provides for security for future costs.

The case of *Wilmot* v. *Freehold House Property Co.* (6), also was not a case of transfer, and, as a matter of fact, the security for costs ordered by the Court of Appeal did not include future costs.

In the case of *Brocklebank & Co.* v. *The King's Lynn Steamship Co.* (7), it was held that security for costs, where the plaintiff had become bankrupt and had filed a petition for liquidation, was not necessarily confined to future costs but might, when applied for promptly, be extended to costs already incurred in the suit.

The cases relied upon by the opposite party therefore, were not cases where there had been a transfer of a person from the category of the plaintiff to that of defendants. The authorities which have been cited before us on behalf of the petitioner, go to show that security for costs up to the date of making the order for transfer of the party was ordered; and we have not been referred to any decision in which it has been held that in a case of transfer of one of the plaintiffs to the category of defendants the remaining co-plaintiff is required to furnish security for future costs.

The learned Pleader for the opposite party referred to two cases in support of the contention that security for future costs might be demanded on the analogy of the provisions of section 380 of Act XIV of 1882 (corresponding to O. XXV, r. 1, clause (3), Civil Procedure Code). The cases of *Ramsingh Bhagwan* v. *Balubai* (8), and *Chandra Kanta Ganguly* v. *Srimati Sarojini Debi* (9), which are relied upon, however, related to security for costs of appeal.

We were also referred to the case of *Hari Nath Singh* v. *Ram Kumar Bagchi* (10). It was not a case of transfer of the plaintiff to the category of defendants and the order for security was made by the lower Court on the ground that the plaintiff would be unable to pay the costs if he lost the suit, and that some other person was financing him. The learned Judges of this Court observed: "The order now before us was not made and cannot be supported under O. XXV; but the question is whether the Court has inherent power

(2) (1841) 3 Beam 598; 10 L. J. Ch. 240; 5 Jur. 500; 90 R. R. 869; 49 E. R. 235.
(3) (1801) 6 Ves. Jur. 145; 31 E. R. 983.
(4) (1861) 3 D. F. and J. 491; 7 Jur. (N. S.) 898; 130 R. R. 222; 45 E. R. 968.
(5) (1879) 12 Ch. D. 807; 48 L. J. Ch. 692; 41 L. T. 783; 28 W. R. 243.
(6) (1856) 33 W. R. 554; 52 L. T. 743.
(7) (1878) 3 C. P. D. 365; 47 L. J. C. P. 321.
(8) 5 Bom. L. R. 661.
(9) 32 Ind. Cas. 786.
(10) 20 Ind. Cas. 708; 18 C. W. N. 119; 19 C. L. J. 59.

to make it. That the Court has some such power seems to be certain." So in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (11), Sir Montagu Smith in delivering a judgment of the Privy Council says: "It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay proceedings until it is given." . . . . . The question which should determine the granting of an order for security thus seems to be,—Has the plaintiff got a substantial interest in the suit, or is he suing for another, in the capacity of what Trevelyan, J., describes as a "puppet,"—and the order for security for costs made by the Court below was set aside on revision.

In the absence of any provisions in the Civil Procedure Code or any authority of the Courts in India, the question must be decided upon some principle. I do not see how, in the absence of any special circumstances, such as are referred to in the case cited above, the mere fact, that one of the plaintiffs is transferred to the category of defendants, would entitle the defendants to call upon the co-plaintiff to furnish security for future costs. It is really a case of amendment; and costs in such cases are allowed up to the date of amendment.

The opposite party produced affidavits in this Court stating circumstances and grounds as to why the plaintiff No. 1 should furnish security. These matters, however, were not before the Court below nor considered by it. If the opposite party can show that the circumstances are such that the plaintiff No. 1 should be called upon to furnish security for future costs, an application may be made in the Court below. But the Court below in directing the plaintiff No. 1 to furnish security for future costs has proceeded upon a misapprehension of the case of *In re Mathews, Oates* v. *Mooney* (1).

So far as security for past costs is concerned, the petitioner does not dispute the order, and, having regard to the English authorities on the point, that order seems to be right; but so far as the order for future costs is concerned, I think the order should be set aside.

As the amount of past costs has not been ascertained, the matter will go back to the Court below which will assess such amount and will call upon the plaintiff No. 1 to furnish security to that extent.

As regards the costs of this hearing, the petitioner will be entitled to costs three gold mohurs.

Cuming, J.:—I agree with the order my learned brother proposes to make.

The facts of this case, so far as they are material, are as follows:—

The present applicant, Kumar Bhairabendra Narain Deb, whom I may describe as plaintiff No. 1, in conjunction with Kumar Udai Narain Deb, who may be described as plaintiff No. 2, brought a suit against a number of persons for the declaration of their title in the alternative and for possession of a large property in Goalpara District in Assam valued, it is stated, at a crore of rupees. This suit was instituted so long ago as 22nd September 1919. As far as can be seen, the suit is not very far advanced at present. After some time the two plaintiffs fell out, plaintiff No. 2 apparently having transferred his interest to a third party and, as it appeared impossible for the two plaintiffs to prosecute the suit jointly, after various other applications, an application was made by the present applicant, plaintiff No. 1, that plaintiff No. 2 should be transferred to the category of defendants. Plaintiff No. 2 made a similar application regarding plaintiff No. 1. On 19th September 1922 the learned Subordinate Judge decided that plaintiff No. 1 should be allowed to conduct the suit and plaintiff No. 2 should be transferred to the category of defendants. The terms of the order were as follows:—

"Considering all the circumstances of the case I think I should give the conduct of the action to the plaintiff No. 1 and make an order that the name of plaintiff No. 2 should be struck out and added as defendant upon security being given by plaintiff No. 1 for the costs of the original defendants within six weeks from this day."

Under what section of the Code this order was made is not clear. It has been suggested it was made under O. I, r. 10, though, looking at O. I, r. 10, it is somewhat doubtful if the order contemplated an order of this kind. I shall return to this point later on.

Plaintiff No. 1 then asked the Court to fix the amount of the costs and the learned Judge then, on 3rd January 1923, fixed a total amount of Rs. 40,000 as the amount of security which the plaintiff No. 1 should furnish for the past and future costs of the defendants other than plaintiff No. 2. Against this order the plaintiff No. 1 moved this Court contending that the amount had been fixed in an arbitrary manner, that the Court had gone behind the order of 19th September 1922 in asking the plaintiff to give security for future costs, and that he should give security only for the costs already incurred and that he could not be asked to give security for the costs of the whole suit.

The order of the learned Judge cannot, I think, be supported. The only section of the Code which makes any provision for taking security from the plaintiff for the defendants' cost is O. XXV, r. 1. It is only necessary to read O. XXV, r. 1 to at once see that, on the facts alleged, on which the order was made, the present case does not fall within the purview of O. XXV, r. 1, neither indeed is it contended that it does. It has, however, been argued that the Court has an inherent power to order a plaintiff to give security for costs and three authorities have been cited in support of the proposition. The first is a decision of the Privy Council, *Ram Coomar Coondoo* v. *Chunder Canto Mukherjee* (11). The decision was under the old Code of 1859. Their Lordships remark in the course of their judgment that it is ordinarily the practice if the plaintiff is suing for another to require security for costs and to stay proceedings until it is given.

In the old Code of 1859 there was no provision at all for giving security for costs by a plaintiff and in the suit in question it does not appear that the particular point had to be decided. This authority has obviously no bearing, therefore, on the present case.

With regard to the other two authorities, I take first the case of *Anandamoi Chaudhurani* v. *Gokul Chandra Roy* (12). On the facts of that case the learned Judge held that the case on its facts fell within the purview of O. XXV, r. 1, cl. (3). This authority hardly supports the contention of the opposite party. The next authority relied on is the case of *Hari Nath Singh* v. *Ram Kumar Bagchi* (10). The learned Judges remark that the order before them could not be supported under O. XXV, but the question was whether the Court had inherent power to make it, and that the Court had some such power seemed to be certain. The reason for this would appear to be the case of *Ram Coomar Coondoo* v. *Chunder Canto Mukherjee* (11). I have already discussed this authority.

With great respect, it seems to me that it is very doubtful if the inherent power of the Court can be called in aid in the present case. Had the Code been entirely silent on the point, then possibly the inherent power of the Court might have been invoked, but when the Code does make certain provisions for the taking of security for costs from the plaintiff, it seems to me that in those cases, and those cases only, may costs be taken from the plaintiff and that for security for costs to be demanded from the plaintiff the case must fall within the purview of O. XXV, r. 1.

We find in other parts of the Code, as, for instance, O. XLI, r. 10, where provision is made for taking security for costs from the appellant, instances where the Code deals with the question of taking security from parties. In O. XXV the Legislature was dealing with the subject of security for costs by the plaintiff and there set forth the cases in which security can be taken. Had the Legislature intended that in other cases also security for costs could be taken from the plaintiff it would have, I presume, said so.

I do not think the inherent power of the Court can be invoked in matters for which the Code does actually provide. The Legislature possibly deliberately did not allow security to be asked for from a plaintiff except in the exceptional cases given in O. XXV, r. 1. To hold otherwise would be to render the enactment of the Code superfluous. Even if it be held that the Court has that inherent power, this does not seem to me to be a case for the exercise of it, for the sole reason apparently for demanding the security for costs is that one plaintiff has been transferred to the category of defendants. Can it be for one moment suggested that this

(11) 2 C. 233 at P. 259 ; 4 I. A. 23 ; 1 Ind. Dec. (N. S.) 442.

(12) 14 Ind. Cas. 370 ; 16 C. W. N. 763.

is of itself a good reason for demanding such security ?

It is then apparently suggested that the case falls under O. I, r. 10, and that under this rule the Court may order, on such terms as it thinks fit, one plaintiff to be transferred to the category of defendant and that in the present case the terms were security for Rs. 40,000. Even if O. I, r. 10 covered the case, which I do not think it does, the terms imposed would, on the facts set forth in the learned Judge's order, be uncalled for. The learned Judge does not suggest in his order that the plaintiff is a man of straw or that he is not the real plaintiff. As I have noted before, the only reason given apparently is that one plaintiff has been transferred to the category of defendants.

It has been contended that the petitioner has not challenged the order of the learned Judge so far as it concerns the giving of security for the costs already incurred and that his only grievance is as regards future costs. That that is so would appear from the grounds of his application, and I would not, therefore, propose to interfere with the order of the lower Court so far as it relates to costs already incurred but with regard to the order for security for future costs I would set it aside.

K. S. D. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1250 OF 1921.

October 26, 1922.

Present :—Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

CHHIDDU SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JHANJHAN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-Fees Act (*VII of* 1870), *s.* 7, *cl.* (*ix*)—*Suit for redemption—Ancillary claim for surplus mesne profits—Court-fee payable—Suit, valuation of.*

When a suit is brought for redemption and a certain amount is claimed as surplus mesne profits the plaintiff is not bound to pay Court-fees upon the surplus amount claimed in addition to the Court-fee on the principal amount secured by the mortgage.

Husaini Khanam v. *Husain Khan*, 29 A. 471, at p. 475 ; (1907) A. W. N. 133 ; 4 A. L. J. 375 ; *Gopi Kishen* v. *Sorabjee*, 68 Ind. Cas. 226 ; (1922) A. I. R. (N). 262, followed.

When plaintiff sues for redemption upon payment of a certain sum, an ancillary claim that an account be taken and any amount found due to or by one of the parties be awarded to the party to whom it is due, does not alter the nature of the suit and does not increase its value.

Kedar Singh v. *Matabadal Singh*, 1 Ind. Cas. 703 ; 31 A. 44 ; A. W. N. (1909) 276 ; 5 A. L. J. 713, followed.

Second appeal from a decree of the Subordinate Judge, Budaun, dated the 6th of May 1921, modifying a decree of the Munsif, Bisauli, dated the 14th of January 1921.

Dr. *M. L. Agarwala*, for the Appellants.

Munshi *Panna Lal*, for the Respondents.

ORDER.—An office report has been put up before us in which it is stated that the amount of Court-fee paid on the plaint was insufficient and that a further sum of Rs. 385 was payable on the plaint. Dr. *Agarwala* disputes the correctness of the office report and we have, therefore, to decide whether the amount of Court-fee payable on the plaint was or was not sufficient. The suit was one for redemption of a mortgage made in 1863. The principal amount secured by the mortgage was Rs. 960. It provided that the mortgagee was to remain in possession, appropriate the usufruct, deduct out of it the amount of interest payable on the mortgage which was at the rate of fifteen annas per cent. per mensem, and appropriate the balance towards the principal. The mortgagors remained in possession of a part of the property upon an undertaking to pay rent for that part. In the present suit the plaintiffs sought to redeem the mortgage on the allegation that the full amount of the mortgage including interest had been discharged by the usufruct and that a surplus of Rs. 7,533-12-9 was due

to the plaintiffs by the mortgagee. The plaintiffs accordingly claimed redemption and also asked that the defendant-mortgagee be directed to pay to the plaintiffs the aforesaid amount. Court-fee was paid upon Rs. 960, the principal amount of the mortgage, in accordance with the provisions of section 7, clause (ix) of the Court-Fees Act. A dispute was raised in the Court of first instance as to the adequacy of the amount of the Court-fee, but that Court held that the amount paid was sufficient. The plaintiffs obtained a decree from the Court of first instance for redemption, subject to the payment of a certain amount to the mortgagee which that Court found to be due to the latter. The plaintiffs appealed in respect of that amount to the lower Appellate Court and that Court varied the amount. From this decree of the lower Appellate Court the present appeal has been preferred. The appeal raises a question as to jurisdiction and, apparently, as to the amount due. But the office reports that Court-fee ought to have been paid on the Rs. 7,533-12-9 in addition to the Court-fee paid in respect of the principal amount of the mortgage

In our opinion the report is not correct. The suit is one for redemption, contemplated by O. XXXIV of the Code of Civil Procedure. Under r. 9 of that Order, upon a decree for redemption being made the Court may order an account to be taken, and if in the result any sum be found due by the mortgagor, the Court should order the mortgagor to pay that amount within a time fixed by the Court. Similarly, if any amount be found due to the mortgagor as surplus mesne profits, the Court should direct the mortgagee to pay the said amount to the mortgagor. The suit, however, in every respect was a suit for redemption. Under section 7, clause (ix), of the Court-Fees Act the amount of Court-fee payable in respect of a suit for redemption is to be calculated on the principal sum secured by the mortgage. Therefore, in accordance with the terms of the Court-Fees Act, the Court-fee payable would be regulated by the principal amount secured by the mortgage. This was the view taken by this Court in the case of *Husaini Khanam* v. *Husain Khan* (1). A similar view was taken in the cases of *Gopi Kishan* v. *Sorabjee* (2). Our attention has not been drawn to any ruling in which a contrary view has been taken. It is true that in a certain number of cases it has been held that, if a dispute arises in appeal as to the amount payable by or to the plaintiff, the appeal should be valued with respect to the amount claimed by the appellant and *ad valorem* Court-fee ought to be paid on that amount, but that is not the question before us. The only question we have to decide is whether, when a suit is brought for redemption and a certain amount is claimed as surplus mesne profits, the plaintiff is bound to pay Court-fee upon the surplus amount claimed, in addition to the Court-fee on the principal amount secured by the mortgage. This question was decided in the cases to which we have referred and in these cases it was held that the suit being a suit for redemption, Court-fee was payable upon the principal amount secured by the mortgage. We agree with the view taken in these rulings, which have, as far as we are aware, not been dissented from by this Court or any other Court. In any case we feel ourselves bound to follow them and hold that the amount of Court-fee payable upon the plaint was rightly paid with reference to the principal amount secured by the mortgage.

On the appeal coming on for hearing on its merits the following judgment was delivered :—

JUDGMENT.—The only question which has been argued in this case is whether the Court of first instance had jurisdiction to entertain the suit. The suit was one for redemption of a mortgage, the principal amount of which was Rs. 960. The facts of the case have been set forth by us in our order passed to-day upon the question of the amount of Court-fee payable on the plaint. In the plaint the prayer of the plaintiffs was that redemption should be granted upon payment of a portion of the mortgage-money ; in the alternative it was prayed that the plaintiffs might be allowed to pay the whole of the mortgage-money ; and in the third place it was alleged that a surplus amount of Rs. 7,000 and odd was due and it

(1) 29 A. 471 at p. 475 ; (1907) A. W. N. 133 ; 4 A. L. J. 375.

(2) 68 Ind. Cas. 226 ; (1922) A. I. R. (N.) 262.

was prayed that this amount should be awarded against the defendant-mortgagee. The plaintiffs themselves, who are the appellants here, took their plaint to the Court of the Munsif in the belief that the Munsif had jurisdiction to entertain the suit. They allowed the suit to proceed to trial and a decree was passed by the Munsif for redemption upon payment of a certain sum. They themselves appealed to the District Judge from the decision of the Munsif, and after the Appellate Court has decided the case and made a decree in favour of the plaintiffs for redemption upon payment of a certain sum, they have come to this Court and they urge that the Munsif ought not to have entertained the suit which they themselves instituted in his Court. We think the case is covered by the ruling in *Kedar Singh* v. *Matabadal Singh* (3). It was for the plaintiffs to value the suit and they themselves valued it at Rs. 960, the principal amount of the mortgage. With reference to that valuation the suit was cognizable by the Munsif. They say that surplus mesne profits were due and they gave an estimate of the amount which they thought was due, but the relief sought in the plaint was that redemption should be granted and an account taken and if, upon the taking of the account, any surplus amount was found due, that surplus should be paid over to them. The real valuation of the suit was based on the amount of the mortgage, with reference to which Court-fee had to be paid, and it was an ancillary part of the claim that an account should be taken and any amount found due to or by one of the parties should be awarded to the party to whom it was due. That did not alter the nature of the suit and did not increase the value of it. This was the view taken in the case to which we have referred and we are not satisfied that a different view was held in any other case by this Court. It comes with very bad grace from the plaintiffs for them now to contend that they went to a wrong Court and, therefore, all the proceedings which have already been taken in the suit should be quashed and a fresh trial ordered in another Court. We think the appeal is without force and accordingly dismiss it with costs.

K. S. D. *Appeal dismissed.*

(3) 1 Ind. Cas. 703 ; 31 A. 44 ; A. W. N. (1909) 276 ; 5 A. L. J. 713.

CALCUTTA HIGH COURT.

INCOME-TAX OBJECTION No. 36 OF 1922-23.

June 13th, 1923.

Present :—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Richardson.

In re BISHNU PRIYA CHOWDHURANI.

Income Tax Act (XI of 1922), s. 22 (2)—Statement of assessee about income—Burden of proof—Assessment based on general principles, validity of.

When an assessee states that he has no income from a certain source and Officers of the Income Tax Department disbelieve him, it is for them to prove that he has such income and not for him to prove the contrary. Any assessment based on the inability of the assessee to prove his negative statement and on general assumptions only is bad and should be cancelled.

The facts will appear from the following report submitted by the Commissioner of Income Tax, Bengal, to the High Court :—

In accordance with the request contained in their order dated 16th January 1923 on the petition of Babu Iswar Chandra Chowdhuri to state a case under the provisions of section 66 of the Indian Income Tax Act (XI of 1922), I have the honour to submit the following for the opinion of the Hon'ble High Court.

1. *History of the Case* :—

The petitioner submitted a return of his income in accordance with section 22 (2) of the Act on the 24th June 1922 in which he declared an income of Rs. 3,966-11-2, which income included nothing on account of *bastu* rents. His accounts were called for and examined on the 1st August following and he was assessed by the Income Tax Officer on Rs. 7,307 including Rs. 1,528-6-4 on account of *bastu* rents, calculated at $2\frac{1}{2}$ per cent. on the assessee's gross rental of Rs. 63,136. It is the inclusion of this item and the method by which the figure has been calculated which forms the subject of the present reference.

On the 16th October following an appeal was filed before the Assistant Commissioner in which this item was the chief subject of objection. This appeal was dismissed by the Assistant Commissioner in his order dated the 12th November which is quoted in the petition filed before the Hon'ble High Court.

BISHNU PRIYA CHOWDHURANI, *In re*

On the 16th December a petition was filed before myself requesting me to state a case to the High Court under section 66 of the Act on *inter alia* the two grounds which form the subject of the present reference. This petition I rejected in my order dated the 18th December as it then appeared to me from the petition and the order of the Assistant Commissioner annexed to it, that the questions in issue were purely of fact, namely, (*a*) whether there was any income from *bastu* rents, and (*b*) what that income was, both of which had been decided by the lower Courts.

On receipt of the order quoted above from the Hon'ble High Court on the 30th January last, I examined the whole record in order to ascertain what the questions of law were on which the case was to be stated.

2. *The questions for decision.*

(*a*) The petitioner's contention "that the assessment in *bastu* estimated on 2½ per cent. is based on no evidence admissible in a judicial proceeding" impugns merely the method adopted by the Income Tax Officer in estimating the amount of income received from this particular source, and followed on appeal by the Assistant Commissioner. The assessment order passed by the Income Tax Officer does not reveal why this particular percentage on rent roll was taken or why this method of estimating the income was followed. But in a note on the margin of the Assistant Commissioner's order sheet appears the following remark: "*Bastu* rent is calculated at 2½ per cent. of the gross rental according to instructions," and the Assistant Commissioner's order supplies the following explanation: "This is the rate adopted in this district for *bastu* and other non-agricultural rents in estates for which no reliable evidence is produced to show a more exact estimate. The main principle of the Income Tax Act is that it is the duty of the assessee to supply the materials of his assessment [*vide* section 22 and section 23 (4)]. If he fails to supply them entirely, the Income Tax Officer is to make the assessment to the best of his judgment under section 23 (4). If he supplies them but fails to substantiate them under section 23 (3), the Income Tax Officer has still "to assess the total income of the assessee." This is apparently to be read with section 23 (4) to mean that he must do so "to the best of his judgment." In the present case the assessee was naturally precluded by his contention, that he had no such income whatever, from showing the amount of the income which the Income Tax Officer supposed him to have. The latter accordingly had to fall back on something else, and he actually resorted to a percentage on gross rental, a percentage which, as appears from the Assistant Commissioner's order, was deduced from other similar cases occurring in the same district, was generally applied in the district in such cases and, apparently, was generally accepted by the assessees as a fair basis of computation.

The first question, therefore, which I have the honour to refer for the opinion of the Hon'ble High Court is:—

Whether, in the absence of other reliable data as to the income of an assessee from a certain source, an Income Tax Officer is justified in making and an Assistant Commissioner in upholding an assessment based on a formula which has been found in practice generally applicable in similar conditions to incomes from that source.

(*b*) The second contention of the petitioner "that the learned Assistant Commissioner erred in law in assessing tax on *bastu* without finding on evidence that there was *bastu* assessable under the Indian Income Tax Act, 1922," is of greater importance. It appears from the assessment record that the inclusion of the item Rs. 1,528-6-4 on account of *bastu* income by the Income Tax Officer in his assessment was based on no foundation in fact at all. This assessment order reads as follows: "The *Gomastha* says no *bastu* rent is received while the rent roll amounts to Rs. 63,135-15. No papers have been adduced concerning the last settlement showing that no *bastu* rent is realised. I cannot accept this. It is too much to believe that persons holding non-agricultural land pay no rent." From this it will be seen that the Income Tax Officer assumed that the assessee had tenants holding non-agricultural land and that he derived income therefrom. The assessee in his verified return of income under section 22 (2) of the Act, had stated that he had no such income but the Income Tax Officer required him to prove that negative and in the absence of evidence in its support—he says "no papers have been adduc-

BISHNU PRIYA CHOWDHURANI, *In re*

ed concerning the last settlement showing that no *bastu* rent is realised "—held that he had failed to prove it, and proceeded to make an assessment on the general assumption that a landlord must have income for such non-agricultural sources assessable to income-tax.

When the case came before the Assistant Commissioner on appeal, the same attitude was adopted. It was assumed that there must be non-agricultural *bastu* income included in the rent roll and the assessee was required to prove his contention that there was not. The evidence produced was considered unsatisfactory relating, as it did, to a state of affairs twenty years before. Here again a reference is made to the District Settlement, the implication being that it was the assessee's duty to support his negative assertion from the Settlement Record.

The question of law which thus emerges, which seems to be that raised in paragraph 9, clause (*c*) of the petition annexed to the Hon'ble High Court's order, is as follows: "Whether an assessee having in a verified return of income stated that he derived no income from a certain source can be required by an Income Tax Officer to prove that statement: Whether, in the absence of such proof, 'the Income Tax Officer is legally justified in assessing him on income from that source without otherwise satisfying himself that he has such income: Whether on such an assessment being made and an appeal being filed against it, an Assistant Commissioner can require the assessee to prove his negative assertion: and whether, in the absence of such proof, he is legally iustified in confirming the assessment."

3. *Opinion.*

(*a*) To the question stated in paragraph 2 (*a*) *ante*, I am respectfully of opinion that the answer must be in the affirmative but the condition as to the absence of other reliable data is of great importance. It is the duty of officers of the Income Tax Department to base their estimate as far as possible on ascertained facts, and a formula such as that used in the present case should only be applied when other sources of information fail. In the present case a satisfactory source was apparently ready to hand in the Settlement Record, but was not utilised.

(*b*) The question stated in paragraph 2 (*b*) *ante* admits in my opinion of but one answer. The ordinary principle of evidence applies and the burden of proof is on the party which would fail if no evidence were produced, *i.e.*, on the Officers of the Income Tax Department. The latter cannot proceed on general assumptions to reject an assessee's verified statement. If an assessee states that he has no income from a certain source and the Officers of the Department disbelieve him, it is for them to prove that he has some such income and not for him to prove the reverse. Any assessment based on the inability of the assessee to prove his negative statement and on general assumptions only is bad and should be cancelled.

Babu *Narendra Nath Set*, for the Petitioner.

JUDGMENT.

Sanderson, C. J.—We have read the case which has been submitted to us by Mr. Blandy, the Commissioner of Income Tax, Bengal. A learned Vakil has appeared for the assessee, but the Crown has not been represented.

In my judgment, for the purpose of disposing of this case, it is sufficient for us to say that we agree with the opinion expressed by Mr. Blandy on the second point raised in the case. This opinion is expressed in clause (*b*) at the end of the case and we, speaking generally, agree with the reasons which induced him to arrive at that decision. It is not necessary for us to consider or express any opinion upon the first question which is dealt with in the case, inasmuch as the opinion of Mr. Blandy upon the second question is sufficient to dispose of this case.

We, therefore, remit the case to the Commissioner of Income Tax in order that he may deal with it in accordance with our judgment, which, as I have already said, confirms his opinion. The assessee will have the costs of the case which we assess at Rs. 150 inclusive of all items.

Richardson, J. agree.

K. S. D. *Case remitted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 545 OF 1921.

October 24, 1922.

Present :—Mr. Justice Muhammad Rafiq and Mr. Justice Stuart.

JAGANNATH PRASAD—DEFENDANT —APPELLANT

versus

CHHATUR KUNWAR—PLAINTIFF —RESPONDENT.

Mortgage—Simple mortgage—Subsequent usufructuary mortgage—Decree on foot of simple mortgage—Third mortgage to satisfy decree—Payment to decree-holder by third mortgagee—Priority.

One *J. K.* executed a deed of simple mortgage in favour of *N.* hypothecating a certain village by way of security. Subsequently, she executed a deed of usufructuary mortgage in favour of one *J. P.* hypothecating the same village by way of security. The first mortgagee obtained a decree on foot of his mortgage. In order to satisfy this decree *J. K.* executed a third mortgage in favour of *R.* the mortgage-money being left with him for payment to the decree-holder. The payment was made by *R.* and his widow *C.* sued for recovery of the amount:

Held, that the mortgage in respect of which the decree was passed was extinguished by the decree and the plaintiff could not claim priority over *J.P.*

Chhagan Lal v. *Muhammad Hussain Khan*, 51 Ind. Cas. 133; 41 A. 456; 1 U. P. L. R. (A.) 1; 17 A. L. J. 741, followed.

Appeal from a decree of the District Judge of Shahjahanpur, dated the 14th January 1921, confirming a decree of the Subordinate Judge, Shahjahanpur, dated the 29th May 1919.

Munshi *Jang Bahadur Lal*, Munshi *Narain Prasad Ashthana* and Munshi *Shiva Prasad Sinha*, for the Appellant.

The Hon'ble *Syed Raza Ali*, for the Respondent.

JUDGMENT :—The facts which have given rise to this appeal are as follows :—One *Musammat* Jainti Kunwar, a Hindu widow, executed a deed of simple mortgage in favour of one Nand Ram on the 27th of April 1906, hypothecating by way of security the village of Karara. Two years afterwards, on the 12th of May 1908, she executed a deed of usufructuary mortgage in favour of Jagannath Prasad for Rs. 3,000, hypothecating by way of security the village of Karara, some other villages, and the mortgagee rights in four other villages. Under the terms of the said deed Jagannath Prasad was to pay off the mortgage of the 27th of April 1906, and the money for that purpose was left in his hands. Jagannath Prasad did not pay off the prior mortgagee. The latter sued on foot of his mortgage and obtained a preliminary decree under section 88 on the 14th of December 1907, and a final decree on the 29th of August 1908. In order to satisfy the said decree and save the property from sale, *Musammat* Jainti Kunwar executed a third deed of mortgage in favour of one Ram Narain on the 19th of February 1910, in lieu of Rs. 1,700 the whole amount of which was left in the hands of Ram Narain for the payment of the decree of the 29th of August 1908. Ram Narain has paid off the decree of the 29th August 1908. He is dead. On the 27th of March 1919, his widow *Musammat* Chhatur Kunwar instituted the suit, out of which this appeal has arisen, for the recovery of Rs. 1,700 plus interest due upon the mortgage of the 19th of February 1910, in favour of her husband, by sale of the mortgaged property. Jagannath Prasad was also impleaded as a defendant in the case. He was the principal contesting defendant. The claim was resisted on various pleas, with one of which alone we are at present concerned here. He contended that he had priority over the mortgage of the 19th of February 1910. On the other hand, the plaintiff *Musammat* Chhatur Kunwar argued that her husband, having advanced money for the satisfaction of the decree of the 29th of August 1906, and having satisfied the said decree, stood in the shoes of the prior mortgagee Nand Ram, whose mortgage of the 27th of April 1906, was prior to that of Jagannath Prasad. The contention of Jagannath Prasad was disallowed by both the Courts below. He has come up in second appeal before us and argues that he has priority over Chhatur Kunwar. He bases his argument on the statement that the mortgage of 27th of April 1906, having merged into the decree of the 29th of August 1908, both the mortgage-security and the right of redemption were extinguished. The mere fact that

the husband of Chhatur Kunwar advanced money for the payment of that decree and paid off that decree would not revive the mortgage of the 27th of April 1906, and thus give Chhatur Kunwar priority over Jagannath Prasad. In support of his contention Jagannath Prasad relies on the cases of *Chhagan Lal* v. *Muhammad Hussain Khan* (1) and *Het Ram* v. *Shadi Ram* (2). For *Musammat* Chhatur Kunwar the contention is that the case of *Het Ram* v. *Shadi Ram* (2) has been re-considered by their Lordships of the Privy Council in a subsequent case, namely, *Sukhi* v. *Ghulam Safdar Khan* (3). We find that in the last mentioned case the decision of their Lordships has turned upon the consideration of the omission of the following words of section 89 of Act IV of 1882, namely, " and thereupon the defendant's right to redeem and the security shall both be extinguished." In the new Civil Procedure Code of 1908, in O. XXXIV, r. 5, these words find no place. In *Sukhi's* case the final decree was passed under the new Act and not under Act IV of 1882. In the appeal before us the decree of the 29th of August 1908, was passed and framed under section 89 of Act IV of 1882. In the case of *Chhagan Lal* v. *Muhammad Hussain Khan* (1), which was a Full Bench case of this Court, it was decided that a final decree passed under section 89 of Act IV of 1882 had the effect of extinguishing both the security and the right of redemption. In other words, the mortgage in respect of which the decree was passed was extinguished. *Musammat* Chhatur Kunwar in the present case cannot claim priority over Jagannath Prasad, in view of the decision in the case of *Chhagan Lal* v. *Muhammad Hussain Khan* (1). We, therefore, allow the appeal, set aside the decrees of the Courts below, and remand the case to the first Court through the lower Appellate Court for trial on the merits. It will be open to the parties to put in fresh pleas with regard to the statement made by the learned Counsel for Chhatur Kunwar before us that the amount claimed by Jagannath Prasad is not due to him, and any other pleas that might be urged by either Chhatur Kunwar or Jagannath Prasad. The remand is under O. XLI, r. 23. Costs here and hitherto will abide the result.

K. S. D.

Appeal allowed.
Case remanded.

(1) 51 Ind. Cas. 133 ; 41 A. 456 ; 1 U. P. L. R. (A.) 1; 17 A. L. J. 741.

(2) 45 Ind. Cas. 798 ; 40 A. 407 ; 5 P. L. W. 88 ; 16 A. L. J. 607 ; 35 M. L. J. 1 ; 24 M. L. T. 92 ; 28 C. L. J. 188 ; (1918) M. W. N. 518 ; 20 Bom. L. R. 798 ; 22 C. W. N. 1033 ; 9 L. W. 550 ; 12 Bur. L. T. 72 ; 45 I. A. 130 (P.C.).

(3) 65 Ind. Cas. 151 ; 43 A. 469 ; (1921) M. W. N. 445 ; 14 L. W. 162 ; 26 C. W. N. 279 ; 42 M. L. J. 15; 30 M. L. T. 175 ; 24 Bom. L. R. 590 ; (1922) A. I. R. (P. C.) 11 ; 48 I. A. 465 (P.C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1026 OF 1921.

May 4, 1923.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

RAMESH CHANDRA SINHA AND ANOTHER —DEFENDANTS—APPELLANTS
versus
MOHAMMED ELAHI BUKSH—PLAINTIFF —RESPONDENT.

Hindu law—Mitakshara *School*—*Family residing in Bengal*—*System applicable*—*What must be proved.*

In order to show that a family residing in Bengal is governed by the *Mitakshara* School of Hindu Law, it is enough to prove their immigration from the North-West and the continued practice of *Mitakshara* customs. It is not necessary to prove the further fact that immigration took place subsequent to the establishment of the *Dayabhaga* system of law.

Pitambar Chandra Saha Chaudhuri v. *Nisikanta Saha*, 55 Ind. Cas. 5 ; 31 C. L. J. 52 ; 24 C. W. N. 215, explained.

Appeal against the decree of the Sub-Judge, Jalpaiguri, dated the 21st December 1920, affirming the decree of the Munsif of that place, dated the 19th September 1919.

Dr. *Dwarkanath Mitte*, (with him Babu *Hemendra Nath Basu*), for the Appellants.

Babu *Braja Lall Chakraburti*, (with him Babu *Santosh Kumar Basu*), for the Respondent.

JUDGMENT.

Walmsley, J.—This appeal preferred by the defendants Nos. 1 and 2 arises out of a suit

brought for declaration of title to a *jote* and for a further declaration that a decree obtained by the defendants Nos. 1 and 2,—the present appellants,—against the *pro forma* defendants in a rent suit was fraudulent. The Courts below have given the plaintiff the decree which he asked for and consequently this appeal is preferred by the defendants Nos. 1 and 2. It is not necessary to go further into the details of the case. The appellants have put forward two contentions. The first is that the so-called tenure is only a *raiyati* and that the holding is a non-transferable *raiyati* holding and the plaintiff acquired nothing by his purchase. So far as this point is concerned, the answer given by the learned Judge of the Court of Appeal is conclusive. The holding is shown in the Record of Rights as a tenure and the defendants Nos. 1 and 2 presented an application under section 105 of the Tenancy Act on the footing that the holding was a permanent tenure. Other facts are given by the Judge ; but it is not necessary to repeat them. This argument, I may say, has hardly been pressed and it fails.

The second argument is that the Courts below are wrong in finding that the family of Fakir Singh was governed by the school of *Mitakshara* Law. The point which is pressed is this that the plaintiff ought to have proved over and above the fact that Fakir Singh's family came from the North-West and that various incidents of their lives show them to have followed the customs of the *Mitakshara* school of law, the further fact that the date of the family's immigration into Lower Bengal took place after the establishment of the *Dayabhaga* system of law. For this proposition, reference is made to the case of *Pitambar Chandra Saha Chaudhuri* v. *Nisikanta Saha* (1). If that case really lays down that, for a family residing in Bengal to show that it is governed by the *Mitakshara* school of law, it must prove immigration and immigration since the establishment of the *Dayabhaga* system and the continued practice of *Mitakshara* customs, it lays a very heavy onus upon the party making the claim and that onus is materially increased if it is correct that *Jimutavahana* flourished not in the 14th Century but in the 11th Century, as is said in the case of *Rajani Nath Das* v. *Nitai Chandra Dey* (2). However, it appears to me, on a correct reading of the case of *Pitambar Chandra Saha Chaudhuri* (1), that the learned Judges did not lay down that this third item of proof must be given. They were dealing with the question of the burden of proof and discussing what facts proved by one side shifted the burden of proof on to the other side and I do not think it is correct to say that they required that this third item of proof must always be given. So, in the view I take of that case, the findings of fact recorded by the learned Judge of the Court of appeal below are sufficient to show that the plaintiff is entitled to say that the family of Fakir Singh was governed by the school of *Mitakshara* Law, for he has given the necessary proof of origin and practice. The result is that this second argument also fails.

The appeal is accordingly dismissed with costs.

Suhrawardy, J.—I agree.

K. S. D. *Appeal dismissed.*

(1) 55 Ind. Cas. 5; 31 C. L. J. 52; 24 C. W. N. 215.
(2) 63 Ind. Cas. 50; 48 C. 643; 32 C.L.J. 338; 25 C. W. N. 433 (F. B.)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 45 OF 1923.

October 30, 1923.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

RAM CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAULA BAKSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Explanation VI—Res judicata—*Same parties—Public right—Dispute over well—Municipal Board party to previous litigation—Failure to assert in subsequent litigation - Public right, effect on.*

The Municipal Board represents the public in disputes about wells and other things which are vested in them ; and any decision between the Municipal Board and the defendants in a previous litigation about such a well, will operate as *res judicata* against the latter, even if the suit is brought by other persons and not by the Municipal Board. The

RAM CHAND *v.* MAULA BAKSH

parties are the same within the meaning of Explanation VI to s. 11, Civil Procedure Code. Any refusal or negligence by the Municipal Board to assert a public right does not affect the existence of such a public right.

Appeal from the order of the Subordinate Judge of Muttra, dated the 7th December 1922.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—We find ourselves unable to agree with the view which the District Judge has taken in this particular matter. The point in dispute is a small one and we think the law is really quite clear. It is probable that the true legal considerations were not pointed out to the learned Judge in the argument. There is in the *Muhalla Taksalyan*, in Muttra, a well which has become the subject of much litigation. There is a mosque adjoining thereto and the trustees of the mosque, who are of course Muhammadans, have been from time to time asserting a right of private ownership over this well. When the word 'well' is used in this connection it includes of course the *chabutra* and also certain strips of land adjoining the *chabutra* and appurtenant to the well, in the same way that when a man speaks of his house he includes the compound and the gate, although they are no part of the house. Sometime back, the trustees of the mosque came into collision with the Municipal Boarda bout this well. They applied to the Municipal Board for a certain sanction under the Municipalities Act and were refused. They then brought a suit asserting that the well was the property of the mosque in which they joined the Municipal Board as defendants and in which certain other persons, *Banias* of the Mohalla, applied for and were granted permission to join as defendants in denfence of the alleged public property in the well. That suit was tried out and it was held that the trustees of the mosque had failed to prove their title to the well, that the well was a public one and that the trustees of the mosque had no right to enclose it. Fifteen years have passed since that decision and the trustees of the mosque, having regard to their present assertions, are entitled to some credit for having sat down patiently under that decision for so long; but whether times have changed, or whether the trustees regard fifteen years as a period longer than is reasonable to expect judicial consistency, they have recently erected, what they politely, call a room but what is really a structure in which nobody is ever likely to sit or was ever intended to sit, but which represents in the shape of a wall an obstruction to the public use of the well. This was no doubt done in defiance of the previous decision and as a challenge to the public. Possibly the complexion of the Municipal Board has changed in the interval. It would have been possible for the Municipal Board, representing the public, to have brought a suit for the removal of that construction. By section 55 of the Act of 1900, and by the corresponding section of the Act of 1916 all public wells in Muttra are vested in the Municipal Board, but they did not, and the present plaintiffs being residents in the *mohalla* interested in the well if it is a public one properly obtained the sanction of the Legal Remembrancer to bring a suit under section 91 for the removal of this interference with their public right. The Municipal Board, of course, represents the public in such matters as wells and other things which are vested in them, but the refusal of the Municipal Board, or the negligence of the Municipal Board to assert a public right, does not affect the existence of the public right, and the plaintiffs had a perfect right to sue in assertion of their public right if they could get the necessary authority required by the Legislature for bringing such a suit. So stated, it would seem perfectly obvious and a mere matter of common sense, apart from any legal considerations, that the only question was whether the construction put up by the trustees of the mosque was an interference with the public well or with the public enjoyment thereof. Nobody could reasonably suppose that it was open to the trustees in any suit brought by persons representing the public to question the point which has already been decided against them. Probably on this ground no evidence was taken in the Court below and the Munsif came to the conclusion that the previous decision bound the defendants, that the construction which the defendants erected amounted to an encroachment and made an order accordingly for its removal. The defendants appealed upon the ground that the mat-

ter was not *res judicata*, and the District Judge, probably overlooking the provisions of section 11. explanation 6, to which we will refer in a moment, has come to the conclusion that the suit is not between the same parties. The view he probably took was that by section 41 of the Evidence Act the previous judgment was not a judgment *in rem* within the meaning of section 41, but that it was merely a matter which was to be taken into consideration within the meaning of section 42 of the Indian Evidence Act. He actually says that the issues and the principal parties are different. In one sense they are, but where we differ from him is that, in our opinion, in the legal sense they are the same. Mr. Gulzari Lal for the trustees of the mosque suggested that the question in this suit related to a certain triangular insignificant piece of land which was outside the well and outside the previous dispute. That point was certainly not clearly stated by the defendants in their written statement but it is a question of fact as to whether or not it appertains to the well. The suit was brought in relation to the obstruction which had been erected on this triangular piece of land on the allegation that the piece appertained to the well. It has not been seriously disputed that it does and of course if it does the triangular piece was substantially decided even though the words used in the former judgment was 'well'. With regard to the parties that is not a question of fact but a question of law. The persons are undoubtedly not the same nor is the form under which they appear on the record ; but the Municipal Board in the previous suit represented the public. The Banias who asked to be joined could not have done so except upon a *bona fide* assertion of an interest in the public right and as they were defendants in the suit brought by the trustees there can be no doubt that they were *bona fide* litigating in respect of a public right which they were defending. Section 11 forbids any Court to try an issue which has been substantially in issue in a former suit between the parties under whom they claim. As a matter of fact, the section is entirely ungrammatical in this respect but it must mean the parties to the subsequent suit claiming under parties to the prior suit and applying explanation 6 to this case it is quite clear that the present plaintiffs are claiming under the persons who *bona fide* litigated in respect of a public right in the first suit. The result is that section 11 applies and that no issue can be raised in this suit as to whether or not this well and its appurtenances are public property. There being nothing else left in the suit, the appeal must be allowed and the judgment and decree of the Munsif restored with costs here and below.

We suggest that, if the parties are desirous of arriving at a final agreement which will bind them and their successors for all time as to the actual dimensions of this public well, the best plan would be for them, if they are agreeable thereto, to apply to the Munsif under this decree to make a further addition thereto. Of course, he cannot do so without their consent, but with their consent there will be no difficulty whatever, and on such application the Munsif either by going there himself or by sending his *amin*, could demarcate the land itself, have a photo taken or by measurement have a plan prepared and affixed to this decree finally showing in a clear picture the dimensions of the land appertaining to the well. If any attempt to do this is made or any difficulty occurs reference may be made to this Bench, but we do not wish the Munsif to understand that he is compelled to do anything if he is not disposed to do so.

M. A. A. *Appeal allowed.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2540 OF 1922.

May 9, 1923.

Present :—Justice Sir Asutosh Mukerjee.

SACHHIDANANDA THAKUR—APPELLANT

versus

MAHES CHANDRA DAS—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 105 (3), rules framed under—Application for assessment of rent—Court-fee payable.

On an application under section 105, sub-section(3), of the Bengal Tenancy Act for a settlement of rent

SACHHIDANANDA THAKUR *v.* MAHES CHANDRA DAS

a stamp of eight-annas is to be levied in respect of each tenancy, not in respect of each tenant who may be one of a group of tenants holding a particular tenancy.

The Registrar of the High Court, Appellate Side, made the following reference :

"In this case, the Stamp Reporter reports that the Court-fee is insufficient by Re. 1-8. The appeal arises out of a proceeding under section 105 of the Bengal Tenancy Act. Under section 105 (3) of the Act, every application under sub-section (1) or sub-section (2) shall, notwithstanding anything contained in the Court-Fees Act, 1870, bear such stamp as the Government of India may, from time to time, prescribe by notification in the *Gazette of India*. It appears that in the notification No. 2254 (*f*) published in the *Gazette of India*, dated the 10th August 1918, Pt. I, p. 1253, which superseded a previous notification No. 322 S R., dated the 19th January 1899, it was provided that a stamp of annas 8 should be paid *for each tenant* making, joining or joined in the application. As regards the application in question, four tenants have been joined. The Vakil for the appellant submits that these four tenants are tenants of one tenancy. Whether this be so or not, it seems to me that, inasmuch as the rule framed by Government requires a stamp of annas 8 for *each* tenant, it is still necessary, on a literal interpretation of the rule framed by Government, for the Vakil to put in deficit Court-fee of Re. 1-8 0. As, however, this is a matter of general importance, I submit the case to the Hon'ble the Chief Justice under section 5 of the Court-Fees Act."

Babu *Atul Chandra Gupta*, for the Appellant.

Babu *Dwarka Nath Chakravarti* and Babu *Surendra Nath Guha*, for the Secretary of State.

ORDER.—The question which has been referred for decision under section 5 of the Court-Fees Act, 1870, relates to the true construction of a rule framed by the Governor-General in Council with reference to section 105, sub-section (3) of the Bengal Tenancy Act, 1885. The rule directs that an application made under the section for a settlement of rent, during the preparation of a Record of Rights, in the Presidency of Bengal under Chapter X of the Bengal Tenancy Act, shall bear a stamp of eight-annas, for each tenant making or joining or joined in the application. The Stamp Reporter has held that if the application relates to a single tenancy, which is held by a number of joint tenants, a stamp of eight-annas must be levied in respect of each of such joint tenants. This novel interpretation of a rule which has been in existence for a quarter of a century is, in my opinion, clearly erroneous.

The rule in question must be read with paragraph 63, clause (4) of the rules framed by the Governor-General in Council on the 7th December 1914. That rule is in these terms :

"With the consent of the Revenue Officer, any number of tenants occupying land under the same landlord in the same village, may make a joint application for the settlement of rent, or may be joined as defendants in the same proceedings on a similar application by the landlord, provided that if, at any time it appears to the Revenue officer that the question between any two of the parties, of whom one is so joined with others, cannot conveniently be so jointly tried, he may order a separate trial to be held of that question, or he may pass such orders, in accordance with the Code of Civil Procedure, for the joint or separate disposal of the application, as he may think fit."

This rule leaves no room for controversy that the case contemplated is that of joinder of matters relating to distinct tenancies in the same application ; otherwise, no special permission would have been necessary, because if the application relates to one tenancy, which is held by a number of joint tenants all the joint tenants would be necessary parties to the application The history of this matter is set out in the judgment of a Full Bench of this Court in the case of *Upadhya Thakur* v. *Persidh Singh* (1). The rule for the levying of stamp-duty which I have previously mentioned was framed with a view to modify the effect of the Full Bench decision. In my opinion the only construction which can be

(1) 23 C. 723; 12 Ind. Dec. (N. S.) 481.

legitimately put upon the rule is that a stamp of eight-annas is to be levied in respect of *each tenancy*, not in respect of each tenant who may be one of a group of tenants holding a particular tenancy. The conclusion follows that adequate Court-fee has been paid on the memorandum of appeal which must be registered accordingly.

E. S. D. *Order accordingly.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 386 OF 1920.

November 5, 1923.

Present :—Mr. Justice Lindsay
and Mr. Justice Kanhaiya Lal.

GHASI RAM AND OTHERS—
DEFENDANTS—APPELLANTS
versus
Pandit BHOLA NATH AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Construction of document—Mortgage-deed—Stipulation to pay arrears of rent due from tenants on redemption—Time-barred arrears, whether payable—Mortgagee in possession, duty of—Occupancy rights created—Mortgagor, whether entitled to compensation.

Where a mortgagor makes himself liable to pay to the mortgagee at the time of redemption all arrears of rent due from the tenants, he should be taken to have intended to pay up only those arrears which he can himself recover. He cannot, therefore, be held liable to pay the amounts of any decrees obtained by the mortgagee against tenants which have become time-barred. [p. 315, col. 2.]

It is the duty of the mortgagee in possession to take as much care of the property mortgaged to him as a prudent man would take if it was his own. If he, therefore, grants occupancy rights to tenants in lieu of *nazrana*, he must compensate the mortgagor, and the amount realized by him must be deducted from the mortgage amount. [p. 316, col. 1.]

Appeal from the decree of the Second Additional Subordinate Judge of Aligarh, dated the 10th September 1920.

Messrs. *P. L. Banerji* and *K. N. Laghate*, for the Appellants.

Messrs. *B. K. Mukerji*, *U. S. Bajpai*, and *S. N. Mukerji*, for the Respondents.

JUDGMENT.—This is an appeal from a suit brought for redemption by the plaintiffs-respondents.

The appellants here are the defendants mortgagees.

In addition to the appeal we have also before us cross-objections put forward against the decree of the Court below by the plaintiffs-respondents.

It is not necessary to set out the facts of the case in any great detail. The dispute between the parties here is with regard to certain items of the mortgage account. The defendants-mortgagees complain that certain items ought to have been allowed to them by the Court below. In turn, the plaintiffs mortgagors complain that the lower Court has not given them credit for certain items to which they were entitled.

To deal first with the appeal of the defendants-appellants, the mortgagees.

One claim which was made in the suit for redemption was that these mortgagees had, during the continuance of the mortgage, cut a large number of trees the value of which was assessed at Rs 3,000.

The plaintiffs, therefore, asked the Court to allow this sum of Rs. 3,000 by deduction from the mortgage-money payable in order to get redemption.

The learned Judge of the Court below came to the conclusion that the plaintiffs were entitled to a deduction of Rs. 2,950. He found with respect to one tree that there was no evidence regarding its value, the value having been assessed by the plaintiffs at Rs. 50. He, therefore disallowed this item.

The defence set up was that the mortgagees never cut down the trees as alleged by the plaintiffs. There was a direct conflict of evidence and the learned Judge, as we have already said, has found in favour of the plaintiffs.

Four witnesses were examined on behalf of the plaintiffs in order to prove that these trees had been cut and that a sum of close on Rs. 3,000 had been obtained by selling them. Much criticism has been bestowed on the testimony of these witnesses and it may at once be acknowledged that their evidence is not perhaps of the highest class. On the

other hand, as opposed to it, we have nothing but the bare denial of one of the mortgagees who appeared as a witness whose testimony was supported by the evidence of a partisan witness whose statement may be disregarded altogether.

During the course of the trial, the Subordinate Judge made an inspection of the spot and recorded a note of what he had observed at the time of his visit. Relying principally upon the result of his observation, the learned Subordinate Judge came to the conclusion that the story for the plaintiffs was probably true and that the trees had been cut as alleged.

We have felt the force of the observations which have been addressed to us on behalf of the defendants-appellants regarding the plaintiffs' evidence in this respect. On the other hand, is the consideration that the learned Judge of the Court below had the witnesses before him and he seems to have been satisfied on the whole that they were telling the truth. He has given reasons for awarding credit to the story told by the plaintiffs and he certainly had some solid ground to go on in the fact that he himself had been to the spot and had observed certain indications that trees had been cut. It is perfectly true that the Subordinate Judge could not as the result of his examination of the locality determine how many trees had been cut or by whom. At the same time, he is perfectly justified in holding that what he saw at the time of his visit entitles him to award preference to the story which has been told on behalf of the plaintiffs and to reject the story which was put forward on behalf of the mortgagees, namely, that no trees had been cut at all.

On this part of the case, therefore, we must decline to interfere with the finding of the Court below. We certainly are not in a position to say that the finding of the learned Subordinate Judge on this part of the case is wrong.

The next point which had been raised on behalf of the mortgagee-appellants is that the Court below wrongly refused to allow them certain sums which were claimed to be owing as arrears of rent.

Under the terms of the mortgage the mortgagor was to be liable at the time of redemption to pay to the mortgagee all sums which were due in respect of arrears from the tenants.

As we understand this term of the mortgage, the intention of the parties was, that the mortgagor should pay up the arrears to the mortgagee when the latter vacated possession and that he in turn was to acquire the right of realizing the arrears from the tenants after he himself had been put into possession after redemption.

The present claim that has been made by the mortgagee-appellants for the arrears is based upon a series of decrees all of which are now time-barred. It is quite obvious, therefore, that if this sum now claimed by the mortgagees were allowed and if the decrees were transferred to the mortgagor after redemption, the decrees would be of no use whatever to the mortgagor. They cannot now be executed by reason of lapse of time. It seems to us, therefore, that on a proper construction of the mortgage-deed and the true intention of the parties this claim for arrears should not be allowed. As for any claim for further arrears over and above those mentioned in the decrees to which we have referred all we need say is that there is no proof of it. Further, we find no provision in the mortgage-deed for the payment of interest on the arrears of rent and the claim for interest, therefore, which is also put forward, must be rejected.

This disposes of the case of the defendants-appellants.

The cross-objections raise really two points. In the first place, it is said that the lower Court ought to have awarded damages to the plaintiffs by reason of losses which they have incurred in the following way:—It is said that these mortgagees during their period of possession by their failure to eject non-occupancy tenants, allowed these tenants to acquire occupancy rights. In some cases it is alleged that occupancy rights were actually granted to non-occupancy tenants in return for *nazrana* (a premium.)

The finding of the Subordinate Judge is that it is proved that a sum of Rs. 580 was realised by the mortgagees in return for the grant of occupancy rights.

The Subordinate Judge, however, refused to allow this sum to the plaintiffs. He gives a variety of reasons for his decision none of which appeals to us. He says, for example, that it can make no difference to the mortgagor whether the land which he has to get back after redemption is burdened with occupancy rights. That is obviously an erroneous conclusion.

It seems to us to be quite clear that the land, after occupancy rights have accrued, cannot be so valuable to the landlord as it was before those rights came into existence. And if it is the duty of a mortgagee to take such care of the property as a prudent man would, he certainly is not entitled to hand the property back to the mortgagor in a worse condition than he received it.

We find, therefore, that occupancy rights have accrued on this land, and those rights, we take it, cannot now be extinguished. We can see no reason, therefore, for denying the plaintiffs this sum of Rs. 580 and we cannot see that the mortgagee has any right whatever to retain this money. Allowance, therefore, must be made for this sum in calculating the amount which is to be paid for redemption. The fact is, that by conferring occupancy rights in return for payment of a premium the mortgagee has been conveying away certain rights of the owner of the property and he is not entitled to retain the money which he has got for granting those rights and at the same time to return the land burdened with those rights to the owner, the mortgagor.

We hold, therefore, that the sum of Rs. 580 ought to be allowed to the mortgagors by reduction of the sum found payable by the Court below.

The other claim which has been put forward on behalf of the mortgagors is, we may say at once, quite untenable.

When the mortgage was made by *Musammat* Shiam Kunwar in the year 1905 it was arranged between her and the mortgagee that she was to remain in possession of an area of cultivated land measuring 67 *bighas*. A portion of this was to be held on payment of rent amounting to Rs. 90 a year and the remainder was to be held rent-free, and it was expressly stipulated between the parties that, while the mortgage continued, the lady was to be allowed to retain possession of all this land, the only right of the mortgagee being that of receiving annually the sum of Rs. 90 from *Musammat* Shiam Kunwar

The plaintiffs ask us to hold that, when Shiam Kunwar sold the equity of redemption to them in the year 1914, they acquired the right to take over possession of this land, that is to say, the tenancy right which *Musammat* Shiam Kunwar had obtained by agreement with the mortgagee when the mortgage was made in the year 1905.

One obstacle to the entertainment of this argument is the fact that the deed of transfer by which the equity of redemption was sold to the plaintiffs does not in terms confer upon them any right to occupy the land which remained in Shiam Kunwar's possession under the terms of the mortgage. It would, therefore, be a sufficient answer to the case of the plaintiffs to say that they have shown no right to set up any claim in respect of compensation or damages relating to the occupation by *Musammat* Shiam Kunwar of these 67 *bighas*.

It was argued further that, being entitled to possession of this land, the plaintiffs were justified in calling upon the mortgagees to eject *Musammat* Shiam Kunwar and they, therefore, asked for damages because the mortgagees refused to eject the lady.

But it is quite clear from the terms of the mortgage that the mortgagees could have had no right whatever to eject *Musammat* Shiam Kunwar as long as the mortgage subsisted. There is, as we have said, an express provision relating to this matter in the mortgage and it is futile to contend that, in any case, the plaintiffs, after their purchase of the right to redeem, had a right to call upon the mortgagees to eject *Musammat* Shiam Kunwar. This part of the case put forward on behalf of the plaintiffs-respondents must, therefore, fail.

The result of this is that we find no force in the appeal of the defendants-appellants and direct that it be dismissed with costs including, in this Court, fees on the higher scale.

As regards the cross-objections we think the plaintiffs-respondents are entitled to succeed to the extent of the sum of Rs. 580 which will be deducted from the amount declared to be payable by them for the purpose

of obtaining redemption. In the cross-objections, therefore, we allow the parties costs in proportion to success and failure including, in this Court, fees on the higher scale.

M. A. A. *Appeal dismissed.*
Cross-objections allowed in part.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 2385 OF 1921.

February 28, 1924.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Chotzner.

SRIMATI SHULACHANA (*Mazumdar*) AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SRIMATI KALI BIBI ALSO RUPJAN BHANU AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) s. 85—Stipulation in an under ryoti *lease for renewal, if valid—Heirs of the under-*ryot, *if can enforce the stipulation.*

In spite of the provisions of section 85 of the Bengal Tenancy Act, a stipulation contained in a lease granted by a *ryot* to an under-*ryot* that after the expiry of the term for which the lease is granted, the *ryot* would grant the under-*ryot* a fresh lease, is valid.

Lani Mia v. *Muhammad Easin*, 20 C. W. N. 948 ; *Amin-ud-din Dafadar* v. *Ananda Chandra Palit*, 28 C. L. J. 507 followed.

When a *kabuliyat* contains a stipulation for a lease for a fresh term upon the expiry of the term already settled, the heirs of the lessee are competent to execute a fresh *kabuliyat* by virtue of the covenant. In such a case the question involved is not one of heritability of the tenure, but of simple contract.

Appeal against the decree of the Sub-Judge, 1st Court, Tipperah, dated the 22nd August 1921 reversing the decree of the Munsif, 2nd Court at Chandpur, dated the 23rd August 1920.

Babu *Bepin Chandra Basu*, for the Appellants.

Babu *Ramdoyal Dey*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for ejectment. There is no dispute about the fact that the defendants' father and predecessor Munshi Gazi was an under-*raiyat* under the plaintiffs by virtue of a *kabuliyat* executed in their favour. The *kabuliyat* was executed in 1317 for a term of nine years which expired in *Chait* 1325. It is admitted on all hands that Munshi Gazi died one month before *Chait* 1325. The substantial question before the Courts below was what construction was to be placed upon the *Kabuliyat*. We have not had the advantage of examining the document for ourselves as it has not been placed before us and we are, therefore, bound to accept the interpretation which has been given to it by the learned Subordinate Judge. It contains a stipulation for a lease for a fresh term upon the expiry of the term already settled. It also contains the expression : "I and my heirs will happily enjoy the land," and it is further stated that in the event of their refusal to execute a fresh lease on fair rent they will not be able to raise any objection to *khas* possession being taken by the lessor. The learned Munsif was of opinion that the contract was a personal one limited to Munshi Gazi and that the defendants as his heirs, were not entitled to avail themselves of it because an under-*raiyati* was not heritable. He, therefore, held that as the term of the *kabuliyat* had expired the defendants were liable to be ejected.

The learned Subordinate Judge has reversed that finding on the ground that the words used in the *kabuliyat* would not only not have the effect of debarring the heirs of Munshi Gazi from the benefit of the lease but were clear indications of a contrary intention. The heirs would, in fact, be competent to enforce specific performance of the contract under section 23 of the Specific Relief Act. He further observed that the defendants had all along expressed their readiness to execute a fresh *kabuliyat* but that the plaintiffs refused to accept it. In his opinion the question of heritability did not arise. The decision turned upon the contractual relation between the parties.

The plaintiffs have appealed and the contentions advanced by the learned Vakil are two-fold. The first is that the defendants being heirs of an under-*raiyat* cannot benefit by a covenant personal to their predecessor-in-interest, and the second is that even if they can they did not avail themselves of the option and so are not entitled to succeed.

In support of his first argument, the learned Vakil has referred to an unreported decision in the case of *Sm. Raklya Banoo* v. *Mahammad Junnach* (See 368 of 1919) where the learned Judges who decided that case held on the facts found that the lease and the agreement together contravene the provisions of section 85, Bengal Tenancy Act and, therefore, were void and has further contended that the defendants as heirs of an under-*raiyat* cannot claim the benefit of the covenant in the agreement as the interest of an under-*raiyat* is not heritable. It is plain that the facts upon which that judgment proceeded are different from those in the present case. There, so far as appears from the judgment, the *kabuliyat* made no mention of the heirs of the lessee. Here, however, there is more than one reference to the rights and privileges of the heirs of the lessee. The lessee and heirs are to enjoy the land in all happiness, they will have the right to a fresh lease on the expiry of the term and will not be entitled to object to the lessors taking possession of the land if they fail to execute a fresh *kabuliyat*. It has been held that in spite of the provisions of section 85, Bengal Tenancy Act a stipulation contained in a lease granted by a *raiyat* to an under-*raiyat* that after the expiry of the nine years for which the lease was granted the *raiyat* would grant the under-*raiyat* a fresh lease is valid. *Lani Mia* v. *Muhammad Easin* (1). That view was also taken in the case of *Aminuddin Dafadar* v. *Ananda Chandra Palit* (2). So the question is narrowed down to the short point whether the defendants as heirs of the original lessee were competent to execute a fresh *Kabuliyat* by virtue of the covenant in the original document agreed on their behalf. It is that they continued in possession of their holding for at least one month before the expiration of the term and were in consequence entitled to the rights and privileges enjoyed by them further under the *kabuliyat*.

This view, in our judgment, is well founded and we must, therefore, hold that the decision of the learned Judge that the question involved is not one of heritability but of simple contract should be maintained.

We are not much impressed by the second argument. The learned Judge has found that the defendants have always expressed their willingness to execute a fresh *kabuliyat* and the mere fact that the plaintiffs refused to accept it does not relieve them of this contractual liability to accept it when offered.

The result, therefore, is that the decree of the lower Appellate Court is affirmed and this appeal is dismissed with costs.

M. B. *Appeal dismissed.*
K. S. D.

(1) 33 Ind. Cas. 448, 20 C. W. N. 948.
(2) 46 Ind. Cas. 924; 28 C. L. J. 507.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 230 OF 1924.

March 14, 1924.

Present :— Mr. Justice Daniels.

AIDAL SINGH—PLAINTIFF—APPELLANT
versus
GYAN SINGH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II *of* 1901), *sec.* 79—*Suit by tenant to recover possession of ex-proprietary holding—Civil or Revenue Court—Jurisdiction—Suit not resisted by Zemindar, effect of.*

A suit by a tenant against his landlord and a person claiming under his landlord to recover possession of an ex-proprietary holding is not cognizable by a Civil Court.

The nature of the suit is not affected by the question whether it is resisted by the landlord or not.

Badri Kasodhan v. *Sarju Misr*, 22 Ind. Cas. 668; 36 A. 55; 12 A. L. J. 29, followed.

Second appeal against the decree of the Additional Subordinate Judge of Aligarh, dated the 4th December 1923.

Mr. *G. Agarwala*, for the Appellant.

JAHA BAKSHA *v.* ABDUL LATIF

JUDGMENT:—This is a suit by a tenant against his landlord and a person claiming under his landlord to recover possession of an ex-proprietary holding. It is on the face of it a suit of the nature described in section 79 of the Tenancy Act, and as such not cognizable by the Civil Court, and the Court below has so held. The appellant disputes this view.

Tikam Singh was an ex-proprietary tenant. He died three years before the suit leaving two illegitimate sons, one of whom is dead and the other is a defendant in this case. Tikam Singh in his life-time agreed to pay an enhanced rate of rent. After his death the *zemindars* recognised his sons as tenants and the latter have been in possession of the holding on payment of rent. The plaintiff is a brother of Tikam Singh and sues the *zemindars* and Tikam Singh's surviving son to recover possession of the holding. The case is clearly one under section 79 and the fact that the *zemindars* did not defend the suit is immaterial. The nature of the suit is not affected by the question whether it is resisted or not. The appellant contends that section 79 is not applicable because he has never held possession of the holding. This contention is negatived by the authority of *Badri Kasodhan* v. *Sarju Misr* (1). That suit was substantially on all fours with the present case. It was a suit brought three years after the late tenant's death by a reversioner who had never obtained possession. This Court held that section 79 applied and that it covered constructive as well as actual possession. Referring to an earlier ruling which they followed the learned Judges say.—

"The principle underlying that ruling seems to be that, where a person claiming to have succeeded to a tenancy by right of inheritance finds that, on endeavouring to take possession of the same, his right is denied and his possession ousted by the *zemindar*, he has suffered an ejectment at the hands of the landlord within the meaning of the section, and his appropriate remedy is by a suit under the Tenancy Act as indicated above."

The appellant refers to a case in *Collector of Benares* v. *Shiam Das* (2), but there the right under which the plaintiff claimed, namely, a purchase under a mortgage decree, did not come into existence till three years after the original tenant had been ejected. The principle of *Badri Kasodhan's case* (1) was in no way dissented from but was recognised as good law.

The appeal fails and I accordingly dismiss it under O. XLI, r. 11.

K. S. D. *Appeal dismissed.*

(1) 22 Ind. Cas. 668; 36 A. 55; 12 A. L. J. 29.
(2) 28 Ind. Cas. 302; 18 A. L. J. 329.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 130 OF 1923.

March 13, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

JAHA BAKSHA AND OTHERS—APPELLANTS
versus
ABDUL LATIF AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal—Dismissal for default—Restoration, application for—Procedure.

An appeal was transferred by the District Judge to the file of the Additional District Judge who, on the same day, took up the same for hearing and dismissed it for default as the appellants were not present; thereafter on the appellants applying for restoration the Judge without taking any evidence or giving the appellants any opportunity to adduce evidence dismissed the application:

Held, that the procedure followed by the Judge was not quite in accordance with law and that an opportunity should have been given to the appellants to prove their contention.

Per SUHRAWARDY, J.—The usual procedure in the case of an application for restoration of an appeal is to register such an application as a miscellaneous case and give both sides an opportunity of adducing evidence.

Under O. XLI, r. 19 of the Civil Procedure Code the Judge can only restore an appeal dismissed for default if it is proved to his satisfaction that the appellant was prevented by sufficient cause from appearing at the hearing.

Appeal against the order of the Additional District Judge of Chittagong, dated the 9th of December 1922.

BHULLAN SINGH *v.* KHUSHI RAM

Babu *Rajendra Chandra Guha*, for the Appellant.

Babu *Narendra Kumar Das*, for the Respondent.

JUDGMENT.

Surhawardy, J.—This is an appeal from an order passed by the Additional District Judge of Chittagong dismissing the appellant's petition for restoration of an appeal which was dismissed as the appellants were absent at the hearing of the appeal. The appeal was pending in the Court of the District Judge of Chittagong. On the 28th November it was transferred to the file of the Additional District Judge and on the same day the case was called and as the appellants were not present, it was dismissed for default. The appellants subsequently filed a petition for restoration of the appeal on the ground that neither they nor their pleader were aware of the transfer of the appeal to the file of the Additional District Judge and so could not be present when the case was called The learned Additional District Judge, without taking any evidence or giving the appellants an opportunity of adducing evidence, dismissed the application as he was of opinon that it was hard to believe that either the pleader or his client was ignorant of the transfer. We think that the procedure followed by the learned Judge is not quite in accordance with law, and that an opportunity should have been given to the appellants to prove their contention. The usual procedure is to register such an application as a miscellaneous case and give both sides an opportunity of adducing evidence. under O. 41, r. 19, the Judge can only restore an appeal dismissed for default if it is proved to his satisfaction that the appellant was prevented by sufficient cause from appearing at the hearing. This proof is only possible if the petitioner is given an opportunity of adducing evidence. It is no doubt possible that after taking all the evidence the learned Judge might still be of the same opinion as he has already expressed. We think, however, that an opportunity should have been given to the petitioner to substantiate his allegations. The usual course would be to send the case back to the learned Judge to dispose of the application after hearing such evidence as may be adduced by the parties. But in the particular circumstances of this case and in view of the fact that the course suggested would only protract the litigation, we propose to allow the appeal and to set aside the order of dismissal of the appeal for default. The whole matter is before us and the circumstances upon which we have been induced to take this course are, first, that the appeal was transferred on the day on which it was dismissed from the file of one Judge to that of another, and secondly, that the pleader who appears for the appellant has also filed the petition in which he mentions that neither he nor his client was aware of the transfer. In these circumstances, we consider it in the interests of the parties concerned that the appeal should be heard and finally disposed of as soon as possible.

The result, therefore, is that this appeal is allowed, the orders of the Court below, dated the 9th December 1922 and that of the 28th November 1922, are set aside and the appeal is directed to be restored to the file and heard and disposed of as early as possible. We make no order as to the costs of this appeal.

Graham, J. :—I agree.

M. B. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1188 AND 1187 OF 1922.

December 3, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

BHULLAN SINGH—PLAINTIFF—APPELLANT

versus

KHUSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872) s. 92, scope of—Document not inter partes—Oral Evidence, whether admissible.

Section 92 of the Evidence Act only excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives-in-interest.

When in a suit for pre-emption the defendants contended that the transaction was really not one of

sale and produced evidence to show the real nature of the document embodying the transaction :

Held, that as the plaintiff was neither a party to the instrument, nor in any sense a representative of any party to the instrument, it was open to the vendee as against the plaintiff, to produce evidence for the purpose of showing that the document was not, in fact, a document of sale.

Second appeal from the decree of the Additional Judge, Meerut, dated the 3rd May 1922.

Dr. *S. N. Sen*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—By a document executed on the 7th of August 1920 purporting to be a sale-deed, certain property was transferred by one Shib Sahai in two *mahals*, namely, *mahal* Ishk Lal and *mahal* Ghasi Ram.

The result of this transfer was to provoke two suits for pre-emption which have given rise to the two appeals before us. In one case the plaintiff was Challoo, who is the appellant in Second Appeal No. 1187. In the other case the plaintiff was Bhullan Singh, the appellant in Second Appeal No. 1188.

It was found by the Courts below that a custom of pre-emption existed in this village.

Both Courts, however, dismissed both the suits on the ground that the document of the 7th of August 1920, which purported to be a sale-deed was not, in fact, a sale-deed and was not evidence of a real transaction of sale giving rise to a right to pre-empt.

The decision of the Courts below is attacked here on the ground that they were both wrong in allowing evidence to be given regarding the nature of this deed. It has been strongly contended that, on the language of section 92 of the Indian Evidence Act, it was not open to the vendee to raise this question or to adduce any evidence for the purpose of showing that a document which on its face purported to be a deed of sale was in reality a deed of some other character.

That contention, however, appears to us to be unsustainable, regard being had to the language of section 92. That section excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives-in-interest for the purpose of contracting, varying, adding or subtracting from its terms. In no way can it be contended that either of the plaintiffs in these suits was a party to the instrument or was in any sense a representative of any party to the instrument, and we hold, therefore, that it was open to the vendee as against the plaintiff, to produce evidence for the purpose of showing that the document upon which the two suits were based was not, in fact, a document of sale.

The evidence which was led before the Court may be put shortly as follows :—It appears that Shib Sahai, who poses as the vendor in this deed, had, as far back as the year 1903, brought a suit for arrears of rent against the persons who are now described in the document as the purchasers.

That suit apparently failed on the ground that Shib Sahai could not establish in fact that the defendants in the suit for arrears of rent were his tenants. It further appears that the defendants in that suit denied Shib Sahai's title. Nothing further was done until about the year 1918 when the Settlement operations were going on. It seems that an application was made by the adversaries of Shib Sahai to the Settlement Officer claiming that they might be entered as proprietors.

Notice of this application was apparently given to Shib Sahai and, on the 28th of April 1919, the application of the defendants was disallowed.

Thereupon, the defendants, that is, Khushi Ram and others, filed an appeal in the Revenue Court contesting the decision of the first Court. The Appellate Court ordered a remand of the case and it was while this matter was under disposal that the document in question was executed.

The case for the defendants was that the deed, although it purports to be a deed of sale, was not in reality a deed of sale but merely a relinquishment by Shib Sahai of whatever claims he had still left over the property in consideration of payment to him of a sum of Rs. 2,500.

We may note that the plaintiffs admit that the property described in this document of the 7th of August 1920 is worth Rs. 10,000. The defendants, on the other hand, say that it is worth Rs. 14,000.

The Courts below came to the conclusion that the document, in reality, amounted to nothing more than a settlement of the dispute between the parties which was then pending in the appeal. Shib Sahai agreed to withdraw his claim on payment of the sum of Rs. 2,500 and this was effected by the execution of the document now in question. We think that the Courts below were right in taking this view of the case. We are quite satisfied that the evidence which was led for the purpose of showing the character of the document was admissible and we also agree that the Courts have come to a correct conclusion on the facts. The result, therefore, is that both these appeals fail and are dismissed with costs.

K. S. D. *Appeals dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 91 OF 1922.

August 29, 1923.

Present :—Mr. Justice Spencer and
Mr. Justice Devadoss.

THE OFFICIAL RECEIVER OF SOUTH ARCOT—PETITIONER—APPELLANT
versus
PERUMAL PILLAI AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 4—Insolvency Court, power of, to decide questions of title—Court, when can decline to adjudicate.

Section 4 of the Provincial Insolvency Act, enables an Insolvency Court to adjudicate upon questions of title in the interests of justice, and reserves to the Court the power to decline to decide questions which it does not deem it necessary or expedient to decide in those proceedings.

Where, therefore, the Insolvency Court, even if it adjudicated upon the title of the insolvent as against his sons, would have no power to recover the property from the sons free of their obstruction, the Court would be justified in not deciding questions of title.

Appeal against the decree of the District Court, South Arcot, in O. P. No. 90 of 1920 in I. P. No. 12 of 1917 (I. P. No. 63 of 1917 on the file of the Official Receiver's Court, South Arcot.)

Messrs. *T. Narsimha Iyengar* and *S. Rangasami Iyengar*, for the Appellant.

Mr. *N. S. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—Section 4 of Act V of 1920 is wide enough to enable an Insolvency Court to adjudicate upon questions of title " which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case " of Insolvency.

But the power given by this section is subject to the provisions of the Act, one of which is the proviso to section 56 (3) which is in the way of a Court removing any person from the possession of property whom the insolvent has not a present right to remove.

In this case it is not admitted that the insolvent has a present right to joint possession of those properties along with respondents Nos. 2, 4 and 5.

In that respect this case differs on the facts from the *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) where the insolvent had a right to be in joint possession of the family property with his sons.

Seeing that the Insolvency Court, even if it adjudicated upon the title of the insolvent as against his sons, would have no power to recover the property from the sons free of their obstruction as prayed for in the petition, it would be a mere waste of time to adjudicate upon questions of title, and, therefore, this was a case in which it would certainly be expedient to have these questions decided in a regular suit.

Section 4 reserves the power to Insolvency Courts to decline to decide questions which it does not deem it necessary or expedient to decide in those proceedings.

We think upon this ground that the Insolvency Court was right in declining jurisdiction. The Receiver has his remedy by a suit.

The appeal is dismissed with costs payable out of the estate.

V. N. V.
K. S. D. *Appeal dismissed.*

(1) 68 Ind. Cas. 898 ; 46 M. 54 ; 16 L. W. 559 ; (1922) M. W. N. 653 ; 43 M. L. J. 569 ; (1923) A. I. R. (M.) 55.

CHANDRA SAHAI *v.* DURGA PRASAD

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 106 OF 1923.

February 28, 1924.

Present :—Mr. Justice Sulaiman.

CHANDRA SAHAI—PLAINTIFF—APPELLANT

versus

DURGA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 13, O. XLIII, r. 1—Ex parte *decree, application to set aside—Dismissal for default—Second application to restore first application, dismissal of—Appeal whether competent.*

An appeal lies from an order refusing to set aside an *ex parte* decree, but the Code of Civil Procedure does not provide an appeal from an order dismissing an application for restoration of an application to set aside an *ex parte* decree. Nor can a right of appeal be claimed by virtue of section 141 of the Code of Civil Procedure, when O. XLIII of the Code makes no provision for such an appeal.

Civil Revision from an order of the Additional District Judge, Aligarh, dated the 28th March 1923.

Mr. *Panna Lal*, for the Applicant.

JUDGMENT.—This Civil Revision arises under the following circumstances :—

A civil suit was instituted by the plaintiff in the Court of the Munsif at Kasganj. The summons was served personally on the defendant and the 8th of November 1921 was fixed for the settlement of issues. On that date, however, the defendant did not appear. The Court then passed an order that the case should be proceeded with *ex parte* and fixed the 28th of November for final hearing. On the 28th of November 1921 the defendant again did not appear and the suit was decreed *ex parte*. The defendant, however, did appear later on in the Court and put in an application under O. IX, r. 13, of the Code of Civil Procedure for setting aside the *ex parte* decree. He filed an affidavit in support of this application explaining why he was not able to appear on the former date and why he appeared late on that date. The Court fixed the 14th of January 1922 for the disposal of this application. On that date the defendant again did not appear and this application was dismissed for default. After this, on the 21st of January 1922, the defendant put in a second application purporting to be an application under O. IX, r. 13, in which a mention was made of the circumstances under which he was not present when his previous application was dismissed for default. An affidavit was also filed showing that he was ill on the 14th of January 1922. The learned Munsif held that this second application was a substantial application under O. IX, r. 13, and was in fact a fresh application under that rule, but as it was filed more than 30 days after the *ex parte* decree it could not be entertained. He accordingly dismissed the application under an order dated the 13th of July 1922.

The defendant went up on appeal from this last mentioned order to the Court of the District Judge. The learned District Judge has allowed the appeal and set aside the order dismissing the application of the 21st of January 1922, and not the *ex parte* decree of the 28th of November 1921, and has directed the Court of first instance "to dispose of the application of the 21st of January 1922 on the merits treating it as one for restoration of the application of the 28th of November 1921."

I am of opinion that the order of the learned District Judge cannot be maintained.

The application of the 21st of January 1922 filed by the defendant may be treated either (1) as an application for restoration of the application of the 28th of November 1921 which had been filed for setting aside the *ex parte* decree, or (2) as an application in itself one for setting aside the *ex parte* decree of the 28th of November 1921.

If the application of the 21st of January 1922 was for restoration of the application of the 28th of November 1921, and not an application for setting aside the *ex parte* decree, then, even though the Court of first instance had jurisdiction to entertain this sort of application, if it did not feel inclined to grant the application, no appeal from its order dismissing the second application lay to the lower Appellate Court. An appeal lies from an order refusing to set aside an *ex parte* decree, but under the Code of Civil Procedure no appeal is provided for from an order dismissing an

application which is for restoration of an application for setting aside an *ex parte* decree. Nor can a right of appeal be claimed by virtue of section 141 of the Code of Civil Procedure, when O. XLIII of the Code makes no provision for such an appeal. In this view of the matter, therefore, the lower Appellate Court had no jurisdiction to hear the appeal at all.

On the other hand, if the application of the 21st of January 1922 was an application for setting aside an *ex parte* decree of the 28th of November 1921 and the Court of first instance dismissed it, an appeal would lie to the lower Appellate Court, though it is manifest that that application itself was barred by time and was incompetent on account of the dismissal of the previous application. Nevertheless, if the learned District Judge, in spite of the application dated the 21st of January 1922 having been barred by time or being barred by the dismissal of the previous application, had allowed the appeal and set aside the *ex parte* decree itself, it might have been difficult for this Court to interfere in revision on the ground of an error of law committed by the lower Appellate Court.

The learned District Judge, however, has not set aside the *ex parte* decree at all but has entertained the appeal as having been preferred from the order dismissing the application of the 21st of January 1922 treating it as an application for restoration of the previous application of the 28th of November 1921. He has simply set aside the order of the 13th of July 1922 and sent the case back to the Court of first instance with a direction to dispose of the application of the 21st of January 1922 treating it not as an application for setting aside the *ex parte* decree but simply as an application for restoration of the application of the 28th of November 1921. This order is obviously wholly irregular. I have already said that no appeal is provided for from an order dismissing an application for the restoration of an application for setting aside an *ex parte* decree. The learned Judge, therefore, could not simply have set aside the order of the 13th of July 1922 and asked the Court of first instance to again proceed with the application of the 21st of January 1923. If he really wanted to entertain the appeal from an order refusing to set aside an *ex parte* decree he might himself have gone into the question and decided whether the *ex parte* decree should or should not be set aside, and this he has not done. He has even not decided whether the application of the 21st of January 1922 should or should not be granted. He has left this latter question still open. The learned Judge has himself taken the view that the second application should in justice be taken to be an application for restoration of the previous application. He should then not have entertained an appeal from its dismissal.

The defendant in this case has entirely misconceived his remedy. If his second application was an application for restoration of the previous application for setting aside the *ex parte* decree and an adverse order was passed against him, he might have come up straight to the High Court in revision if he could bring his case within section 115 of the Code of Civil Procedure, but in no case could he have gone to the lower Appellate Court in appeal.

I accordingly allow this application, set aside the order of the lower Appellate Court and restore the order of the Court of first instance with costs in all Courts, leaving it open to the defendant to have recourse to whatever other remedy he may be advised to take, if he considers himself aggrieved by the first Court's order.

K. S. D. *Application allowed.*

LAKSHMI AMMAL *v.* ALAMELU AMMAL

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 220 OF 1922.

March 13, 1923.

Present :—Justice Sir Francis Oldfield and Mr. Justice Devadoss.

LAKSHMI AMMAL *alias* PICHAI AMMAL —APPELLANT

versus

ALAMELU AMMAL AND ANOTHER— RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. VI, r. 17 ; O. XXII, r. 4—Partition, suit for — Preliminary decree—Death of defendant—Claim by survivorship—Amendment of plaint, whether can be allowed — Application to implead legal representatives.

Plaintiff sued her sister for possession by partition of a moiety of a certain property alleged to be *Stridhanam* property of their mother. After a preliminary decree was passed recognising the plaintiff's right to half the property the defendant died and the plaintiff made two applications, one for impleading the legal representatives of the deceased and the second for an amendment of the plaint so as to enable her to get the other half on the ground of survivorship:

***Held*, (1) that as the plaintiff's right to a half share in the property had been finally established, the death of the defendant was not sufficient to deprive her of her original cause of action and the legal representatives of the deceased could be brought on the record ;**

(2) that the amendment of the plaint could not be allowed inasmuch as it sought to introduce a new cause of action which was not available for the plaintiff when the original plaint was presented.

Appeal against the order of the Court of the Subordinate Judge, Madura, dated the 20th February 1922, in A. S. No. 17 of 1921 (A. S. No. 145 of 1921, District Court, Madura), preferred against the order of the Court of the District Munsif of Madura Town, dated the 10th December 1920, in O. S. No. 292 of 1920 and in I. A. Nos. 740 and 741 of 1920.

Mr. *C. Krishnamachariar*, for the Appellant.

Mr. *K. Rajah Aiyar*, for the Respondents.

JUDGMENT.

Oldfield, J.:—The facts are that the plaintiff sued her sister and also the latter's husband, although he need not be, for this, referred to, for partition and possession of a moiety of a certain property alleged to be *stridhanam* property of their mother. The suit eventually reached the stage of a preliminary decree, recognising the plaintiff's right to half the property ; and it is now pending for the passing of a final decree, after ascertainment, by metes and bounds, of the plaintiff's share. The present proceedings have arisen from the death of the plaintiff's sister. Thereupon the plaintiff has moved in one application to have her sister's daughter, respondent, impleaded as legal representative of the deceased and in another for an amendment of the plaint to enable her to obtain a decree in these proceedings, not merely for the moiety of the property from which she alleges she was wrongfully excluded during her sister's lifetime, but also for the other moiety, on the ground that by survivorship she is entitled to the whole. The lower Appellate Court has granted both the applications, and we think that it was justified in granting the first. The plaintiff's right to a half share of the property has been finally established, and nothing more remains to be done except to ascertain that half share and make a final decree for the delivery to her possession of it. That can be done against any person, who, like the respondent, has come into possession, in succession to the deceased. It is suggested that the plaintiff is now no longer entitled to the benefit of the decree she has obtained because she has lost the character of a joint tenant and has acquired in its stead a right to the whole estate. That we do not think to be sufficient to deprive her of her original cause of action when the proceedings have been instituted and have resulted in a recognition of her right in a preliminary decree. Taking this view we confirm the lower Appellate Court's decision in so far as it relates to I. A. No. 741.

Turning to I. A. No. 740 for the amendment, we observe that the lower Appellate Court can hardly be regarded as having exercised judicial discretion. For, it made its order simply on the ground that it was not sure that the lower Court was right in passing the contrary order. We are unable to see in the present case any reason for departing from the ordinary rule that an amendment should not

be made to introduce a new cause of action. The cause of action assumed in the amendment is the death of the plaintiff's sister; and that, of course, was not available when the original plaint was presented. There is, however, no reason that we can see why the plaintiff should not take the ordinary course of suing on the cause of action which she has acquired and which, unless some objection is established, will entitle her to the other moiety of the property. We, therefore, modify the lower Appellate Court's order by dismissing I. A. No. 740 of 1920. In the circumstances of the case, each party will bear his costs in this and in the Lower Appellate Court. In the District Munsif's Court the respondent will pay the plaintiff's costs in I. A. No. 741 and obtain costs from the plaintiff in I. A. No. 740.

V. N. V.
K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 201 OF 1922.

February 11, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice Mukerji.

RAM SUNDAR RAM—OPPOSITE PARTY—APPELLANT

versus

RAM CHARIT BHAKAT AND OTHERS—PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920) *s. 4—Insolvent, conveyance by—Creditor, whether can institute proceedings for annulment.*

Under the Provincial Insolvency Act the property of the insolvent vests in the Receiver. The provisions of section 4 of the Act cannot, therefore, be taken to authorise a creditor to prosecute an enquiry in regard to a conveyance executed by the insolvent shortly before his adjudication.

Appeal against the order of the Additional District Judge, Dinajpur, dated the 8th of March 1922.

Babu *Girija Prosanna Sanyal*, for the Appellant.

Babu *Dwarka Nath Chakravarty* and Babu *Bimal Chandra Das Gupta*, for the Respondents.

JUDGMENT.

Walmsley, J.:—One Ganpat Ram was adjudicated insolvent by an order of the District Judge of Dinajpur on January 12, 1920. The Nazir of the Court was then appointed Receiver of the Insolvent's estate.

In April, a creditor, Syed Mahammad Musa Choudhuri (No. 8) and in the following January another creditor, Ram Charitra, now respondent, asked the Judge to take proceedings in regard to a conveyance executed by the insolvent in favour of the appellant, Ram Sundar Ram, shortly before the insolvent sought the refuge of the Court. The Judge held an enquiry and annulled the conveyance.

The transferee prefers this appeal and his principal contention is that the proceedings were incompetent because they were conducted by a creditor or creditors and not by the Receiver. It appears to me beyond doubt that it is the Receiver and only the Receiver who should conduct such proceedings. The course that is to be taken is clearly described in the case of *Joy Chandra Das* v. *Mahomed Amir* (1). It is argued that since that decision a new Act has been passed and that the terms of section 4 are wide enough to justify the procedure followed in this case. I do not think that this argument is correct because the words "subject to the provisions of this Act" appear in that section and as under the Act the property of the Insolvent vests in the Receiver, the provisions of section 4 cannot be taken to authorise a creditor to prosecute an enquiry of this kind.

It is true that, in substance, the result may be much the same, whether the creditor carries on the enquiry in person or uses the Receiver as a figurehead, but that is not a sufficient reason for countenancing a procedure not warranted by law particularly where, as in this case, the objection was taken, though perhaps rather obscurely, in the lower Court.

I think that the appeal should be allowed and the order annulling the conveyance set aside, with costs: the hearing-fee in this Court being assessed at two gold mohurs. We express no opinion on the merits and this order will not prevent the Receiver taking action if thought advisable.

Mukerji, J.—I agree.

K. S. D. *Appeal allowed.*

(1) 44 Ind. Cas. 143 ; 22 C. W. N. 702.

MAHABIR SINGH *v.* MATABADAL SINGH

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 752 OF 1922.

March 11, 1924.

Present :—Mr. Justice Lindsay
and Mr. Justice Kanhaiya Lal.

MAHABIR SINGH AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
MATABADAL SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Pre-emption—Mohtamim's *rights, nature of—Alienation by* mohtamim—*Custom of pre-emption, whether applicable.*

The rights of a *mohtamim* as recorded in the Settlement of 1883-84 are transferable proprietary rights of a kind to which the custom of pre-emption recorded in the *wajib-ul-arz* can be made applicable [p. 329, col. 2.]

Second appeal from the decree of the District Judge, Benares, dated the 14th January 1922.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption, and the question for consideration is whether the plaintiffs are entitled to claim pre-emption in respect of the property in dispute. The property in question comprises a certain *zemindari* share in *pargana Kariat Mendha* in the district of Jaunpur and was sold by Gaya Din Singh, the defendant No. 12, in favour of the defendants Nos. 1,5, 10 and 11 for Rs. 1,300 on the 25th February 1919. The *parganas* constituting the district of Jaunpur, were evidently re-cast sometime after the Permanent Settlement of 1795 and *pargana Kariat Mendha* is evidently identical with or included in *pargana Karindha* referred to at pages 185 and 245 in the Duncan Records of 1795.

The allegation of the plaintiffs was that there was a custom of pre-emption prevailing in the village and that the real sale consideration was Rs. 1,025. The Trial Court found that there was a custom of pre-emption in the village as recorded in the *wajib-ul-arz* of 1883-84 but it was inapplicable to the property in question wherein the vendor possessed only the "rights of a *mohtamim*." With regard to the amount of sale consideration the finding of the Trial Court was that the amount mentioned in the sale-deed was correct. The lower Appellate Court upheld that decree.

The main point for consideration in this appeal is whether the rights of a *mohtamim*, as recorded in the Settlement of 1883-84 are transferable rights of a kind to which the custom of pre-emption recorded in the *wajib-ul-arz* can be made applicable.

It was admitted by the parties before the Court of first instance that the *mohtamims* made collections of rents from the tenants, paid the Government revenue and were in the habit of selling their shares and could get the same partitioned. In fact, the entire arrangement in connection with the collection of rents and the letting out of land appertaining to the village was in the hands of these *mohtamims* who only paid a certain amount of profits to the absent or sleeping proprietors. In the *khasra kistwara*, prepared in 1864 these *mohtamims* were recorded in the column of tenants; but at the time of the last Settlement in 1884 two columns were prepared in the *khewat*, one for the names of the *pattidars* and the other for the names of *mohtamims*, *mustajirs* or *murtahins*. A *mustajir* was a farmer; a *mohtamim* actually meant a manager; and a *murtahin* meant a mortgagee. The existence of these columns indicated that there was at that time a certain class which was then generally known as *mohtamims*, possessing certain definite rights. The nature of the rights exercised by these *mohtamims* being now admitted, the point that arises for consideration is whether these rights were proprietary or under-proprietary rights so as to give rise to a right of pre-emption in case they were transferred.

A reference to the Settlement Report of 1883-84 shows that there were several kinds of proprietary tenures in the Jaunpur district and among those proprietary tenures were two classes of tenures one of which comprised *peshkashdari mahals* and the other, *pattidari mahals* in the possession of *Sarbarahkars* or *mohtamims*.

At the time of the Permanent Settlement of 1795 it was found that these *pattidari mahals*

contained such a multitude of small tenures that it was not easy for the Government to make satisfactory arrangements for the collection of the land revenue from each and every one of the petty holders separately. The Board of Revenue accordingly wrote to Duncan on the 19th September 1794 suggesting that, in order to obviate the inconveniences of settling with the numerous *pattidars*, who possessed proprietary rights, it might be advisable to appoint managers such as were provided for by Regulation 8 of 1793 for Bengal. Duncan wrote in reply on the 20th of October 1794 that he had already concluded his Settlement without any applications for managers being appointed except in one *pargana* named *pargana Karindah* and that it was unnecessary to make any change, as every *pattidar* could sue to have his own *pattidari* divided. On the 7th November 1794 the Governor-General wrote to Duncan, approving of his view and telling him that it was inadvisable to appoint managers, as suggested by the Board, as it seemed better to permit and support, as far as could be done, the system of internal management with reference to the *pattidaris* now in force on the principle of preserving a union among the different sections of large families, preferring occasional and individual claims to the Courts of justice. The best account of what the system adopted by Duncan was will be found in Duncan's own words in the following extracts from the Benares Regulations, which will be found in the Settlement Report aforesaid at page 80 :—

"The landholders in the *zemindari* of Benares consist for the most part of village *zemindars*, paying the revenue of their lands to Government jointly with one or more *pattidars* or partners descended from the same common stock. Some of these *pattidars* have had their interior *pattis* or shares rendered distinct ; whilst those of the major part still continue annexed to, and blended or in common with, the share or shares of the principal family, or of the headmen amongst the brethren, being either one or more, whose names have been usually inserted in the *pattas*, *kabuliats* and other engagements for the public revenue. With the general consent of the inferior *pattidars*, this mode was adhered to in the aforesaid Settlement, leaving an option to such *pattidars* as might then or afterwards think themselves aggrieved, or be desirous of separating from their brethren, to prosecute for that purpose in the *Adalat*. By this mode of procedure, they may obtain a separation of their family share of the estate, and procure a separate *patta*, subject to the payment of a proportionate part of the *jama* assessed on the joint estate, but, in the meantime, those of the brethren whose names stand inserted in the Government *patta*, are held and considered to be immediately responsible, through the *amils*, to Government for the whole of that *jama*. The only exception to this general rule exists in the *pargana* of *Karindah*, where the Decennial Settlement could only be concluded by a considerable number of these *zemindars* being admitted to enter into *kabuliats* in which they themselves agreed to the nomination of certain persons to act on their joint parts, under the description of *sarbarahkars* or managers. This expedient was acquiesced in, under the condition that the responsibility of the *zemindars* should remain undiminished, and that they might, whenever they pleased, dismiss these agents, after adjusting accounts with and satisfying them as to any balance that might be justly due to them."

Although Duncan said he did not want managers the system he aimed at was a *lambardari* one. That system appears to have been adopted in respect of *pargana Karanda* which then formed one of the *parganas* of the Jaunpur district.

Section 23 of Regulation 8 of 1793, which appears to have been followed in this *pargana*, lays down :—

" Where more proprietors than one possess an undivided estate, and the whole of them be not within the description of disqualified landholders specified in section 20, the Settlement is to be made with them jointly, and they are to be required to elect a *sarbarahkar* or manager, who shall have the exclusive management of their lands during the continuance of his appointment. The determination of the majority of the proprietors, or of the majority of those present in the event of the absence of any, is to be binding on the remainder

> in the choice of a manager; and when the votes of the proprietors are equal, the election of the manager is to be determined by the greater interest of the proprietors in the property. If in any case the interest also be equal, the manager is to be appointed by the Board of Revenue."

A reference to the various provisions of that Regulation shows the necessity for the various titles assigned to the persons who were made responsible for the payment of the Government revenue in the revision of records of 1883-84. There was a column provided for *pattidars* or proprietors and there was another column provided for the entry of the names of farmers (*mustajirs*), managers (*mohtamims*) and mortgagees (*murtahins*) the liability of each of whom to pay the Government revenue was recognised by the Regulation.

The managers were clearly the representatives or agents of the entire proprietary body of the *mahal* and their powers were co-extensive with the powers of the proprietors whom they represented with the only difference that while all the proprietors continued jointly and severally liable to the Government for the payment of the revenue, the persons who were immediately responsible for the collection of the rents and for letting out the lands to the tenants and for the payment of the revenue were persons who were nominated by the co-sharers or appointed by the Board of Revenue as *mohtamims* or managers to represent the entire proprietary body.

The Court of first instance refers to a decision of the District Judge of Benares in a suit filed by certain superior proprietors against some other persons for a declaration in the Civil Court that they were the *zemindars* and that the *mohtamims* were not entitled to claim a partition of the village. That suit was decreed by the first Court but on appeal the then District Judge, Mr. Dalal, acting on the analogy of "*peshkashdars*" and "*farotars*," referred to in the Settlement Report of Mr. P. C. Wheeler, came to the conclusion that the *mohtamims* were under-proprietors holding under what he called a *mohtamim* tenure and were entitled to sue for a partition of their share. A *peshkashdari* tenure is, however, different from a *mohtamim* tenure, for, as stated in the old *Gazetteer* of the Jaunpur district compiled by Mr. (now Sir John) Hewett, the *peshkashdari mahals* received their name from the fact that their revenue was formerly assigned for the maintenance of the Jaunpur garrison and was collected by the Bakshi or the Pay-master of the Army. The *mohtamims* were appointed in accordance with Regulation 8 of 1793 and possessed proprietary rights. They were themselves co-sharers and possessed a power of management over the entire *mahal* on behalf of all the *pattidars* or co-sharers of the village.

The *wajib-ul-arz* recording the custom of pre-emption was verified by all the *mohtamims* and some of the superior proprietors; and we have no doubt that these *mohtamims* held at any rate a kind of proprietary interest in the village and that the custom of pre-emption recorded in the *wajib-ul-arz* was applicable to them. The plaintiffs are, therefore, entitled to claim pre-emption. The correctness of the finding of the Trial Court regarding the amount of sale-consideration settled for the property in question is not here disputed. This appeal must, therefore, succeed and is accordingly allowed, the result being that the claim of the plaintiff will stand decreed for possession of the property in dispute subject to the payment of Rs. 1,300 into Court to be paid over to the defendants-vendees within two months from this date. In case of payment the plaintiffs will get their costs here and hitherto from the defendants-vendees and in case of non-payment the defendants-vendees will get their costs here and hitherto from the plaintiffs. The costs in this Court will include in either case fees on the higher scale.

K. S. D. *Appeal allowed.*

PRITHURAM KALITA *v.* MAYARAM SARMA

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2418 OF 1921.

March 5, 1924.

Present :—Mr. Justice M. N. Mukerji.

PRITHURAM KALITA—PLAINTIFF—APPELLANT

versus

MAYARAM SARMA—DEFENDANT—RESPONDENT.

Fraud—Agreement to withdraw appeal—Failure to act upon agreement—Prosecution of appeal—Ex parte decree—Decree, whether fraudulent—Contract Act (IX of 1872) ss. 17, 18.

Plaintiff sued to set aside an *ex parte* decree on the ground of fraud alleging that at the time of the execution of an order in his favour, defendant paid a part of the money due and agreed to withdraw an appeal which he had already preferred against the said order in full satisfaction of the claim ; but that he proceeded with the appeal and obtained an *ex parte* decree, no notice in respect of the appeal being served on him. The Court found that the defendant did enter into an agreement with the plaintiff to withdraw the appeal, but that there was no fraudulent suppression of summons :

Held, (1) that although it was alleged that there was fraud in connection with the agreement that the defendant entered into with the plaintiff by reason of the fact that the defendant never meant to act up to the stipulation which he was entering into, it would not be a fraud of the description which would be sufficient for setting aside the *ex parte* decree;

(2) that the defendant's fraud in connection with the compromise would not help the plaintiff in getting a decree for setting aside the *ex parte* decree so long as it was not established that, as a matter of fact, there was fraud in the service of notices and other processes of Court by which the defendant obtained that *ex parte* decree ;

(3) that since, as a matter of fact, there was no fraud in the matter of the service of the processes of the Court, the plaintiff was not entitled to the relief sought.

Appeal against the decree of the Additional District Judge, Assam Valley Districts, dated the 13th of June 1921, affirming the decree of the Munsif, Gauhati, dated the 29th April 1920.

Babu *Manmatha Nath Roy*, for the Appellant.

Dr. *Jadunath Kanjilal*, for the Respondent.

JUDGMENT.- The plaintiff is the appellant in this appeal. The facts, so far as they are necessary for the purpose of the present appeal, are these : The plaintiff had an order in his favour entitling him to a sum of Rs. 35-2-3 as costs payable to him by the defendant in certain previous litigation which he had with the defendant. In execution of the said order, he took out attachment of the defendant's moveables. The plaintiff's case was that when the moveables were attached, the defendant paid a sum of Rs. 20 and promised not to prosecute an appeal which he had already preferred against the order which was then under execution, and that, on account of his promise, he, the plaintiff, accepted the said sum of Rs. 20 in full satisfaction of the claim. The plaintiff further alleges that the defendant did not, as a matter of fact, withdraw the appeal but proceeded with it and the said appeal was eventually decided *ex parte* in favour of the defendant, no notices in respect of the appeal having been served upon the plaintiff and the plaintiff not having appeared therein. The plaint goes on to state that, after obtaining the said *ex parte* decree, the defendant took out execution not only for the said sum of Rs. 35-2-3 which formed the subject-matter of the appeal but also for the costs awarded to him in that appeal amounting to Rs. 12-1-3, and that in the course of the said execution proceedings of which also no notice was given to the piaintiff, the defendant caused some of the properties belonging to the plaintiff to be attached and sold and purchased the same himself. Upon these allegations the plaintiff instituted the suit, which has given rise to the present appeal, for setting aside the said *ex parte* decree passed by the Appellate Court and the said execution-proceedings, on the ground that they were fraudulently obtained and carried on. The fraud alleged by the plaintiff in the suit was of a two-fold character. It was alleged, first, that the arrangement that was entered into by the defendant with the plaintiff, while paying the sum of Rs. 20 as aforesaid, was an arrangement which the defendant fraudulently entered into with him without any intention of acting up to it. Next, it was alleged that the

PRITHURAM KALITA *v.* MAYARAM SARMA

notices of the appeal as also the notices of the subsequent proceedings (*e. g.*, processes of attachment, proclamation, delivery of possession, etc.) were never served upon him and he had no knowledge thereof. On these grounds, the plaintiff sought for the setting aside of the *ex parte* decree and also of all subsequent proceedings held thereunder.

The defence in the case was that there was no such arrangement as alleged by the plaintiff and further that the notices and processes referred to above were, as a matter of fact, served upon the plaintiff.

The suit has been dismissed by both the Courts below. The learned Munsif held that the arrangement set forth in the plaint that the plaintiff would accept the sum of Rs. 20 out of Rs. 35 odd in full satisfaction of the decretal amount and that the defendant would not proceed with the appeal had not, as a matter of fact, been arrived at, and that if there was an arrangement, one would not have expected an endorsement of full payment such as there was in this case mentioning the amount on the back of the warrant under which the moveables had been attached. He also came to the conclusion that the non-service of the processes as alleged by the plaintiff had not been proved. On appeal by the plaintiff, the learned Additional District Judge held that the arrangement relied upon by the plaintiff had been proved and that the appeal aforesaid was prosecuted by the defendant in spite of an agreement to drop the proceedings. He, however, came to the conclusion upon the evidence in the case that the notices and processes, referred to above, had been duly served and he was of opinion that the decree in question was not obtained by fraudulent suppression of summonses. As I have said, upon these findings respectively arrived at by them, the Courts below have dismissed the plaintiff's suit.

The plaintiff's contention in the present appeal is this: It having been found by the lower Appellate Court that the appeal in question was prosecuted notwithstanding the agreement to drop the proceedings, it should have been held, in spite of the finding of proper service of notices, that, as a matter of fact, there was fraud which vitiated the decree and, therefore, the decree should have been set aside. With reference to this matter, it is only necessary for me to say that, although it was alleged that there was fraud in connection with the agreement that the defendant entered into with the plaintiff by reason of the fact that the defendant never meant to act up to the stipulation which he was entering into, it would not be a fraud of the description which would be sufficient for setting aside the *ex parte* decree. With regard to this matter the appellant has relied upon sections 17 and 18 of the Contract Act. Now under section 17, clause (3), "a promise made without any intention of performing it", amounts to fraud. Under section 19, "a party to a contract whose consent was caused by fraud or misrepresentations may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true." On the basis of the fraud as set forth above, the plaintiff undoubtedly, if he could establish fraud, could claim a decree against the defendant for damages or he could have insisted that the contract should be performed if it was capable of performance any longer, or he could have asked that he be put in the position, if that were possible, in which he would have been if the representations made had been true. The present suit was not a suit of any of those descriptions. The plaintiff was competent to make a case like this that although he received notices of the appeal, in consequence of the fraud that was practised upon him by the defendant promising to him that he would not proceed with the appeal he was under the impression that the appeal would not be proceeded with and so the decree was fraudulently obtained *ex parte*. If he had made a case like that, the question as to whether this fraud led him to believe that the appeal would not be proceeded with would have been one of the material questions to be determined in the case and if established would have enabled the plaintiff to get the *ex parte* decree set aside. But that was not what he alleged. The plaintiff based his case as to fraud, so far as it affected the decree which he sought to set aside, upon the ground that there was fraudulent non-service of notices and other processes of Court. Therein he has failed in the judgment of the lower Appellate Court. In my judgment, although it has been proved that the defendant acted

fraudulently in connection with the compromise referred to above, that would not help the plaintiff in getting a decree for setting aside the *ex parte* decree so long as it is not established that, as a matter of fact, there was fraud in the service of notices and other processes of Court by which the defendant obtained that *ex parte* decree. This point having been found against the plaintiff by the Courts below, I am of opinion that the plaintiff is not entitled to any relief in this case. In this view of the matter, this appeal must be dismissed with costs.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 79 OF 1920.

November 6, 1923.

Present :—Mr. Justice Piggott and Mr. Justice Stuart.

GANGA PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS
versus
GANESHI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 13—Foreign Judgment, suit on—Merits of judgment, inquiry into—Submission to foreign jurisdiction, effect of—Refusal to apply Indian Law.

In a suit in British India on a foreign judgment, the general rule is that the Court which entertains the suit cannot institute an enquiry into the merits of the original action, or the propriety of the decision.

A foreign judgment must be enforced by the Court in British India in every case in which the judgment-debtor had voluntarily appeared before the Foreign Court which passed the judgment.

Emanuel v. *Symon*, (1908) 1 K. B. 303 ; 77 L. J. K. B. 180 ; 98 L. T. 504 ; 24 T. L. R. 85, relied on.

Where a Foreign Court has applied the Law of Limitation in force there, and which is different from the Law of Limitation in force in British India, it cannot be said that the Foreign Court has refused to recognise the Law of British India in a case in which such law is applicable; and its judgment will be enforceable.

First appeal from the decree of the Subordinate Judge of Agra, dated the 3rd January 1920.

Messrs. *U. S. Bajpai* and *N. P. Asthana*, for the Appellants.

Messrs. *Gulzari Lal* and *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—This appeal was filed by Ganga Prasad and Ram Rattan, defendants in the original suit. There were other defendants in the original suit but the decree was passed against Ganga Prasad and Ram Rattan alone. While the appeal was pending, Ganga Prasad died. His representatives are on the record. Later on, Ram Rattan died. His representatives have not been brought on the record, and under the law they cannot be brought on now. The appeal must, therefore, be taken to have abated as far as Ram Rattan is concerned. It has been argued on behalf of the representatives of Ganga Prasad.

The facts may be stated very briefly. A decree was obtained by the plaintiffs-respondents against Ganga Prasad, Ram Rattan and others in the Court of the Additional Judge of Dholpur on the 30th of April 1913. The decree was for a sum of money. A portion of this amount was realised by execution of the decree, and the plaintiffs instituted the suit out of which this appeal has arisen to recover the balance upon the foreign judgment of the Dholpur Court. In the course of the trial Ganga Prasad and Ram Rattan set up that the Dholpur Court had no jurisdiction, and they further set up that the judgment of the Dholpur Court should not be operative in the Court in British India inasmuch as it proceeded on a refusal to recognise the Law of British India in a case in which such law was applicable.

The learned Subordinate Judge repelled these and the other pleas and decreed the suit as against Ganga Prasad and Ram Rattan, the remaining defendants being held not liable by consent of the plaintiffs.

The present appeal is preferred and the only points argued before us were that the Dholpur Court had no jurisdiction and that judgment was founded on a refusal to recognise the Law of British India.

In respect of the first point we consider it sufficient to say that, inasmuch as the appel-

lants Ganga Prasad and Ram Rattan themselves appeared and contested the claim in the Dholpur Court, the plea of jurisdiction cannot be raised. We need specify no further authority for this conclusion than the decision in *Emanuel* v. *Symon* (1). At page 309 it is laid down that a foreign judgment must be enforced by the Courts in England in every case in which the judgment-debtor had voluntarily appeared before the Foreign Court which passed the judgment. The law is the same in British India. It is laid down in the decisions of the High Court in Madras which have been quoted by the Subordinate Judge.

The second plea is as follows. If the suit upon which the foreign judgment was passed had been brought in British India, it would have been held to be time-barred under the Law of Limitation in operation in British India; but the Law of Limitation in Dholpur is not the same as the law of British India and the remedy in Dholpur was not time-barred. This is a case in which it cannot be suggested that there has been a refusal to recognise the Law of British India where such law was applicable. The general rule is that a Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action, or the propriety of the decision and that rule applies here.

For the above reasons, we dismiss the appeal of Ganga Prasad with costs and fees on the higher scale. The appeal of Ram Rattan has abated.

M. A. A. *Appeal dismissed.*

(1) (1908) 1 K. B. 303 ; 77 L. J. K. B. 180 ; 98 L. T. 304; 24 T. L. R. 85.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1428 AND 1440 OF 1920.

May 3, 1923.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

PRAN KRISHNA GHARAI—DEFENDANT—APPELLANT

versus

NITYA GOPAL MAITI—PLAINTIFF—RESPONDENT.

Suits Valuation Act (VII of 1887), *s.* 8—*Sale in execution—Suit to set aside sale and recover plaintiff's share—Valuation—Suit beyond Court's pecuniary jurisdiction—Procedure.*

Where property has been sold in execution and plaintiff sues to recover possession of his share therein by setting aside the sale the valuation of the suit should be calculated on the value of the entire property and not only on that of the plaintiff's share.

Umoda Persad Roy v. *Erskine*, 12 B. L. R. 370 ; 21 W. R. 68.

Where the Court comes to the conclusion that it has no jurisdiction to entertain a suit the proper procedure is to return the plaint to the palintiff with directions to present it to the proper Court.

Appeals against the decrees of the Subordinate Judge, Midnapore, dated the 13th February 1920, reversing the decree of the Munsif of that place, dated 13th March 1918.

Dr. *Dwarkanath Mitter* (with him Babu *Bijoykumar Bhattacharya*), for the Appellant.

Babu *Mahendranath Roy* (with him *Pramathanath Bandopadhyaya*), for the Respondent.

JUDGMENT.

Walmsley, J.—These appeals are the outcome of a sale of property under the Public Demands Recovery Act. The plaintiff in each of the two suits claims only a share in the entire property sold and in each case he has valued the suit and paid court-fees on the basis of the valuation put on his share. An objection was taken by the contesting defendants that the suits ought to have been valued for purposes both of jurisdiction and court-fee

at the value of the entire property. The learned Munsif accepted that contention and held that he had no jurisdiction to try the suits. He proceeded, however, to record findings on the other issues and one of his findings was that the suits were not maintainable. The learned Judge on appeal, in a judgment which I find rather hard to follow, held that the Munsif had jurisdiction to hear the suits. The question which has been argued before us is as to the manner in which the suits should have been valued. Without going into details, I think the second prayer made in each of the plaints—the prayer that an order should be passed directing that the sale held under the Public Demands Recovery Act should be set aside—brings the case within the terms of the decision of the Full Bench in the case of *Unnoda Persad Roy* v. *Erskine* (1). What Couch, C. J., said there was this: "The plaintiff has in fact sued in respect of part only of the cause of action, namely, that which applied only to himself; the cause of action was the sale of the whole, and the suit ought to be framed and valued accordingly." I think, therefore, having regard to the second prayer in each suit, the valuation should have been calculated on the value of the entire property. The plaintiffs themselves valued the property at Rs. 2,800, that is, at a sum beyond the pecuniary jurisdiction of the Munsif in whose Court the plaints were presented. The proper procedure for the Munsif to have followed, on coming to the conclusion that he had no jurisdiction to entertain the suits, was to return the plaints to the plaintiffs with directions to them to present the plaints in the proper Court. I think that the order we shall pass now is to direct that the records be remitted to the first Court for the Munsif presiding over that Court to return the plaint in each of these two suits to the plaintiffs in order that the plaintiffs may present the plaint in a Court having jurisdiction to entertain the suit. We abstain from making any comments on the merits of the cases into which we have not entered. The appellant-defendant is entitled to recover his costs of this Court from the plaintiffs-respondents on contest in suit No. 215 and *ex parte* in suit No. 221.

Suhrawardy, J. —I agree.

K. S. D. *Appeals allowed.*

(1) 12 B. L. R. 370; 21 W. R. 68

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 176 OF 1923.

March 11, 1924.

Present :—Mr. Justice Lindsay.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—PETITIONER

versus

RADHEY LAL—PLAINTIFF—OPPOSITE PARTY.

Post Office Act (VI of (1888), Ss. 6, 34—Parcel sent V.-P. Post—Goods not delivered to consignee—Suit for value of goods, whether maintainable.

Plaintiff sent a parcel containing brass rings from *M* to *B*. The parcel was sent V.-P. P. but never reached the consignee at *B*. It appeared that the label had been torn and no clue could be found to the address. The parcel eventually reached the Dead Letter Office and was sold. Plaintiff sued to recover the value of the rings:

***Held*, that the suit being for the value of property sent by post was maintainable and sections 6 and 34 of the Post Office Act did not apply as the goods were not lost and the plaintiff was entitled to succeed.**

Civil Revision against the order of the Judge of the Court of Small Causes, Muttra, dated the 13th October 1923.

Mr. *R. Malcomson*, for the Petitioner.

Mr. *N. P. Asthana*, for the Opposite Party.

JUDGMENT:—I have heard the Counsel in this case. I do not think any ground has been made out for interference with the judgment of the Court below. The facts are simple enough. The plaintiff Radhey Lal sent off a parcel containing a number of brass rings from Muttra to Badrinath.

This parcel was sent V.-P. P. and apparently never reached the consignee at Badrinath. The evidence is to the effect that the label had become torn and the result of all this was that in due course the parcel reached the Dead Letter Office at Lucknow.

There the parcel was opened but no clue having been obtained as to where the parcel had come from nothing more could be done. The Officer in charge of the Dead Letter Office

says that the seal of the office of posting had left an indistinct impression so that it was impossible to say from what Post Office the article had been posted. After being kept in the Dead Letter Office for a period of about a year the parcel was sold and brought a sum of Rs. 15 odd.

The plaintiff in this suit claimed the value of the goods contained in this parcel, the amount stated being Rs. 86-8-0 for which the Court below has given a decree.

The Secretary of State sought to avoid liability on the basis of sections 6 and 34 of the Post Office Act. I think the Court below was right in holding that section 6 did not apply in this case inasmuch as there was no loss, misdelivery or delay of, or damage to any postal article in the course of transmission by post. The article sent was never lost in the course of transmission. All that happened was that by reason of the label having been torn it was not possible to deliver it to the addressee. As for section 34 that, too, does not seem to me to have any application. The suit here is not one for recovery of money which the Secretary of State had recovered or was bound to recover from the addressee of the V.-P. parcel. On the contrary, the suit was brought to recover the value of the property which was sent by post.

It seems to me, on the whole, that this is not a case in which the Secretary of State can disclaim liability and I think the order of the Court below should be upheld. I dismiss this application with costs to the opposite party.

K. S. D. *Application dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 216 OF 1920.

July 2, 1923.

Present :—Mr. Justice Das and Mr. Justice Macpherson.

JHOBALI RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAKHI RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (*I of* 1872), *s.* 32 (5), *scope of—Genealogical Table, when admissible—Special means of knowledge of relationship—Hearsay, source of.*

Under section 32 (5) of the Evidence Act to make a geneological table admissible in evidence it must be shown that the statements contained in the pedigree were made by a person who had special means of knowledge of the relationship to which the statements relate.

Where a witness is stating from hearsay, he must show that his knowledge comes from a person whose statements are admissible under section 32 of the Act.

Plaintiffs sued to recover possession of certain lands alleging that they were entitled to succeed to these lands as heirs of one *M*, who at his death over 30 years ago, was in possession as the sole surviving member of a joint *Mitakshara* family. The defendants were in possession and the Record of Rights was in their favour. The important evidence in the case was a genealogical table produced by a partisan witness *J* at a late stage of the case and alleged to have been copied from an old genealogy which no longer existed :

Held, that before the genealogical table could be admitted in evidence, the plaintiffs must show who was responsible for the old genealogy ;

(2) that inasmuch as *J* was a partisan witness, he was really in the position of a party and the plaintiffs should have explained why the genealogical table was produced at a late stage of the case ;

(3) that, under the circumstances, the pedigree was not a reliable document and could not be accepted.

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 11th August 1920.

Messrs. *Sultan Ahmad*, *Yusuf Aziz Ahmad*, *P. C. Roy*, and *Mahabir Prosad*, for the Appellants.

JHOBALI RAI *v.* SAKHI RAI

Messrs. *S. M. Mullick, Nawal Kishore* II, and *Deoki Prosad Sinha*, for the Respondents.

JUDGMENT.

Das, J.—The properties in dispute in this litigation are 52 *bighas* of *kasht* lands described in schedules A, B and C of the plaint. According to the plaintiffs, these *kasht* lands belonged to three brothers of a joint *mitakshara* family, Bhola Rai, Mahabir Rai and Bihari Rai and upon the death of Bhola Rai and Bihari Rai, Mahabir Rai, as the sole surviving member of the joint *mitakshara* family, took posssession of these lands. The plaintiffs assert that they are the heirs of Mahabir Rai and they became entitled to succeed to these *kasht* lands left by Mahabir Rai at his death which took place over 30 years ago. As to the question of delay in enforcing their claim, the plaintiffs say that they allowed the properties to remain in the possession of *Must.* Lakhpati Kuer, the widow of Bhola Rai and *Must.* Ramlochan Kuer, the widow of the predeceased son of Bhola Rai, and they maintain that their cause of action arose on the 15th *Baisak* 1318, the date of the death of *Must.* Lakhpati Kuer. The defendants in their written statement alleged that they were the heirs of Mahabir Rai, but in their evidence they completely repudiated their own written statement and put forward the case that they were in possession of the *kasht* lands in their own rights. They also rely upon limitation and adverse possession to defeat the plaintiffs' claim. It is only necessary to add in this connection that the Record of Rights is completely in favour of the defendants.

The learned Subordiate Judge has taken the view that the oral evidence in the case is not of any value ; and, on a consideration of the circumstances, he has come to the conclusion that the plaintiffs have not established their case that they are the heirs of Mahabir Rai. In this Court it was strongly contended on behalf of the plaintiffs by Mr. Sultan Ahmad that upon the finding of the Court below that the defendants have no sort of title to these properties, the Court should not have required such strict proof of the plaintiffs' title as it would have been justified in requiring, had there been a competition between the plaintiffs and the defendants on the question of heirship. With this contention I do not agree. The defendants are in possession of the properties, and the Record of Rights is in their favour, and the question of their title does not fall to be considered until the plaintiffs have established their title to the properties. The important evidence in favour of the plaintiffs is the genealogical table which has been produced by the witness Jagdeo Rai. In my opinion it is doubtful whether the document was properly admitted in evidence. The evidence upon this point is that of Jhabli Rai, and Jagdeo Rai. Jhabli Rai, the plaintiff, says in his evidence that the genealogical table produced by Jagdeo Rai was written by one Thakur Rai who died 22 or 23 years ago. He adds that Thakur Rai gave it to Jagdeo Rai saying "it would be of use in future". Jagdeo Rai's evidence is that Thakur Rai wrote the genealogy in his house and in his presence and that it was written by Thakur Rai 26 or 27 years ago. He admits that there was an old genealogy from which it was copied and he says that the old genealogy was worn out and that it no longer exists. Now the only section under which the genealogy could be admitted is section 32, clause (5), which provides that statements, written or verbal, made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relation ship by blood, marriage or adoption the person making the statement has special means of knowledge, and when the statement was made before the question in dispute was raised. It will be noticed that the section requires that it must be shown that the statements contained in the pedigree were made by a person who had special means of knowledge of the relationship to which the statements relate. Now, whose statement is contained in the genealogical table ? Not the statement of Thakur Rai, for it is admitted by Jugdeo Rai that Thakur Rai merely copied the statements from an old genealogical table which was in his possession and which is no longer in existence. In my opinion, before the pedigree could

be admitted in evidence, the plaintiffs should have shown who was responsible for the old genealogical table. The evidence might indeed be hearsay, but where the witness is stating from hearsay, he must show that his knowledge comes from a person whose statements are admissible under section 32 of the Act. In this case it is not shown by the plaintiffs that the statements contained in the genealogical table are the statements of any person whose statements are admissible in evidence under section 32 of the Act. If it were the case of the plaintiffs that Thakur Rai wrote out the whole genealogical table from his own knowledge as to the relationship of the different parties, the document would undoubtedly be admisssible in evidence under section 32, clause (5) of the Act; but that is not the case of the plaintiffs. The case of the plaintiffs, on the other hand, is that there was an old genealogical table in the possession of Thakur Rai and that Thakur Rai merely copied from the old pedigree which was in his possession. Since it is not shown who was responsible for the old pedigree which was in the possession of Thakur Rai, I very much doubt whether the genealogical table was properly admitted in evidence.

But I do not desire to decide this case on this narrow ground. In my opinion the learned Subordinate Judge was right in not relying upon the genealogical table. The learned Subordinate Judge in his judgment says that the document was produced at a very late stage. In this Court it was argued that the learned Subordinate Judge should have made a distinction between a document which is produced by a party and a document which is produced by a witness and that since this document was produced not by a party but by a witness, he should have come to the conclusion that no question arose as to its late production. In order to determine this question it is necessary to see whether Jagdeo Rai is in fact a witness or a party. In my opinion the evidence of Jagdeo Rai establishes that he is a partisan witness and not an independent witness. For instance, he supports the case of the plaintiffs that Bharosa Rai got possessan of these lands after Mahabir's death and that the ladies asked Bharosa Rai to be allowed to enjoy the produce and that Bharosa Rai agreed to this. Now Jhobali Rai undoubtedly made himself resposible for this portion of the case, but he admitted that no one was present when he and Bharosa gave the lands to the *Musammats* for their maintenance. In order, then, to see whether Jagdeo Rai should be accepted as a witness of truth, it is necessary to consider whether it is possible to accept that part of his evidence in which he gives support to the plaintiffs in regard to their case that the ladies were in possession of the disputed lands with the permission of the plaintiffs. In my opinion it is only necessary to state the facts to reject it entirely. The plaintiffs were, neither of them, in affluent circumstances. Jhobali Rai, one of the plaintiffs, states that he had only about 14 *bighas* of land in his possession which he inherited from Chaturi. It appears that Bharosa had about 15 *bighas* of *kasht* lands. Now the properties in dispute in this litigation are *kasht* lands having an area of 52 *bighas*. It is impossible to accept the case that these two persons each having between 12 to 15 *bighas* of *kasht* lands should have consented to the ladies holding possession of no less than 52 *bighas* of *kasht* lands for their maintenance. Now, if this portion of the case is rejected, it is impossible to resist the conclusion that Jagdeo Rai is a partisan witness. In other words, he is really in the position of a party and not in the position of a witness. That being so, there is no explanation why the pedigree should have been produced at a late stage of the case. Mr. Sultan Ahmad on behalf of the appellants has argued before us that the pedigree has received strong corroboration from some admitted circumstances in the case. For instance, he relies upon the fact that the pedigree shows that Uma Rai was the father of Bhola Rai, Bihari Rai and Mahabir Rai. That may be so. Nobody disputes that the pedigree is correct in certain matters; but the question is whether the pedigree ought to be accepted as a genuine document in so far as it shows that the plaintiffs are the heirs of Mahabir Rai. Mr. Sultan Ahmad also relies upon Ex. 4, the *batwara khasra*, which shows that plot No. 1220 was the *khand* of Mahabir Rai, Bharosa Rai and Sarabjit Rai. In my opinion it is quite impossible to found an argument upon Ex. 4, for it may well be that Mahabir Rai, Bharosa Rai and Sarabjit Rai were co-sharers and not members of the same family.

ABDUR RASHID *v.* QUDRATUNNISSA

On the whole I agree with the learned Subordinate Judge that the pedigree is not a reliable document and should not be accepted.

The question really is a short one and it is this, why have the plaintiffs delayed in putting forward their case for over 30 years? Their only answer is that they allowed the ladies to appropriate the profits arising out of these lands. For myself, I am unable to accept the explanation. I have shown that neither of the plaintiffs was in affluent circumstances, and it is impossible to accept the explanation that they allowed the ladies to remain in possession of the lands to which they were entitled by right of inheritance. It follows, therefore, that the basis of their claim must be scrutinized with care. Their evidence is unconvincing and the genealogical table upon which they rely is unacceptable. That being so, it is quite impossible to say that the conclusion at which the learned Subordinate Judge has arrived is incorrect.

I would accordingly dismiss this appeal with costs.

Macpherson, J.—I agree.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 110 OF 1922.

March 7, 1924.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

Shaikh ABDUR RASHID—
DEFENDANT—APPELLANT
versus
Musammat QUDRATUNNISSA BIBI—
PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. II, r. 2—Cause of action, definition of—Muhammadan lady leaving husband, sister and daughters as heirs—Suit by sister for recovery of her share of inheritance—Subsequent suit by sister for her daughter's share of dower, whether barred.

The words 'cause of action' include every fact which it would be necessary for the plaintiff to prove if traversed by the defendant in order to support his right to the judgment of the court.

One Must. A died leaving as her heirs under Muhammadan Law her sister Q her husband A. R. and her minor daughter K. F. On 10th November 1914, Q. brought a suit against A. R. and K. F. for recovery of possession of her share in the zemindari property left by A, alleging that A. R. had taken illegal possession of the whole of the property of the deceased and purported to do so in the name and in the interest of his minor daughter K. F. On the 30th January 1917, Q brought another suit against the same defendants for recovery of her share and that of K. F. in the dowerdebt due by A. R. to the estate of the deceased :

***Held*, that as the cause of action was different in the second suit it was not barred under the provisions of O. II, r. 2, Civil Procedure Code.**

Appeal under clause 10 of the Letters Patent from the judgment of Mr. Justice Kanhaiya Lal (differing from Mr. Justice Lindsay), dated the 5th June 1922.

Dr. *Katju*, for the Appellant.

Messrs. *Iqbal Ahmad* and *Haider Mehdi*, for the Respondent.

JUDGMENT.—This is an appeal under the Letters Patent in a case in which two learned Judges of this Court have differed on a question of law raised before them in a second appeal. As might be expected, the question is one of some delicacy, but in its essence it is simple enough. The facts are as follows:—

One *Musammat* Ashraf-un-nissa died on the 28th of January 1914. Her heirs under the Muhammadan Law were her husband Abdul Rashid, her sister Qudrat-un-nissa and a daughter Kaniz Fatma, at that time a minor.

On the 10th of November 1914 *Musammat* Qudrat-un-nissa filed a suit in which she impleaded Abdul Rashid and Kaniz Fatma as defendants. The suit was one for recovery of possession of the one-fourth share in certain specified *zemindari* property which had came to the plaintiff by inheritance on the death of her sister. The allegation made in the plaint was that the defendant Abdul Rashid had improperly taken possession of the whole of the *zemindari* property of the deceased, and that he was purporting to do this in the name and in the interests of his minor daughter Kaniz Fatma. This last

allegation was supported by the fact that mutation of names in the Revenue Court had been effected at the instance of Abdul Rashid in the name of Kaniz Fatima.

On the 30th of January 1917 the suit was brought out of which the present appeal has arisen. *Musammat* Qudrat-un-nissa was again the plaintiff and the defendants were the same, namely, Abdul Rashid and Kaniz Fatma. In this plaint the allegations are that the dower-debt due from Abdul Rashid to *Musammat* Ashraf-un-nissa was Rs. 10,000 which was unpaid on the date of Ashraf-un-nissa's death. Her husband being himself an heir to the estate to the extent of one-fourth, it was assumed that one-fourth of this debt had been automatically discharged, inasmuch as the husband had himself inherited the right to receive the same. The plaintiff had obtained a succession certificate in respect of the balance of Rs. 7,500 which then constituted the whole of the debt due to the estate of the deceased. She sued to recover one-third of this, or Rs. 2,500, for her own benefit and the remainder of Rs. 5,000 for the benefit of the defendant Kaniz Fatima, whom she described (somewhat loosely) as being " in collusion" with the first defendant in this matter. The fact of course was that Kaniz Fatima as a minor, living under the guardianship of her father, was not in a position to prefer any claim in respect of her own share in this dower-debt. Kaniz Fatima died while this suit was pending and, after making necessary amendments in the plaint, Qudrat-un-nissa obtained a decree for Rs. 2,500 due to her from the defendant Abdul Rashid alone. The suit was resisted on various grounds, one of the pleas taken being that the dower-debt was not Rs. 10,000, but Rs. 160 only. The suit was decreed by the Trial Court as stated above and an appeal by Abdul Rashid was eventually dismissed by the District Judge, after most unfortunate delay, due to the fact that the defendant had wrongly filed the appeal in the first instance in this Court. Upon a second appeal the learned Judges of this Court have differed, as already noted, upon the question of law. The result of their difference was that Abdul Rashid's appeal was again dismissed.

The question of law is as follows :—It was contended throughout that the present suit was barred by the provisions of O. II, r. 2, of the Code of Civil Procedure, on the ground that *Musammat* Qudrat-un-nissa was under an obligation by law to have claimed in the previous suit instituted by her on the 10th of November 1914, the relief which she sought in the present suit.

In considering this point we are bound to treat the subsequent death of the girl Kaniz Fatima as a mere accident which has no bearing on the determination of the question before us. That question refers us back to the 10th of November 1914, the date of the institution of the first suit. In substance, two more or less distinct points have been argued before us. On the one hand, it has been sought to ignore or put on one side, for the sake of argument at any rate, the position of Kaniz Fatima as a defendant in both suits and to discuss the question only in so far as it affects the defendant Abdul Rashid. The appeal cannot really be decided on this basis and it is not incumbent on us to discuss the purely hypothetical question thus raised at any length. The learned Judge of this Court, who decided in favour of *Musammat* Qudrat-un-nissa, has referred to an important decision by their Lordships of the Privy Council, *Pittapur Raja* v. *Suriya Rau* (1), which comes very near to determining by authority the question now before us. We have also been referred to a number of other decided cases, the most important of which seems to be that of *Mahomed Riasat Ali* v. *Hasin Banu* (2). The correct definition of the expression 'cause of action,' which has been quoted in numerous decided cases, is that these words include every fact which it would be necessary for the plaintiff to prove if traversed by the defendant in order to support his right to the judgment of the Court. On the strength of this definition it is contended that in the claim for recovery of possession over a share of the *zemindari* property the plaintiff's complete cause of action consisted, not only of the fact that she was an heir to one-fourth of the estate of the deceased lady under the Muhammadan law, plus the fact that the property claimed had formed part of that estate, but also of the further fact

(1) 8 M. 520 ; 12 I. A. 116 ; 9 Ind. Jur. 274 ; 4 Sar. P. C. J. 688 ; 3 Ind. Dec. (N. S.) 356 (P. C.).

(2) 21 C. 157 ; 20 I. A. 155 ; 17 Ind. Jur. 484 ; 6 Sar. P. C. J, 874; Rafique and Jackson's P. C. No. 188 10 Ind. Dec. (N. S.) 787 (P. C.).

that Abdul Rashid was wrongfully keeping her out of possession over the same. The Madras case was very similar; but it so happened that the plaintiff in that case had obtained possession peaceably over the immoveable property claimed, after the death of the person from whom she had inherited, and that her cause of action was based upon a subsequent ouster by another of the heirs who was, as in the present case, the husband of the deceased. We think it sufficient to say that we doubt whether a valid distinction can be drawn between that case and the one before us, even if we limit our consideration to the position of the defendant Abdul Rashid.

When, however, we pass on to consider the position of the defendant Kaniz Fatima the case seems much clearer. She was beyond question a necessary party to the first suit. Her father Abdul Rashid was sheltering himself behind her and by obtaining mutation of names in the Revenue Court in her favour, he was putting her forward, and not himself, as the rival claimant to the property which *Musammat* Qudrat-un-nissa was seeking to recover. In order, therefore, to obtain in that suit the relief which she was asking from the Court, *Musammat* Qudrat-un-nissa had to implead both Abdul Rashid and Kaniz Fatima. In the second suit, for recovery of the outstanding balance of the dower-debt *Musammat* Kaniz Fatima again appeared in the array of defendants, but the cause of action as against her was wholly different. The suit was actually being brought in part for her benefit. The cause of action against her, that is to say, the fact which rendered it necessary for her name to appear on the record as a defendant, was that, being a minor girl living with her father, who was the debtor against whom the suit was brought, she was not in a position to join with *Musammat* Qudrat-un nissa in preferring any claim against Abdul Rashid. It seems to us, therefore, that the learned Judge of this Court was right when he affirmed the decision pronounced by the two Courts below and overruled the plea based upon the provisions of O. II, r. 2, of the Code of Civil Procedure.

We dismiss this appeal with costs, including fees on the higher scale.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 69 OF 1921.

August 7, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

K. P. S. KARUTHAN CHETTIAR —PETITIONER-CREDITOR—APPELLANT *versus* R. M. N. RAMAN CHETTY—INSOLVENT-DEBTOR—RESPONDENT.

Provincial Insolvency Act (III of 1907) sec. 43—Application by creditor—Order of dismissal without enquiry—Creditor whether person aggrieved—Appeal.

A creditor is not a "person aggrieved" by a final order passed after enquiry by the Court under section 53 of the Provincial Insolvency Act 1907. But whenthe application of the creditor is dismissed without inquiry without receiving any report from the Receiver and without stating any reasons except that the creditor is not interested in making the application, the creditor is a "person aggrieved" by the order and can prefer an appeal against it to the High Court.

Ayappa Nainar v. *Manicka Asari*, 27 Ind. Cas. 241 40 M. 636, distinguished.

Gujar Shah v. *Barkat Ali Shah* 56 Ind. Cas. 744; 1 L. 213; *Palaniappa Chetty* v. *Subramaniam Chetty* 54 Ind. Cas. 710; 11 L. W. 145 ;(1920) M. W. N. 135; 38 M. L J. 358, not followed.

Appeal against the order dated 7th September 1920 of the District Court, Ramnad, Madura, in C. M. P. No. 63 of 1919 in I. P. No. 27 of 1913, on the file of the Court of the Official Receiver, Ramnad, in I. P. No. 15 of of 1913, on the file of the District Court of Ramnad, Madura.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

JUDGMENT.—All that the creditor did in this case was to move the Court to take action under section 43, Provincial Insolvency Act (III of 1907). The District Judge might very well have asked the Receiver to investigate the allegations of fraud but there was no occasion for him to dismiss the creditor's petition without stating any reason except

that the creditor was not interested in making the application, and without any enquiry and before receiving a report from the Receiver.

In *Ayyappa Nainar* v. *Manicka Asari* (1), the Court took cognisance of the complaint, held an enquiry and refused to frame a charge. We do not question the authority of this decision for the proposition that a creditor is not "person aggrieved" by the final order passed after enquiry by the Court under section 43.

In *Gujar Shah* v. *Barkat All Shah* (2), and in *Palaniappan Chetty* v. *Subramaniam Chetty* (3), the omission in section 43 to give creditors a right to move the Court by application similar to that provided by section 13, is made a ground for holding that a creditor has no 'legal grievance' if the Court declines to entertain his petition. With due respect, we think that no words are required to enable a creditor to move the Court under section 43, and if Courts were not so moved either by the Receiver or by one of the crediters, cases of their taking disciplinary action against debtors in the exercise of their insolvency jurisdiction would be very few and far between. As the petitioner was 'aggrieved' by the Lower Court's order dismissing his petition without enquiry, an appeal lies to this Court.

We set aside the District Judge's order dismissing the appellant's petition and we direct him to keep it pending until the enquiry is complete and till final orders have been passed as to the action to be taken by the Court under section 43.

The appellant's costs in this appeal and in the lower Court will be borne by the respondent.

V. N. V. *Appeal accepted.*

(1) 21 Ind. Cas. 241 ; 40 M. 630.
(2) 56 Ind. Cas 744 ; 1. L. 213.
(3) 54 Ind. Cas. 740 ; 11. L. W. 145 ; (1920) M. W. N. 135 ; 38 M. L. T. 338.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 536 OF 1923.

November 13, 1923.

Present :—Mr. Justice Sulaiman.

EAST INDIAN RAILWAY COMPANY—
APPLICANT
versus
SRI RAM MAHADEO—
OPPOSITY PARTY.

Railways Act (IX of 1890), s. 72—Risk Note, form B, goods consigned under—Loss of Goods—Railway Company negligence of—Burden of proof.

In the case of loss of goods consigned under Risk Note, form B, the burden of proving that the loss was caused by the wilful neglect of Railway servants lies *prima facie* on the consignor.

But where circumstances are established either by direct evidence produced by the plaintiff or by the cross-examination of the defendants' witnesses, from which circumstances wilful neglect or negligence can be inferred, the burden must then be shifted to the Railway Company.

Plaintiff sued to recover damages for the loss of certain bags consigned to a Railway Company under Risk Note, form B. It appeared that the wagon carrying these bags was intact at the time of its arrival at its destination, but was allowed to remain on a siding for two days before being unloaded. It appeared further that the wall of the Railway yard was broken on the Jungle side of the wagon and had been broken open and the goods stolen in the yard ;

Peld, that under the circumstances it was open to the Court to infer that there had been wilful neglect by the Railway Company.

East Indian Railway Company v. *Nathmal Behari Lal* 39 Ind. Cas. 130; 89 A. 418; 15 A ; L. J. 821, relied on.

Civil Revision from the order of the Judge, Small Cause Court, Cawnpore, dated the 27th August 1923.

Mr. *L. P. Zutshi*, for the Applicant.

JUDGMENT.—This is an application in revision arising out of a Small Cause Court matter. The plaintiff was the consignee of 126 bags, which were loaded at Kidderpur station, and were despatched to Cawnpore. The waggon admittedly arrived at Cawnpore on the 27th of December 1921 and the seals

on the waggon were found intact. As the Railway Company had many other waggons to unload, this waggon was put on a siding and remained there for two days. On the 29th of December it was reported that the seals on one side of the waggon were broken. When the contents were checked it was discovered that six bags were missing. After a lengthy correspondence, which came to nothing, the plaintiff instituted the present suit to recover damages for the loss of the bags.

The Railway Company took several pleas in defence, but three main issues were framed by the Trial Court. The first was whether the Risk Note absolved the defendant Company of all liability or not. The second was whether the goods were stolen at Cawnpore yard and whether the Risk Note (Form B) applied and whether the defendant Company was guilty of wilful negligence or not. And the third was to what money the plaintiff was entitled.

The learned Judge of the Small Cause Court found these issues in favour of the plaintiff and granted him a decree. The defendant Company has come up in revision, and on its behalf it is urged that the findings of the lower Court are quite insufficient, and further that the burden lay on the plaintiff to prove that there was either a wilful neglect of the Company or theft by or on account of the wilful neglect of its servants.

I am bound to concede that, under the contract, which took the shape of the Risk-Note (Form B), a *prima facie* burden lay on the plaintiff to prove neglect or theft of the kind mentioned therein. I agree that mere proof of the loss of the goods would not be sufficient to entitle the plaintiff to a decree. This was the view expressed by a Bench of this Court in the case *East Indian Railway Company* v. *Nathmal Behari Lal* (1), and the same view has prevailed in other High Courts also. I do not, however, take that rule to mean that in no case can the burden of proof be shifted to the defendant. It is obvious that the evidence, if any, of wilful neglect or negligence is within the special means of knowledge of the Railway Company, and it is ordinarily very difficult for a plaintiff to establish that the loss was due to the wilful neglect of the Company. Nevertheless, I concede that under the terms of the contract the burden is *prima facie* on the consignee. But I am of opinion that, where certain circumstances have been estalished, either by direct evidence produced by the plaintiff or by the cross-examination of the witnesses for the defendant, from which circumstances wilful neglect or negligence can be inferred, the durden must then be shifted to the defendant Company. Such circumstances, coupled with the patent fact that the packages have been lost, may justify a Court to hold that the burden has been discharged.

As to the case of *East Indian Railway Company* v. *Nathmal Behari Lal* (1), referred to above, it is to be noted that the only circumstance which the plaintiff had there proved was the fact that the goods had been despatched and on arrival of the train in Cawnpore seals of the doors of five waggons were found to have been broken and six bags of sugar found missing. The learned Judges were doubtful whether it was not a case of theft from a running train.

In a recent case decided by the House of Lords, namely, *H. C. Smith Ld.*, v. *Great Western Railway Company* (2), it was laid down that the burden of proving *in the first instance* that the loss sustained arose from the wilful misconduct of the Company's severants was thrown upon the trader. In that case also all that the plaintiff was able to show, as will appear from the remarks on that page, was that he had proved the delivery of the goods to the Railway Company's servants, and he put in evidence subsequent correspondence between himself and the Railway Company which suggested that the Company was very reluctant to supply information to the plaintiff. On behalf of the plaintiff it was urged by his Counsel that the wilful misconduct on the part of the Company's servants must be inferred from the subsequent correspondence. Their Lordships did not accept that contention, and found that the burden of proving wilful neglect had not been discharged.

In the present case I find that the learned Judge of the Small Cause Court had before him a clear issue at to the wilful negligence

(1) 39 Ind. Cas. 180 ; 39 A. 418 ; 15 A. L. J. 321.

(2) (1922) 1 A. C. 178 at p. 183 ; 91. L. J. K. B. 423; 27 C. W. N. Cas. 247; 38 T. L. R. 359.

of the Company. In the course of his judgment he has pointed out that the yard where the waggon was kept was a very large one and that its wall on the jungle side was broken at several places at the time when the goods were stolen. He has also commented on the fact that the Railway Company took two days to unload the goods after their arrival at the station. Having considered these circumstances he remarks, "If the goods are lost on account of the Railway Company's not making proper arrangements the Railway is liable." Further on he remarks that it was clearly not a case of theft from a running train. In view of these findings, I am unable to hold that the judgment of the learned Judge of the Small Cause Court is wrong. There were certain circumstances before him from which it was open to him to infer that proper arrangements had not been made by the Railway Company, and that, therefore, there was a wilful neglect. He was entitled, therefore, to hold that the burden had been discharged. In view of this, I am unable to interfere. The application is rejected.

K. S. D.
M. A. A. *Application rejected.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. OF 9 1922.

December 5, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Waller.

KARAKKATTIDATHIL RYRAPPAN NAMBIYAR—PLAINTIFF—APPELLANT

versus

KALLIYATT THAZHATHVEETIL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7, cl. I, (e), XIV (f) —Suit for declaration—Jurisdiction value how determined—Suit for declaration that plaintiff is liable to pay royalty at particular rate.

In a suit for a declaratory decree the jurisdiction value cannot be held to be higher than the value of the subject-matter in dispute between the parties.

A suit by the plaintiff, one of the owners of certain hills for a declaration that he is liable to pay *Achupalisha* a kind of royalty only at a particular rate and not at the higher rate claimed by the defendant is one for a declaratory decree without any consequential relief. The jurisdiction value of such a suit must be determined by the value of the subject-matter in dispute which is the capitalised value of the diffrence in the yearly payment between what the plaintiff admits is a proper charge on the property and the amount claimed according to him by the defendant.

Ganapathi v. *Chathu*, 12 M. 223 ; 24 Ind. Dec. (N.S.) 505; followed.

Such a suit as the above cannot be regarded as a suit for abatement of rent falling under s. 7, cl. 11 (*f*) the Court-Fees Act, nor as one for a right to some benefit arising out of land under s. 7, cl. 4 (*n*), nor even as a suit for a sum of money periodically payable and falling under S. 7, cl. 1 of the Act

Shahzadi Begum v. *Mahbub Ali Shah*, 55 Ind. Cas. 809 ; 42 A. 353 ; 18 A. L. J. 328 ; 2 U. P. L. R. (A). 149, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Tellicherry, dated 13th July 1921, in O. S. No. 44 of 1920.

Mr. *K. Govinda Marar*, for the Appellant.

Mr. *V. P. Karunakaran Nambiar*, for the Respondent.

JUDGMENT.

Krishnan, J.:—This is an appeal against an order of the Subordinate Judge of Tellicherry returning the plaint filed in his Court in O. S. No. 44 of 1920 for presentation to the proper Court. The Subordinate Judge held that the suit was designedly overvalued in order to bring it within his jurisdiction and that, if properly valued, it fell within the jurisdiction of the District Munsif. The suit was for a declaration that the plaintiff was liable to pay *Achu palisha*, only at the rate of 150 seers of paddy per annum in respect of the plaint-mentioned 5½ hills, and that he was not liable to pay 3593/8 seers of paddy which the defendant was claiming. What the origin of this liability to pay *Achu palisha* was is not stated, but the liability itself is admitted. It would seem from the plaint that the total 5093/8 seers of paddy is charged upon 16 hills of which the plaintiff has become the owner of 5½ hills, the defendant apparently being now the owner of some of the other hills. The defendant's right to this *Achu palisha* is not based upon his ownership

of any property, but it is conceded that the defendant in his capacity as the head of his Kalliatt Thazhatha Veedu tarwad and as Uralan of Kalliatt Vayathur Kaliss Devaswam is entitled to be paid *Achu palisha* by every one who is the owner or *jenmi* of the hills in question. The Subordinate Judge treated the suit as one falling under section 7, clause, 11, sub-clause (f) of Court-Fees Act as a *suit for abatement of rent*, and applying the Suits Valuation Act, he estimated the jurisdiction value at the value of the amount of the rent payable for a year. Thus valued, he held the suit was for a sum far below the maximum amount fixed for the jurisdiction of the District Munsif and directed the plaint to be returned. This view of the Subordinate Judge can hardly be, and has not been attempted to be, supported, as clause 11, *applies only to suits between the landlord and tenant*. It is impossible to say that there is any such relationship between the plaintiff and the defendant in this case. The plaintiff is the full owner or *jenmi* of the 5½ hills he claims, and whatever the exact nature of *Achu palisha* may be, it is not rent. It seems to be *some kind of royalty* that is payable to the defendant's family from these hills.

It was attempted by the plaintiff to bring the case under section 7, clause 4 (e) as a suit for a right to some benefit which will arise out of land. We do not think that the suit can well be considered as falling under that clause either, for there is no benefit involved in this case arising out of land in favour of the plaintiff. If there is any benefit at all, it is one that goes to the defendant and the clause refers to a suit *for a right to some benefit*. The Subordinate Judge was, therefore, right in overruling that contention.

It was further contended before us by the defendant-respondent that the suit may be held to fall under section 7, clause 1, as one for money or other sums payable periodically. Here again the argument fails. The suit by the plaintiff does not claim any sum of money at all. *Shazadi Begam* v. *Mahbub Ali Shah* (1) cited by the defendant is thus clearly distinguishable as that was for a sum of money payable to the plaintiff. After a careful consideration we have come to the conclusion that this is a suit for a declaratory decree without any consequential relief. What the plaintiff really prays for is that the Court should declare that he is liable to pay only 150 seers of paddy as *Achu palisha* on a proper apportionment of the total amount payable on all the hills. The question thus is, how is such a suit as that to be valued for purposes of jurisdiction? The Suits Valuation Act does not help us to settle this question. But we have come to the conclusion that, in a suit for a declaratory decree, the jurisdiction value cannot be held to be higher than the value of the subject-matter in dispure between parties. This was the view taken in *Ganapathi* v. *Chathu* (2), and we adopt that view and hold that the jurisdiction value of this suit must be determined by the value to be put upon the subject-matter in dispute in this suit. The subject-matter in dispute here is the difference between what the plaintiff admits is a proper charge on his property and the amount he says the defendant is insisting upon being paid, namely, the difference between 150 seers and 359½ seers. That comes to 209½ seers of paddy a year. The declaration which the plaintiff seeks, if allowed to him, will relieve him from the liability to pay the difference between these two sums for all time, and, therefore, in estimating the value of the subject-matter in dispute, we think we must take the capitalised value of that right. Assuming that 5 seers of paddy is worth a rupee, which is itself a high commutation rate, and assuming that 20 years' purchase or even 25 years' purchase is the capitalised value of the yearly payment, the total value of the subject-matter would not come to more than about Rs. 1,000. In this view the case would clearly fall within the jurisdiction of the District Munsif. It was not open to the plaintiff to put the jurisdiction value at Rs. 5,000 so as to bring it within the cognizance of the Subordinate Judge apparently with the object of defeating the plea of *res judicate* by the defendant. In the result, we uphold the order of the Subordinate Judge though not for the reasons given by him and dismiss the Civil Miscellaneous Appeal with costs.

Waller, J :—I agree.

V. N. V.
K. S. D. *Appeal dismissed.*

(1) 54 Ind. Cas. 809; 42 A. 353 ; 18 A. L. J. 321 ; 24 P. L, R. (A) 149.

(2) M. 228 ; 4 Ind. Dec. (N.S.) 505.

NAZIR AHMAD *v.* MUHAMMAD SHARIF

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 69 OF 1923.

February 13, 1924.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

Sheikh NAZIR AHMAD AND OTHERS —DEFENDANTS— APPELLANTS
versus
Sheikh MUHAMMAD SHARIF AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 233 (K) —Application for partition—Subsequent suit for exclusive possession, whether maintainable—Jurisdiction of Civil Court.

Where proceedings for partition under the provisions of the U. P. Land Revenue Act are pending a suit by one co-sharer for exclusive possession of certain plots and for damages for the value of the crops misappropriated by the defendants, is excluded from the cognizance of a Civil Court.

Ganesh Tewari v. *Sakib Pande*, 25 Ind. Cas. 42 ; 12 A. L. J. 949 ; *Subhag Singh* v. *Dip Narain Singh*, 64 Ind. Cas. 481 ; 44 A. 74 ; 19 A. F. J. 865 ; (1922) A. I. R. (A) 158, followed.

Appeal from an order of the District Judge, Azamgarh, dated the 26th January 1922.

Mr. *Mukhtar Ahmad*, for the Appellants.

Mr. *M. A. Aziz* for *Iqbal Ahmed*, for the Respondents.

JUDGMENT.—The plaintiffs and defendants in this suit are both co-sharers of *Mauza* Nandput. The plaintiffs applied for partition under the provisions of the Land Revenue Act, Act No. III of 1901, U. P, Both the plaintiffs and the defendants were parties to those proceedings. Subsequently, the plaintiffs brought this suit against the defendants alleging that they were in exclusive possession, and had been in exclusive possession for a long time, of certain plots of land in the village, the numbers of which are given in the plaint. They said that they had sown wheat and barley on these plots, and that the defendants had trespassed and wrongfully cut the crop. They asked for a decree for exclusive possession of the plots aad for Rs. 165 damages, the value of the crop misappropriated by the defendants. All these plots were included in the lands of which part tion was pending. The defendants in their first plea urged that 'the suit was barred by section 233 (k) of the Land Revenue Act. The learned Munsif upheld this plea and dismissed the suit *in limene* on the ground that it was barred by that section. The plaintiffs appealed, and the lower Appellate Court allowed the appeal and remanded the suit for determination of the remaining issues. The defendants come here in second appeal from that order of remand. It seems to us that the Legislature has given Revenue Courts exclusive jurisdiction over the partition of a *mahal* among recorded co-shares, and has, therefore, provided by section 233 (k) that no person shall institute any suit or other proceedings in the Civil Court with respect to partition or union of *mahals* except as provided in sections 111 and 112. The learned Judge of the Court below has held that the claim for damages would undoubtedly lie in a Civil Court, and if the Trial Court was right, the plaintiffs were without a remedy. There is no doubt that, if the plaintiffs had framed their suit so as to confine their claim merely to damages, they might have succeeded. But they have chosen to join this claim to a claim to obtain exclusive possession of certain specified plots, which undoubtedly are the subject of the partition. The learned Judge of the Court below says that the plaintiffs do not raise any question of proprietary title, and, therefore, the jurisdiction of the Civil Court is not ousted. One of the matters which the Revenue Court has to consider is, what particular plots should be given to a particular co-sharer on partition, and it seems to us that, where suit is brought to force the hands, as it were, of the Revenue Court, or to embarrass it in coming to a decision on such a question, that such a suit is excluded from the cognizance of a Civil Court. We think that this is concluded by authority, *Ganesh Tewari* v. *Salik Pande* (1), which was approved of in *Ram Subhag Singh* v. *Dip Narain Singh* (2).

The result is that we allow this appeal, set aside the order of the Court befow and restore the decree of the fiirst Court. The apellants are entitled to their costs in this Court.

K. S. D. *Appeal allowed.*

(1) 25 Ind. Cas. 32; 12 A. L. J. 949.
(2) 64 Ind. Cas. 488; 44 A. 74 ; 19 A. L. J. 865; (1922) A. I. R. (A.) 158.

NALINI BHUSAN GUPTA *v.* ALI MIA

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1864 OF 1921.

February 1, 1924.

Present :—Mr. Justice Suhrawardy and Mr Justice Page.

NALINI BHUSAN GUPTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALI MIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 84—Abwab—*Improvement of* dak *and* bhet *expenses if abwab—Construction of* Kabuliyat.

Where in a *kabuliyat* the rent of the land was fixed at a certain rate and over and above that the tenant was to pay a certain amount for the impromeut of *dak* and *bhet* expsnses in respect of the land and the total amount was payable in instalments for which *dakhilas* were to be given :

Held, that the amounts fixed under improvement of *dak* and *bhet* expenses were not *abwabs* and were revokable by the landlords as they were clearly intended to be included under the rent payable by the tenant.

A document has to be construed as a whole and the intention of the parties gathered from the nature of the entire contract.

Appeal against the decree of the Subordinate Judge, 1st Court, Backerjunge, dated the 23rd June 1921, modifying the decree of the Munsif, 2nd Court at Bhola, dated the 24th April 1920.

Babu *Gunada Charan Sen*, with Babu *Suresh Chandra Talukdar* a for the appellant: This suit is one for arrears of rent at the rate of Rs. 33 per annum and the sole question is whether a certain part of it should be considered an *abwab* under section 14 of Bengal Tenancy Act. The tenancy was created in 1895 by means of a *Kabuliyat*, the terms of which are very important. They will reveal that this part is really consolidated with rent and cannot be treated as an *abwab*. Reads *Kabuliyat*. The *Dall* and the *Bet* expenses are to be collected together with the rent. This question always depends on the terms of the contract itself. Although there is a rate, the rate is added to the amount in dispute and the whole is not only described as rent but is distributed uniformly over ten instalments. Reads *Kabuliyat* : *Bejoy Singh Dhudhuria* v. *Krishna Bachari Biswas* (1). Beyond these particular items to be paid annually here are other items which are to be paid on different occasions. These latter items are *abwabs* but the former ones are not : cites *Chuttan Mahton* v. *Tilakdhari Singh* (2), *Radha Prasad Singh* v. *Bal Roweter Kaeri* (3), *Kulanand Singh* v. *Eastern Mortgage Agency Co.*, (4).

Babu *Probtodh Chandrakar*, for the Respondent.

The *Kabuliyat* is very carefully drawn and clearly proved that this sum is separate and distinct from rent. Two rates of rent, one for the agricultural and homestead lands and the amount so calculated is really rent. The rest must be *abwab*. The only difference is that whereas this sum is to be paid annually the *Rajbhat* and other taxes are to be paid occasionally. But that cannot convert it into rent, whose rate has already been fixed in the previous portion of the document : cites *Malhura Prasad* v. *Lala Singh*, (5).

In this case the Full Bench and Privy Council cases in *Tilakdari Singh* v. *Chulton Mahton*, (6) were considered Also *Radha Charan Ray* v. *Golak Chandra Ghose* (7). There is a distinction. In these there was realisation of total amount *Kalar Singh* v. *Mathura Prasad* (8). In this case there has been no such realisation at the higher rate *Kalar Singh* v. *Mathura Prasad* (8). The Settlement Record is in my favour. That raises a presumption : cites *Bejoy Singh Dhudhuria* v. *Krishna Biswas* (1). This later case has discussed all previous cases and is directly in point.

(1) 41 Ind. Cas. 561; 21 C. W. N. 959; 45 C. 259.
(2) 11 C. 175 (F.B.); 8 Ind. Dec. (N.S.) 876.
(3) 17 C. 726 (F.B.); 5 Ind. Dec. (N. S.) 1426.
(4) 19 Ind Cas. 701; 18 C. L. J. 83.
(5) 17 Ind. Cas. 177; 16 C. L. J. 296; 40 C. 806.
(6) 17 C. 131; 16 I. A. 152; 13 Ind. Jur. 251; 5 Sar. P. C. J. 408; 8 Ind. Cas. (N. S.) 625 (P.C.).
(7) 31 C. 884; 8 C. W. N. 529.
(8) 25 Ind. C. 547; 19 C. L. J. 402.

NALINI BHUSAN GUPTA *v.* ALI MIA

JUDGMENT.

Suhrawardy, J.—This is a suit for rent for the year 1322 to 1325 at the rate of Rs. 33 per annum, and interest on arrears of rent has also been claimed. The claim for rent is based upon a *kabuliyat* dated the 23rd June 1875. The defence was that rent was not as claimed by the plaintiff but the actual rent was Rs. 28-12-9, the balance being in the nature of an *abwab* and hence irrecoverable. The determination of this question depends upon the construction to be put upon the *kabuliyat*. A large number of cases have been placed before us in which the question as to whether a portion of the rent claimed was *abwab* or not was raised and decided in one way or the other on the construction of the contract in each particular case. It will not be necessary, therefore, to examine those cases, as we are called upon to construe the contract in the present case. It will serve no usuful purpose to seek help from other forms of contract in interpreting the terms of the contract in this case, as the learned Chief Justice observed in the case of *Bejoy Singh Dhudhuria* v. *Krishna Behari Biswas* (1). "It seems that the rule which had been followed in this case is that each case must depend upon the proper construction of the contract before the Court and if, upon a fair interpretation of the contract, it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, that is, if it is really a part of the rent, although not described as such, the landlord can recover it." Proceeding to interpret the contract before me it would be necessary to quote that portion of the *kabuliyat* which relates to the present enquiry. In the first part of this *kabuliyat*, no doubt, rent has been fixed of culturable and homestead lands at a certain rate per *kani*. To the total amount of the sum thus obtained certain other sums have been added under the head of improvement of *Dak* and *Bhet* expenses and the rent total is put down as Rs. 33. Then follow the instalments in which, not the rent of the lands as fixed at a certain rate per *kani* but the whole Rs. 33 are to be paid. This sum of Rs. 33 has to be paid according to the instalments mentioned therein and has to be paid in ten instalments annually. After the instalments have been mentioned follow the following words which really have a great bearing on the true construction of this *kabuliyat*. The words are "Rents Rs. 33 according to above instalments I shall pay to your estate and receive *dakhilas* for same." Reading these words, it seems to me that what the parties intended was that the rent of the land was fixed at a certain rate, but over and above that the tenant had to pay a certain amount for improvement of *Dak* and *Bhet* expenses in respect of the land which also was intended to form part of the rent. No case has been placed before us in which all these circumstances have been combined. But there are cases in which one of these conditions exists; for instance, in the case of *Mathura Prasad* v. *Tosa Singh* (5), the circumstance that rent was fixed at so much per *bigha* was mentioned in the *kabuliyat*. But in other respects that *kabuliyat* is very different from the present one. In that case the tenant undertook to pay a cart load of husk over and above the rent, or, in default, its value which was assessed at Rs. 5 per cart load. Two other circumstances there were in that case, namely, that the plaintiff did not claim the price of the husk at the rate mentioned in the *kabuliyat* but at a higher rate alleging that that was the market rate at the time. This additional sum was note made a part of the rent. Then, again, in that case cesses were not calculated on the rent as claimed. In these circumstances, the Court held that the claim for the value of the husk must be taken as not a part of the rent. In this case we have got a very important factor, namely, that the total amount payable by the tenant according to the calculation mentioned in the *kabuliyat* was distributed over certain instalments and the whole sum is mentioned in the *kabuliyat* as rent. This is a circumstance which is of a very great importance, as is observed by Chatterji, J., in the case of *Bijoy Singh Dhudhuria* v. *Krishna Behari Biswas* (1). The real question is what was the intention of the parties when they entered into the contract. That intention is to be gathered from the terms of the contract. On the construction of the *kabuliyat* before us I have no hesitation in coming to the conclusion that the parties intended that the sum of Rs. 53-0 under the head of improvement of *Dak* and *Bhet* expenses should be a

part of the rent payable by the tenant. This view is further strengthened by the last clause of the above document. There it is stipulated that on occasions of marriage and other auspicious ceremonies the tenant shall pay *Rajshuti* and *Selami* according to the practice prevailing in the *Mouza*. This is clearly an *abwab* as it does not form part of the actual rent. It has been held in several cases that where a payment of a certain sum is embodied in a certain portion of the document and in another portion of the document some excess amount is mentioned it may fairly be inferred from this circumstance that the latter amount was not intended as a part of the rent. In the present *kabuliyat* the entire sum of Rs. 33 has been mentioned in one place where the different items payable by the tenant are mentioned. Both the Courts below have taken the view that this amount claimed under head of the improvement of *Dak* and *Bhet* expenses is an *abwab*. They have come to this conclusion by the fact that the rent of the land has been fixed at a certain rate per *kani*. No dodubt that is an important circumstance to be taken into consideration but that is not all. The whole document has to be construed and the intention of the parties gathered from the nature of the entire contract. There are some other circumstances mentioned by the learned Munsif in his judgment though the lower Appellate Court does not rely upon them. But those circumstances do nor go very far to enable us to interpret the document. It is found that the plaintiff has failed to prove that he had realised rent at the rate claimed. But it is also found that the defendant has paid sums of money from time to time to plaintiff which he appropriated at the rate now claimed. Then the entry in the Record of Rights is also in favour of the defendants. That only raised the presumption that the rent payable by the defendant is so much. I may mention here that the defendant admits that he is liable to pay rent at the rate of Rs. 28-12-6, but the Record of Rights shows the amount of rent as only Rs. 28. In constructing a contract, it is not neecssary that it must be proved that rent was realised at the amount mentioned in it. No doubt that circumstance would be of great assistance where the terms are ambiguous. But I do not think that there is any ambiguity about the terms here. I am of opinion that the view taken by the Courts below is wrong and that this appeal ought to succeed. In the construction I put upon the *kabuliyat* in this case the plaintiff is entitled to a decree at the rate claimed by him.

The result is that this appeal is allowed. The decree of the Court below set aside and the plaintiff's suit decreed for the amount of rent claimed with costs in all the Courts.

Page, J.:—I am of the same opinion, The question which calls for determination is, whether the items of *dak* and *bhet* expenses form part of the rent payable for the use and occupation of the premises or are illegal *abwabs* under section 74, Bengal Tenancy Act' In the course of the argmment a number of cases were cited before us. The law on the subject may, I think, be ascertained from the following cases: *Chultan Mahton* v. *Tilakdhari Singh* (2), *Radha Prosad Singh* v. *Balkower Koeri* (3), *Sri Kanta Pershad Hazari* v. *Irshad Ali Sarkar* (9), *Kulanand Singh* v. *Eastern Mortgage-Agency Coy.* (4), and *Bejoy Singh Dhudhuria* v. *Krishna Behary Biswas* (1), little, if any, assistance can be obtained from a consideration of the facts in other cases because, in 'my opinion the determination of the question as to whether the items in question form part of the rent or whether they are *abwabs* depends upon the construction of the terms of the particular tenancy in each case. The rule of construction to be applied, in my opinion, is that laid down by Mr. Justice Ghose in the case of *Radha Prosad Singh* v *Balkower Koeri* (3). His Lordship observed: "It appears to me that if, in any given case, the Court finds that any particular sum specified in the lease is a lawful consideration for the use and occupation of any land, that is to say, if it is really a part of the rent although not described as such, it would be justified in holding that it is not an *abwab* and is recoverable by the landlord," I agree with Mr. Justice Chatterjee that "if the items other than the rent proper are consolidated with it and appear from the construction of the lease to have been included in and treated as part of the rent, so that the two items constituted

(9) 17 Ind. Cas. 173; 16 C. L. J. 225.

the rent agreed upon at the creation of the tenancy, then the mere fact they are two items would not make the item other than the rent proper an *abwab*." Applying the above test to the terms of the *kabuliyat* in this case, in my opinion, it is clear that the disputed items form part of the consolidated rent payable for the use and occupation of the premises and are not to be regarded as *abwabs* or illegal imposts on the tenant within the meaning of section 74, Bengal Tenancy Act. It was urged on behalf of the tenant that because in the *kabuliyat* Rs. 6 a *kani* in respect of culturable paddy land and Rs. 8 a *kani* in respect of homestead land is set out as the rent of such land, the rent must be regarded as made up of these two sums. But, in my opinion, reading the *kabuliyat* as a whole, that contention is not sound. In my opinion, by stating the particular rates in respect of the paddy land and homestead land, the parties intended to discriminate between the rate which was payable for culturable land and the rate payable for homestead lands; but it was not intended that the rent calculated on that basis should be the sole rent payable in respect of the lands in question. This appears to me to be clear from a perusal of the *kabuliyat*, because there is found in the *kabuliyat* in addition to the sum payable on the basis which I have stated a further fixed sum for *dak* and *bhet kharach* of Rs. 5 and odd. A line is then drawn, and a total of Rs. 33 is entered. From that it would appear that the sum of Rs. 33 was the sum which it was intended should be the amount payable for the use and occupation of land. The matter does not rest there, because it is afterwards provided in the *kabuliyat* that the Rs. 33 shall be payable in stated instalments month by month; and, further, it is provided thus, "rent Rs. 33 according to above instalments I shall pay to your estate and accept *dakhilas* for same. In case of default in the payment of any instalment I shall pay interest at the rate of one anna per rupee per mensem." Now, in my opinion, having regard to the form of the *kabuliyat*, it would be unreasonable to come to any conclusion other than that the fixed and definite sum of Rs. 5 and odd in respect of *dak* and *bhet kharach* forms part of the consolidated rent payable in respect of the premises. This view is further supported by the provision which is found in the *kabuliyat* that if any marriage or other auspicious ceremonies take place the tenant shall pay *Rajdhuli* and *Selami* according to the practice prevalent in the *mouza*. The parties in this manner appear to me to have indicated that a distinction is to be drawn between such occasional payments and the fixed and definite payment of the items in dispute in this case. For these reasons, I concur in the order which has been proposed.

M. B. *Appeal allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 103 OF 1922.

February 11, 1924.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

GUR PRASAD MUKERJI—PLAINTIFF—APPELLANT

versus

BISHUN DUT—DEFENDANT—RESPONDENT.

Easement—Agreement not to block window—Diminution of light and air—Servient owner, position of.

The owner of the servient tenement is permitted to reduce the access of light and air to the dominant tenement provided he does not diminish the light and air so as to make it less than the owner of the dominant tenement requires for the ordinary proposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings.

One party to a suit agreed that he would not block up a certain window in the house of the other party and the suit was compromised. Subsequently, the first party erected a shed which diminished the light and air of the window of the second party but still sufficient was left for the purposes for which the room was used. In a suit for injunction by the second party who urged that the agreement was absolute in its language.

Held, that upon a true construction of the agreement it had no such character, and under it the plaintiff obtained for his window nothing more than the character of an ancient light and his suit must fail.

Appeal under clause 10 of the Letters Patent, against the judgment of Mr. Justice Stuart, dated the 15th of May 1922.

GUR PRASAD MUKERJI *v.* BISHUN DUT

Dr. *K. N. Katju* and Mr. *H. Kaul*, for the Appellant.

Mr. *M. S. Bajpai*, for the Respondent.

JUDGMENT :—This was a suit by the the plaintiff to restrain the defendant from diminishing the light and air enjoyed by a window belonging to the plaintiff. The position appears to be that in 1913 Bishun Dat, the present defendant, was plaintiff in a suit against Gur Prasad Mukerji. Bishun Dat then complained that Gur Prasad Mukerji had unauthorisedly opened the two widows in his house which looked over the plaintiff's property. A compromise was arrived at by which Bishun Dat, secured the closing up of one of the windows entirely and the present plaintiff secured the maintenance of the southern window with liberty to heighten it by one foot if that were possible, otherwise to leaves it as it was before the suit. There was an agreement that the defendant would not block up that southern window. The exact words of the compromise were,—

"And he (Bishun Dat) will have no right to block this window" (*Band Karne.*)

Subsequent to the compromise the defendant erected a tin shed which, according to the plaintiff, was an infringement of this compromise. No oral evidence was given in the Court below but the Munsif went on two occasions to see whether "by his proposed constructions the defendant would be materially interfering with the light and air which used to pass through the window." He came to the conclusion that there would be a certain extent of diminution but sufficient light and air would be left for the purposes for which the room was used. The room was in fact used as a store-house. The learned Munsif, relying upon the decision of *Peter Charles Earnest Paul* v. *Robson* (1), came to the conclusion that he could not grant to the plaintiff the relief claimed. The lower Appellate Court reversed that finding which was in turn reversed by the decision of Mr. Justice Stuart. The point that Dr. Katju has argued is that this case must be decided on the basis of the particular agreement between the parties and not according to the general relationship which exists between a servient and dominant tenement. There is no doubt that this case ought to be decided according to the special agreement of the parties because but for that agreement of the parties the present plaintiff would not have acquired any prescriptive right to light and air in respect of that window. In effect, the agreement following on the first litigation did give to that window in our opinion the character of an ancient light. That being so, it having the advantages attaching to an ancient light it was also subject to its limitations and disadvantages, and the owner of the servient tenement is permitted to reduce the access of light and air provided he does not so diminish the light and air as to make it, in the language of *Paul* v. *Robson* (1), less than the owner of the dominant tenement required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. Dr. Katju has contended that the agreement is absolute in its language and it for ever precluded the defendant from putting up any building which in the slightest possible decree diminished the free ingress of light and air. We think that this is not the proper construction of the agreement, for if that is what the parties had intended it would have been quite easy to express it and believing as we do that by this compromise the plaintiff obtained nothing more for that window than the character of a window which had a prescriptive right to light and air we are of opinion that the decision of the learned Judge of this Court was right and we, therefore, dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

N. H.

(1) 24 Ind. Cas. 230 ; 12 A. L. J. 1166 ; 16 C. W. N. 933 ; 27 M. L. J. 117 ; 1 L. W. 561 ; 16 M. L. J. 204 ; (1914) M. W. N. 631 ; 16 Bom. L. R. 803 ; 20 C. L. J. 553 ; 42 C 46 ; 41 I. A. 180 (P. C.).

NARENDRA NATH *v.* RAKHAL DAS

CALCUTTA HIGH COURT.

CIVIL RULE NO. 178 OF 1924.

March 5, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

NARENDRA NATH CHATTERJI—JUDGMENT-DEBTOR—PETITIONER
versus
RAKHAL DAS TARAFDAR—DECREE-HOLDER—
SRINATA CHATTERJI AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE-PARTIES.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, applicability of—Execution sale, application to set aside—Dismissal in default—Order, effect of—Appeal, whether maintainable—Revision—High Court, whether will interfere.

O. IX of the Code of Civil Procedure is not applicable to applications arising out of execution proceedings.

Charu Chandra Ghosh v. *Chandi Charan Roy*, 19 C. W. N. 25 ; *Hari Charan Ghosh* v. *Manmatha Nath Sen*, I. L. R. 41 Cal. 1 ; *Bhutaneswar Prasad Singh* v. *Tilakdhari Lal*, 4 Pat. L. J. 135, followed.

The objections that are made under O. XXI of the Civil Procedure Code to the execution of a decree, though numbered separately and treated as separate miscellaneous cases, are virtually proceedings in execution and hence s. 141, Civil Procedure Code, is not applicable to them.

The effect of the dismissal of an application under O. XXI, r. 90 of the Civil Procedure Code even for default is to confirm the sale under r. 92 ; hence an appeal lies against such an order and the High Court will not interfere in revision.

Rule against an order in Revival Case No. 127 of 1923 arising out of Title Execution Case No. 150 of 1922 of the Court of Subordinate Judge, Nadia.

Babu *Tarekeswar Pal Chowdhry* (with him Babu *Jnan Chandra Roy*), for the Petitioner.

Babu *Manmatha Nath Roy*, for the Opposite Party.

JUDGMENT. — This Rule is directed against an order of the Court below dated the 14th January, 1924 rejecting an application made by the petitioner under O. IX, r. 4, for restoration of an application which was dismissed for default. The original application was under O. XXI, r. 90 for setting aside a sale on the ground of material irregularity in the publication of sale processes. On the date of hearing neither party appeared and the Court, having disallowed the partioner's prayer for further time, dismissed the application and confirmed the sale. The petitioner thereupon applied to the learned Subordinate Judge for its restoration. The learned Judge being of opinion that O. IX, Code of Civil Procedure, was not applicable to an application under O. XXI, r, 90 dismissed the petition without entering into its merits.

It is argued before us that the view taken by the Court below is wrong and that O. IX is applicable to an application under O. XXI, r. 90. This question has been before this Court on many occasions and there has been a divergence of opinion on the point. There is a class of cases, such as the cases of *Diljanmihha Bibi* v. *Hemanta Kumar Roy* (1), *Bhuban Behari Nag* v. *Dhirendra Nath Banerjee* (2) and *Bepin Behary Saha* v. *Abdul Barik* (3), which follows the view that O. IX is applicable to matters arising out of execution proceedings. On the other hand, a large number of cases support the view of Richardson, J., that O. IX is inapplicable to any matter arising in the course of execution of a decree. *Charu Chandra Ghose* v. *Chandi Charan Roy* (4), *Hari Charan Ghose* v. *Manmatha Nath Sen* (5), *Hanseswari Dasi* v. *Radhika Dasi* (6), and *Kala Chand Bishard* v. *Sheikh Admat Ali* (S. A. 521 and 522 of 1923 decided on the 26th November, 1923). We have considered all these cases having regard to the *ratio decidendi* stated. We have come to the conclusion that the view that O. IX, Code of Civil Procedure, is not applicable to applications arising out of execution proceedings is corect and shall be adopted. The recent Full Bench decision of the Patna High Court in the case of *Bhubaneswar Prosad Singh* v. *Tilakdhari Lal* (7) has stated the case

(1) 29 Ind. Cas. 395 ; 19 C. W. N. 758.
(2) 83 Ind. Cas. 581 ; 20 C. W. N. 1203.
(3) 35 Ind. Cas. 613 ; 21 C. W. N. 30 ; 24 C. L. J. 446 ; 44 C. 950.
(4) 27 Ind. Cas. 492 ; 19 C. W. N. 25.
(5) 19 Ind. Cas. 688 ; 41 C 1 ; 18 C. W. N. 848.
(6) 63 Ind. Cas. 855.
(7) 49 Ind. Cas. 617 ; P. L. J. 185 ; (1919) Pat. 75 (F. B.).

comprehensively and we entirely agree with the reasons given therein. It is, however, still argued that section 141, Code of Civil Procedure makes O. IX applicable to cases like the present. The argument is based on the ground that an application under O. XXI, r. 90 is numbered separately as a miscellaneous case and this makes the provisions of the Code of Civil Procedure applicable to any proceeding so numbered and treated as a separate proceeding in executisn. This argument found favour with the learned Judge who decided the case of *Diljanmihha Bibi* v. *Hemanta Kumar Roy* (1). We do not think that there is much force in it. The objections that are made under O. XXI to the execution of a decree, as where the adjustment of a decree has not been certified under O. XXI, r. (2), as in the case of *Hanseswari Dasi* v. *Radhika Dasi* (6) or objections under rr. 100 and 103, as in the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (5), or under such other circumstances, are no doubt numbered separately but they are virtually proceedings in execution. In the case of *Charu Chandra Ghose* v. *Chandi Charan Roy* (4), the application under consideration was one under O. XXI, r. 90. It was there held that O. IX, Code of Civil Procedure, was not applicable.

It is next urged that the cases which have held that O. IX is not applicable to execution proceedings have proceeded upon the view that there are other remedies open to the applicant and, therefore, the Legislature has purposely made O. IX inapplicable to such cases ; and it is argued that in the present case there is no remedy open to the petitioner as no separate suit lies in which the order under O. XXI, r. 90 can be challenged. It is contended, therefore, that O. IX ought to be made applicable to cases like this. We do not think that there is any substance in the contention. The reason for holding that O. IX is not applicable to a case under r. 101 applies equally to a case under O. XXI, r. 90.

There is one other difficulty in the petitioner's way. The order passed by the learned Subordinate Judge on the 29th November 1923 is in these terms: "Neither party appears though called. Ordered that the objection be disallowed for default. The sale be confirmed and the execution case be dismissed in part satisfaction." By this order the Court, disallowing the petitioner's objection under r. 90, confirms the sale. That last portion of the order must be taken to have been passed under r. 92. If that be so, an appeal lies from that order under O. XLIII, r. 1 (f). The proper course which the petitioner should have followed was to appeal against the order of the Court below and not to come to this Court to seek the exercise of our revisional jurisdiction. The question whether an order dismissing an objection under r. 90 *ex parte* is appealable or not came up for consideration in the case of *Charu Chandra Ghose* v. *Chandi Charan Roy*, (4). There it was argued that the order passed by the Court below was one under O. IX, r. 13 and, therefore, it was appealable under O. XIII, r. 1 (*e*). The learned Judges held that O. IX does not apply to such cases. The point was also considered in the case of *Kali Kanta* v. *Shyam Lal* (8), and Richardson and Smither, JJ., without deciding whether O. IX was applicable under O. XXI, r. 90, held that the effect of the dismissal of an application under r. 90 even for default was to confirm the sale under r. 92 and hence an appeal lay to the lower Appellate Court. The present case is stronger than the case quoted. The order of the Court below dated the 24th November 1923 not only disallowed the petitioner's objection but also confirmed the sale. In our judgment the order was passed under r. 92 and was, therefore, appealable. The present application invoking our interference under our revisional jurisdiction cannot be maintained.

We are, in conclusion, asked by the learned Vakil for the petitioners to exercise our revisional jurisdiction by treating this application for restoration as one under O. XLVII, r. 1 or under section 151, Code of Civil Procedure. We are not prepared to adopt this course. Besides, if we are correct in the view that we have expressed, namely, that an appeal lies in this matter, we have no jurisdiction to interfere with the order of the Court below under section 115, Civil Procedure Code.

This rule accordingly fails and is discharged with costs. We assess the hearing fee at two gold mohurs.

M. B.
K. S. D. *Rule discharged.*

(8) 38 Ind. Cas. 598 ; 25 C. L. J. 163.

BHAWANI PRASAD MISIR *v.* RAM SUNDER

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1456 OF 1922.

February 12, 1924.

Present :—Mr. Justice Daniels.

BHAWANI PRASAD MISIR—
DEFENDANT—APPELLANT
versus
RAM SUNDER AND ANOTHER
PLAINTIFF AND DEFENDANT—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3 --Agreement by defendant to admit plaintiff's claim on fulfilment of certain conditions—Agreement, whether amounts to adjustment– Defendant, how far bound.

In a suit for redemption it was contended by the defendants that plaintiff was not the son of *B* through whom he claimed but was the illegitimate son of *B*'s widow *P*. Plaintiff called one *D* to prove his case and the defendants agreed that if the witness would eat food cooked by *P* the suit should be decreed against them. This agreement was reduced to writing by the Court and signed by the defendants. The witness having eaten food cooked by *P*, both the Courts below decreed the suit. On second appeal:

***Held*, (1) that the agreement could not be treated as an adjustment of the suit under O. XXIII, r. 3 of the Civil Procedure Code and no decree could be passed on it as it stood.**

(2) that the defendant was bound to this extent that he could not thereafter question the legitimacy of the plaintiff.

Second appeal from the decree of the Subordinate Judge, Jaunpur, dated the 14th August 1922.

Mr. *S. S. Sastry*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is a second appeal in a case in which both Courts have declared the plaintiff's right to redeem certain mortgages and directed him to do so. The plaintiff claimed to redeem as the reversioner of one Badal and one of the main defences to the suit was that the plaintiff was not the son of Bhikha through whom he claimed but was the illegitimate son of Bhikha's widow *Musammat* Pargashi. The plaintiff called one Dukharan Dube as a witness in support of his case. When this witness was called the defendants agreed that if the witness would eat *kachcha* food cooked by *Musammat* Pargashi the suit should be decreed against them. This was on the 14th December 1921. On the same date the agreement of the parties was reduced to writing by the Court and signed by the defendants including the present appellant Bhawani Prasad. Dukharan expressed his willingness to eat foot cooked by *Musammat* Pargashi and arrangements were made for food to be cooked by her and eaten by the witness on the following day. On that day the appellant made a further statement that if, after *Musammat* Pargashi had cooked the food, the plaintiff would serve it to the witness he was willing that the suit should be decreed. This was duly done and the witness ate the food. On the same day, before the case was decided, the appellant put in a written application resiling from his agreement and alleging that owing to the witness having lived in Bombay he had ceased to be particular in caste matters. Both the Courts below have found that the defendant had no good ground for resiling from the agreement and should not be permitted to do so. The case was, therefore, decreed in accordance with the agreement.

The defendant appeals to this Court and the plea pressed on his behalf is, that the agreement in question did not amount to an adjustment of the suit under O. XXIII, r. 3, and that the willingness of the witness to eat food cooked by *Musammat* Pargashi could at most only be conclusive on the particular point it was directed to establish, namely, the plaintiff's legitimacy. At most, therefore, this issue should have been decided in favour of the plaintiff and the other issues should have been decided on evidence. Apart from authority, I should have been disposed to accept the view taken by the Courts below. There seems no reason, in the nature of things, why an agreement of this kind should not be treated as a lawful agreement and why a party who makes it should not be bound by it. The authorities of this Court appear to me, however, to be against it. The leading case cited is that of *Muhammad Zahur* v. *Cheda Lal* (1). In that case the parties agreed that if a particular statement was to be found in a bond in the possession of a witness

(1) 14 A. 141; A. W. N. (1892) 3; 7 Ind. Cas. (N. S.) 460.

the Court should decree the suit but should otherwise dismiss it. Mr. Justice Straight and Mr. Justice Knox who decided the case held that the agreement could not be treated as an adjustment because no decree could be passed on the agreement as it stood. Something still remained to be done before a decree could be passed, namely, it had to be ascertained whether the statement in question was in the agreement or not. This is exactly parallel to the present case. No decree could have been passed on the agreement in this case as it stood. The Court had still to ascertain the willingness of the witness to eat the food which *Musammat* Pargashi cooked. Although cases in which a party has agreed that the suit should be dismissed if the other party takes an oath in particular form are not precisely parallel they also tend in the same direction. In several such cases, *e.g.*, *Moyan* v. *Pathukutti* (2), and *Parbhu Dayal* v. *Jamil Ahmad* (3) it has been held that, even if a party agrees that a suit should be dismissed, the oath taken can only be conclusive of the particular matter stated by the witness. Such agreements have not been treated as adjustments under O. XXIII, r. 3. In the state of the authorities, I must hold that the defendant-appellant was bound to this exent that he could not, thereafter, question the legitimacy of the plaintiff, and it must be held to have been definitely decided against him that the plaintiff is the legitimate son of Bhikha. The other issues must be decided on the merits.

I accordingly set aside the decrees of the Courts below and remand the case under O. XL, r. 23, for decision of the remaining questions at issue. Costs here and heretofore will abide the result.

K. S. D. *Appeal allowed.*

Case remanded.

(2) 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98.
(3) 64 Ind. Cas. 646 ; 44 A. 117; 19 A. L. J. 911; (1922) A. I. R. (A.) 160.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No 174 OF 1921.

February 6, 1924.

Present :—Mr. Justice Newbould and Mr. Justice B. B. Ghosh.

HARI CHARAN DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TARAPRASANNA SEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Defendant, whether can set up new cases in appeal—Principal and Agent—Money paid under directions of another—Payment, whether creates agency.

A defendant cannot be allowed to make out a new case in appeal altogether different from the case which he made out both in his written statement and in his evidence before the Trial Court. [p. 357, col. 1.]

The fact that money is paid by *A* to *B* under the direction of *C* would not make *B* the agent of *C*. It must be proved that *C* intended that the money should be paid to *B* on behalf of *C* and that *B* accepted the money as payment on behalf of *C*. [p. 357, cols. 1 and 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, District Backergunge, dated the 30th April 1921.

Babu *Girija Prosanno Rai Choudhuri* (with him Babu *Nilkanto Ghosh*), for the Appellants.

Babu *Basanta Kumar Bose* (with him Babu *Bepin Chandra Bose*), for the Respondents-Defendants Nos. 2 and 3.

Babu *Gunada Charan Sen* (with him Babu *Surendranath Das Gupta II*), for the Respondent-Defendant No. 1.

JUDGMENT.—This is an appeal against the dicision of the Subordinate Judge, first Court, Barisal The plaintiffs brought a suit to recover a sum of Rs. 6,500 with interest. They obtained a decree for Rs. 2,000 with interest and have appealed against this decree. The defendant No. 1 has filed a cross-objection on the ground that the suit should have been dismissed as against him.

The plaintiffs' case at the trial was as follows:—Tarini Kumar Gupta and another purchased at auction-sale in execution of a decree certain properties belonging to the estate of

Syed Obidulla Choudhuri. The defendant No.2 is a borother of Syed Obidulla Choudhuri who is now deceased and defendant No. 3 is the wife of defendant No. 2. After this purchase the auction-purchasers entered into a contract to sell those properties to the second and third defendants for Rs. 6,000. That contract was entered into on the 23rd February 1912 and at that time Rs. 1,000 was paid as earnest-money. The plaintiffs were the tenants of land in the property sold on temporary lease and they were anxious that the defendants Nos. 2 and 3 should obtain the property and grant them a permanent lease. The defendant No. 1 is the Sadar Naib of defendants Nos. 2 and 3. The plaintiffs entered into negotiations and arranged to pay the sum of 7,250 rupees for a lease,the understanding being that defendants Nos. 2 and 3 should re-purchase the property and then grant them a *patta*. In view of this arrangement they paid, on the 15th February 1914, corresponding to the 3rd *Falgun* 1320, the sum of 6,500 rupees to the first defendant, the understanding being that this money should be paid at once to the auction-purchasers. It transpired, however, that the auction-purchasers had already agreed to sell the property to other persons named Durga Charan Das and Kali Charan Das, and, as a matter of fact, a deed of sale in favour of these persons was executed on the 16th February 1914. When the plaintiffs ascertained that the money could not be paid to the auction-purchasers they agreed to its being retained in order that a suit might be brought for specific performance of the orignal contract of sale, and they then demanded a receipt from the first defendant which was granted by him and in that receipt he undertook to re-pay the money after the final disposal of the suit if it should fail. The suit was brought and it was finally dismissed on appeal by the High Court on the 9th August 1917. The plaintiffs, therefore, claimed this sum with interest at six per cent. per annum from that date. In their plaint they asked for this relief against the defendant No. 1 only. But they joined the second and third defendants as *pro forma* defendants apparently anticipating that defendant No. 1 might raise the defence that he acted as agent for the other defendants and then in the suit heard in their presence it might be possible to obtain relief against them in the alternative. But the plaint as framed asked for no relief against defendants Nos. 2 and 3 except on the contingency that, should the Court hold on the evindence and the circumstances of the case that defendants Nos. 2 and 3 also ought to be liable, then a decree might be granted against them. The written statement of defendant No. 1 denies all the principal allegations of the plaintiffs. He denies that any money was paid to him or that the receipt for 6,500 rupees filed with the plaint was signed by him. He alleges, however, that a sum of 2,000 rupees was paid to the defendant No. 2 by the plaintiffs and others for the purpose for which the sum of 6,500 rupees was alleged to have been paid. The learned Subordinate Judge has held that the sum of 2,000 rupees and no more was in fact paid by the plaintiffs to this defendant and that he is bound to re-pay this sum.

We have been through the whole of the evidence and we are unable to agree with the finding of the learned Subordinate Judge that the plaintiffs have failed to establish their case as to the payment of 6,500 rupees. The learned Subordinate Judge has dealt with this part of the case very shortly and has not discussed the evidence at length. The plaintiffs' story is that the plaintiff Hari Charan Das paid 5,000 rupees and Rup Chandra Das 1,500 rupees. The principal point found against this story is that the accounts produced by Hari Charan Das show that on the 2nd *Falgun*, when he left home with the money, he had not 5,000 rupees. We have examined the accounts and we are unable to hold that they support this finding. The accounts filed are accounts which were not written up daily but at intervals of few days ; with reference to the period near the alleged payment of the money we have the accounts of the 28th *Magh*, the 3rd *Falgun* and the 9th *Falgun*. The account of the 28th *Magh* shows that the cash in hand at that date was 3,840 rupees, and it is argued and the learned Subordinate Judge has held that as the account showed no credit entries previous to the 3rd *Falgun* no money could have been received between the 28th *Magh* and 2nd *Falgun*. In our opinion, that is not the correct inference that should be drawn. The accounts appear to us to be accounts kept by a man who did not keep his accounts regularly. At intervals he wrote up his accounts, and when he wrote

them up he wrote on the day that he wrote the accounts the transactions of the previous days without showing their actual dates. It seems unlikely that there should be no transaction for four or five days, and then on the fifth or sixth day a large number of transactions, if the accounts really show only the transactions of the dates on which the accounts were written. Further, it was the duty of the defendant No. 1, if he questioned these accounts, to cross-examine Hari Charan on them and give him an opportunity of explaining how he came to be in possession of 5,000 rupees on the 2nd *Falgun*. Not only was no such question put to him but no question was put to him suggesting that the accounts were not genuine. On the evidence we hold that these accounts are genuine and that, far from contradicting the plaintiffs' story, they are strong corroborative evidence.

Then another reason given for disbelieving the payment of 6,500 rupees is that it is improbable that such a large payment would have been made without the plaintiffs' seeing that it was actually paid to Tarini Kumar Gupta. But we have it from the defendants' own evidence that, at any rate, the sum of 2,000 rupees was paid without a receipt being taken until some days later. If the defendant No. 1 could be trusted with 2,000 rupees, it is not unlikely that he should have been entrusted with the larger sum of 6,500 rupees.

Further, we have the evidence of the receipt itself. This receipt was witnessed by a pleader practising at Barisal named Ganga Charan Das Gupta. He was examined for the plaintiffs and his story is that he was asked by the plaintiff's agent to sign the receipt said to have been given by Tara Prasanna Sen and he signed it. Though Tara Prasanna Sen was not present at the time he never at any time subsequently asked Tara Prasanna whether he had signed it or not. This pleader was then living at Tara Prasanna's house. If this story is true the pleader was guilty of serious unprofessional conduct. But in any case as regards the evidence of the receipt itself it seems very improbable that the plaintiffs would have got this receipt signed by this pleader if it were a forgery. The case of defendant No. 1 on his evidence is that, though he did not sign this receipt, he signed another receipt for 2000 rupees under the direction of defendant No. 2. It was not suggested in the cross-examination of any witness that the receipt for 2,000 rupees had been granted; nor was any attempt made to support the defendants' case on this point by other evidence than his own, though he says that these facts were made known to two pleaders one of whom is dead, but the other might have been called. The learned Subordinate Judge came to no finding as to whether this receipt was genuine or not. But he has held that if it be genuine there was some conspiracy between the plaintiff's and defendant No. 1. But that is nobody's case.

Then as regards the payment of the money, it is the plaintiffs' case that this sum of Rs. 6,500 was brought to Barisal in silver coins and was kept that night at the house in charge of the keeper of the hotel where he stayed. No attempt was made to test the truth of this story by cross-examination. One would have thought, having regard to the fact that this money must have weighed over two maunds, there would be ample material for a searching cross-examination, as to how it was conveyed to the hotel and from the hotel to Tara Prasanna. The natural inference to draw is that the defendants' legal advisers omitted to cross-examine the witnesses on this point for fear that such cross-examination would have the effect of strengthening the plaintiffs' case. It is suggested that it is unlikely that the plaintiffs would have kept so much money in charge of the hotel-keeper, a man of no substance, and that they would prefer to keep it with their pleader or *zemindar* who live at a short distance. Having regard to the habits and customs of these people we see nothing improbable in the story. It appears from the evidence that, though the money was made over to the hotel-keeper's charge, the plaintiffs or members of their party themselves slept on the chest in which the money was kept.

It is further urged, having regard to the negotiation as to re-purchase of the property the plaintiffs would have paid the money far earlier. The only evidence we have as to the actual contract between the defendants Nos. 2 and 3 and the auction-purchasers is contained in the plaint filed by defendants Nos. 2 and 3 in the suit for specific performance. As that suit failed, we cannot hold that the plaint gave an accurate account of the con-

tract, and it is hard to draw an inference as to the probability or improbability of the conduct of the plaintiffs in the present suit when we do not know what the conditions were. But we think there is nothing improbable that the plaintiffs, though ready to pay the money for the purpose stated, did not pay it until too late having regard to the frequency of delay in these matters ; and it is not improbable that, when the plaintiffs discovered that there was danger of the property being sold to somebody else, they made a special effort and collected the money in the hopes of inducing the auction-purchasers by a large cash payment to sell the property as they desired.

For the above reasons, we hold on the facts that the plaintiffs did pay the sum of Rs. 6,500 to the defendant No. 1 and that the defendant signed the receipt, exhibit 1, and undertook to re-pay the money on the failure of the suit for specific performance.

On behalf of defendant No. 1 it is urged strongly before us that, even on these findings of fact, we should hold that the defendant No. 1 is not liable as he acted as agent on behalf of defendants Nos. 2 and 3. But this is not the case which the defendant tried tc make on his evidence. In paragraph 4 of his written statement he denied having any authority to make the contract or receive the money mentioned in the plaint. No issue was framed on the question whether the defendant No. 1 acted as agent or not. His case now rests on the evidence of the plaintiffs themselves and some other witnesses to the effect that the money was paid to Tara Prasanna upon the verbal order of defendant No. 2. We do not think that defendant No. 1 can make out this case having regard to the case he made both in his written statement and in his evidence before the Court. He is not entitled to say, " I have not received the money ; but if I did receive it I am not accountable for it." It was not the plaintiffs' case that he acted as agent of defendants Nos. 2 and 3 and their evidence as to the circumstances under which the money was paid is not necessarily contrary to their case that the defendant No. 1 did not receive the money as agent of defendants Nos. 2 and 3. The mere direction to the plaintiffs to pay the money to defendant No. 1 would not alone make the defendant No. 1 the agent of defendant No. 2. It would be necessary to prove that defendant No. 2 intended that the money should be paid to defendant No. 1 on behalf of defendant No. 2, and also it is necessary to show that defendant No. 1 accepted the money as a payment on behalf of defendant No. 2. Further, if defendant No. 1 had received the money on behalf of the other defendants it would have been entered in the estate accounts. It is in evidence that defendant No. 1, who is no longer a servant of defendants Nos. 2 and 3, is in possession of the accounts in which this payment would have been entered, if it had been a payment on account of the estate. These accounts have not been produced by him.

We should have taken serious notice of the conduct of the pleader Ganga Charan Das Gupta since, on his own evidence, it is impossible to avoid the conclusion that he acted in a manner unworthy of his profession in signing the document purporting to have been executed by another person without any knowledge or without any attempt to ascertain whether that document was a genuine document or not. But, having regard to the time that has elapsed, nearly ten years, since this matter occurred we do not think it necessary to pursue it any further.

The result is that this appeal is decreed. The plaintiffs will obtain a decree for the full amount claimed by them, that is, Rs. 6,500 with interest at six per cent. per annum from the 10th August 1917 to this date. The decretal amount will carry interest at six per cent. per annum until payment. As against defendants Nos. 2 and 3 the appeal is dismissed.

The plaintiffs will get their costs in this and in the lower Court from defendant No. 1. The defendants Nos. 2 and 3 respondents will get their costs of this appeal from defendant No. 1.

The cross-objection is dismissed.

K. S. D. *Appeal accepted.*

Cross-objection dismissed.

KANDHAIYA OJHA *v.* JAGRANI KUER

ALLAHABAD HIGH COURT

STAMP REFERENCE IN S. A. NO. 478 OF 1923.

February 14, 1924.

Present :—Mr. Justice Piggott.

KANDHAIYA OJHA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Musammat JAGRANI KUER—DEFENDANT—RESPONDENT.

Court-Fees Act (*VII of* 1870), *s.* 7 (4) (*c*)—*Suit for declaration of plaintiff's right and injunction against defendant—Value for purposes of jurisdiction and Court-fees—Court-fee payable—Suits Valuation Act*—(*VII of* 1887), *s.* 8.

In a suit by reversioners against a Hindu widow in possession of her deceased husband's property for a declaration of the plaintiff's right and for an injunction restraining the defendant from wasting the property, the Court-fee payable must be computed according to the amount at which the relief sought is valued in the plaint. [p. 360, col. 2.]

In such a suit the plaintiffs are entitled to state the value to them of the relief claimed and the Court-fee payable must be calculated according to the amount at which the relief sought is thus valued, they are not entitled to put a high valuation on the plaint for purposes of jurisdiction and thus obtain an adjudication on the matter from a Court of superior grade while at the same time asking for a different and much lower valuation for the purposes of Court-fees. [p. 360, col. 1.]

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondent.

Office Report.—The suit giving rise to this appeal was brought by reversioners against a Hindu widow for the following reliefs :—

(*a*) It may be held that the plaintiffs have a right and a perpetual injunction may be issued by the Court to the defendant restraining her from wasting the debt realized or that may be realized in future.

(*b*) Any other relief which the Court may think just and proper with reference to the circumstances of the plaintiffs may be granted to them.

(*c*) The costs of the suit may be charged to the defendants.

The suit was valued for purposes of jurisdiction at Rs. 3,038-7-0, but a Court-fee of Rs. 10 was paid, apparently for a declaration, and 12 annas for injunction, which was valued separately at Rs. 10 only. This valuation of the relief for injunction is arbitrary which is not admissible by law. Practically, the suit is for an injunction restraining the widow defendant from committing waste and as such is governed by section 7, clause 4 (*d*) of the Indian Court-Fees Act of 1870, read with section 8 of the Suits Valuation Act of 1887. The value of the property in suit being given as Rs. 3,038-7-0 for purposes of jurisdiction is the value which determines the value for payment of the Court-fee. It being so, the Court-fee payable on the plaint comes to Rs. 180-. Deducting Rs. 10|12|- already paid there is a deficiency of Rs. 169-4 payable by plaintiffs-appellants for the Court of first instance.

The Court of first instance dismissed the suit. The plaintiffs then appealed to the lower Appellate Court which Court, too, upheld the decree of the first Court They then preferred this second appeal. In each of the two Appellate Courts they valued their appeal at Rs. 3,038 and paid only Rs. 10|12|-. as Court-fee. For reasons stated above, the memorandum of appeal in each Court was deficiently stamped by Rs. 169-4-0.

The result is that the deficiency payable by the plaintiffs appellants for all the three Courts is Rs. 169-4-0 × 3, equal to Rs. 507-12-0.

Dr. M. L. Agarwala :—I shall object to this report. It appears to read section 8, Suits Valuation Act, upside down.

Objection by Dr. M. L. Agarwala:—The suit is for declaration and injunction to restrain a Hindu widow from wasting the reversion. The value of the reversion is indicated as Rs. 3,038-7-0 and of the injunction as Rs. 10.

As their Lordships of the Privy Council observe in 35 Calcutta, 202, "the value of the action must mean *the value to the plaintiff*." In a suit by a reversioner to restrain waste, one cannot put a figure on "the value to the plaintiff," because the plaintiff may get nothing in the end, even if he succeeds, as the person who is the nearest reversioner at the death of the widow will get the estate and that may not be the plaintiff. The relief for injunction cannot, therefore, be even roughly valued, or, at the

most, it can be said to be incapable of valuation, so as to attract the provisions of Article 17 (vi) of the second Schedule of the Court-Fees Act.

Office Report. Taxing Officer.—The objection rais ed by the learned Counsel for appellants is cheifly based on a Privy Council judgment reported in *Phul Kumari* v. *Ghanshyam Misra* (1), but I submit, that the facts of that case are distinguishable from the facts of the case before you. This case was all along treated by the first Court as well as by the second Court as one for an injunction restraining the defendants from committing waste. (Please see the first sentence of the judgment of the Subordinate Judge and also the first sentence of the judgment of the District Judge). Assuming that the case was for declaration and injunction, as the learned Counsel admits, even then the Court-fee leviable on the plaint will be *ad valorem* on the jurisdiction value of the suit according to a ruling of this Hon'ble Court reported in the *Jageshra* v. *Durga Prasad Singh* (2). Consequently from which ever point of view the relief sought by the plaintiffs may be judged, the Court-fee payable on plaint will be *ad valorem* on the value of the property in suit.

Submitted for favour of decision and order.

Objection from Dr. M. L. Agarwala :—I still maintain that the value to the plaintiff is the test of Court-fees. In a suit for injunction to restrain waste by a widow in possession, the plaintiff does not claim anything for himself or to deprive the widow of any property.

Taxing Officer :—To me the learned Counsel's argument seems equitable. On the other hand, such rulings as may be held to bear on the point appear to be rather against him. I feel I must trouble the Hon'ble Taxing Judge with this and must refer to him for decision.

The following judgment was delivered by

Piggott, J :—This matter has been laid before me as Taxing Judge, in order that I may pronounce an opinion as to the amount of Court-fee legally payable by the plaintiffs in the Court of first instance, as also on their memorandum of appeal to the lower Appellate Court and in second appeal to this Court. There is a certain ambiguity about the wording of the plaint, although not, in my opinion, a material one. The suit was one by reversioners to the estate of a deceased Hindu against his widow in possession of the same. The relief sought is in the following words :—

"It may be held that the plaintiffs have a right and a perpetual injunction may be issued by the Court to the defendant restraining her, etc."

If stress be laid on the fact that the words are 'it may be held,' and not 'it may be declared,' then this is a suit to obtain an injunction, classified in section 7 of Court-Fees Act (No. VII of 1870) under clause 4 (*d*). On the other hand, in stating the valuation of the suit, the plaintiffs used the following language :—

"For purposes of jurisdiction the suit is valued at Rs. 3,038-7-0 and a Court-fee of Rs. 10 is paid. The relief for issue of injunction is valued at Rs. 10 and a Court-fee of 12 annas is paid on it."

If stress be laid on the wording of the above paragraph, then it must be held that the plaintiffs themselves have treated the suit as one for a declaratory decree in which consequential relief is also prayed. In that case suit must be classified under clause 4 (*c*) of section 7 aforesaid. In either event, the Court-fee payable must be is computed according to the amount at which the relief sought is valued in the plaint. In arguing the case for the appellants Dr. Agarwala started with the assumption that, in so far as the suit was one for a declaration, it was subject to a fixed fee of Rs. 10 under Article 17 of the second Schedule to the Court-Fees Act (No. VII of 1870). He then took up the relief sought by way of injunction as if it had been claimed in a separate suit and contended that the plaintiffs had a perfect right to value this particlar relief as they pleased, and, further, that in the present instance it was not unreasonable for the plaintiffs to put the value of this relief by way of injunction as low as Rs. 10. He referred in argument to clause 6 of Article 17 in the Schedule aforesaid. This provides a fixed fee of Rs. 10 for every other suit where it is not possible to estimate at a money value the

(1) 35 C. 202 ; 7 C. L. J. 36 ; 12 C. W. N. 169 ; 10 Bom. L. R. 1 ; 5 A. L. J. 10 ; 17 M. L. J. 618 ; 2 M. L. T. 506 ; 14 Bom. L. R. 41 ; 35 I. A. 22 (P. C.)

(2) 24 Ind. Cas. 679 ; 12 A. L. J. 844 ; 36 A. 500.

subject-matter in dispute which is not otherwise provided for by this Act. This is the fundamental fallacy in the argument of the learned Counsel for the appellants. Whichever way the plaint of this suit be looked at, it is one otherwise proved for by the Act. It is either a suit to obtain an injunction, or it is a suit to obtain a declaratory decree in which consequential relief is prayed. The argument for the appellants is so far correct that the plaintiffs in such a suit are entitled to state the value to them of the relief claimed and the Court-fee payable must be calculated according to the amount at which the relief sought is thus valued. These provisions, however, must be read subject to section 8 of the Suits Valuation Act (No. VII of 1887). What the plaintiffs in a suit like the present are not entitled to do is to put a high valuation on the plaint for purposes of jurisdiction, and thus obtain an adjudication on the matter from a Court of superior grade, while, at the same time, asking for a different and much lower valuation for the purposes of Court-fees. This is precisely the point which was considered by a Bench of this Court in the case of *Jageshra* v. *Durga Prasad Singh* (2). It is quite true, as was contended by Counsel for one of the parties in the above case, that the intention of the Legislature is that parties should first value their suits for purposes of Court-fees and, when this has been done, the valuation for purposes of Court-fee will, in all cases falling under the operation of section 8 of the Suits Valuation Act, be the same for purposes of jurisdiction. The present case is, beyond question, one to which the section above referred to applies. If the plaintiffs had stated that the value of the declaration and of the accompanying injunction was to them little more than nominal, if, for instance, had fixed upon Rs. 100 as the value of the declaration and Rs. 10 as the value to them of the further injunction, or if, treating the suit as one simply for an injunction, this being the substantial relief claimed, they had put a valuation of only Rs. 10 on the relief sought, I should not be prepared to say that they would not have been within their rights ; but in that event the suit would have been filed in a Court of subordinate jurisdiction to that which actually entertained and disposed of it. The plaintiffs committed themselves to the statement that they valued the suit at Rs. 3,038-7-0, plus a further sum of Rs. 10 as the separate valuation placed upon the relief claimed by way of injunction. Under these circumstances, they are not, in my opinion, entitled to contend that the relief sought in the suit as a whole had been valued by them in the plaint at Rs. 10 only. I uphold and affirm the report of the Stamp Officer. The plaintiffs-appellants must make good the deficiency shown in the said report and I allow them one month's time within which to do so.

K. S. D. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2722 OF 1920.

February 22, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

MAHIMJAN BIBI—PLAINTIFF—APPELLANT

versus

MIR RAHIM ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Waqf—Mutwalli, *powers and position of*—*Mortgage of* waqf *property, whether valid* —*Necessity*—Onus.

A *mutwalli* has no power under the Muhammadan Law to mortgage or transfer the *waqf* property or any portion of it without the leave of the Kazi or of the Court. Such a tranfer is under the law void. [p. 361, col. 2.]

Shama Charan v. *Abdul Kabeer*, 3 C. W. N. 158, reference to.

The curator of a *wakf* whether called *mutwalli* or *sajjadanashin* or by any other name, is merely a manager. [p. 361, col. 2.]

Vidya Varuthi Thirtha v. *Balusami Ayyar*, 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; (1921) M. W. N. 449 ; 41 M. L. J. 346 ; 3 U. P. L. R. (P. C.) 62 ; 15 L. W. 78 ; 30 M. L. T. 66 ; 3 P. L. T. 245 ; 26 C. W. N. 587; 24 Bom. L. R. 629; 20 A. L. J. 497 ; (1922) A. I. R. (P. C.) 123 (P. C.); *Abdur Rahim* v. *Narayan Das Aurora*, 71 Ind. Cas. 646; 28 C. W. N. 121; (1923) A. I. R. (P. C.) 44; 17 L. W. 509; 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; (1923) M. W. N. 441; 38 C. L. J. 242; 50 C. 329 (P. C.), followed.

MAHIMJAN BIBI *v.* MIR RAHIM ALI

Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *wakf* the whole mortgage fails.

For an advance of money otherwise than to satisfy the legitimate needs and purpose of the *wakf*, no part of the property held in *wakf* is chargeable either by the settlor or by the Court.

It is well-established in law that the exercise of a particular power must the considered in connection with the condition under which the power has been conferred. The *Mutwalli* in this case could only mortgage the *Wakf* property if it was necessary for the purpose of the *Wakf*. The onus, therefore, lies heavily upon the mortgagee to prove the existence of any such necessity. [p. 362, col. 2.]

Moonshee Golam Ali v. *Sowlantoonissa*, W. R. (1864) 242, distinguished.

Appeal against the decree of Additional District Judge, Bakergunge, dated the 16th June 1920, affirming the decree of the Subordinate Judge, 1st Court, of that district, dated the 30th April 1919.

Babu *Ram Chandra Mazumdar* (with him Babus *Abinash Chandra Guha* and *Sarat Chandra Dutt*), for the Appellant.

Babu *Gunada Charan Sen* (with him Babu *Someshwar Mukerji*), for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for a declaration that the mortgage by defendant No. 2 of the properties in suit to defendant No. 1 is void and not against *wakf* estate, of which defendant No. 2 is the *Mutwalli*. One Kamal Sherif executed a *wakfnama* on the 4th November 1892 and appointed his two sons by his two wives as *Mutwallis* in respect of his *Wakf* properties which were devided into two parts, each *Mutwalli* holding one half. The defendant No. 2, was thus the *Mutwalli* of one half of the *Wakf* properties in which the plaintiff and some other defendants were beneficiaries. Defendant No. 2 mortgaged the *Wakf* properties to one *Sasi* on the 11th August 1906. On the 31st May 1911 he mortgaged the same properties to one *Kasi* and out of the consideration for this mortgage he liquidated the first mortgage. On the 13th February 1914 he mortgaged, the *Wakf* properties for the third time for Rs. 3,000 to defendant No. 1 and paid off the second mortgage. It is beyond controversy that a *Mutwalli* has no power under the Muhammadan Law to mortgage or transfer the *Wakf* property or any portion of it without the leave of the *Kazi* or the Court. Such a transfer is under the law void: *Shama Churan* v. *Abdul Kabeer* (1). The power and liability of a *Mutwalli* have been authoritatively settled in the recent case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (2), which has been followed by their Lordships of the Judicial Committee in the more recent case of *Abdur Rahim* v. *Narayan Das Aurora* (3). These cases lay down that the curator of a *Wakf* whether called *Mutwalli* or *Sajjadanashin* or by any other name, is merely a manager. The facts of the case of *Abdur Rahim* v. *Narayan Das Aurora* (3) are very similar to those of the present case. There also the previous *Mutwalli* had mortgaged the *Wakf* property and the mortgagee in execution of a decree in the suit upon the mortgage obtained possession of the *Wakf* property. The subsequent *Mutwalli* brought a suit for declaration that the alienation by the previous *Mutwalli* was not binding on the *Wakf* and so far was void. This contention was successful and their Lordships stated the fundamental principle which governs the handling of *Wakf* properties under the Muhammadan Law as follows:—"Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *Wakf*, which is therefore as such unsustainable, the whole mortgage fails." They added: "Their Lordships are of opinion that for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the *Wakf*, no part of the property held in *Wakf* is chargeable either by the settlor or by the Court. This is in accord with the view taken by this Court in the case

(1) 8 C. W. N. 158.

(2) 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 34 P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P.C.) 123 (P.C.).

(3) 71 Ind. Cas. 646; 28 C. W. N. 121; (1923) A. I. R. (P.C.) 44 17 L. W. 509 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; (1923) M. W. N. 441; 38 C. L. J. 242; O. C. 329 (P.C.).

of *Nimai Chand Adhya* v. *Golam Hoessin* (4) where the Muhammadan Law as found in the original texts has been expounded in detail. This being so, the only question that needs our consideration is whether the mortgage challenged in this suit was made for the purposes of the *Wakf*, or, as the Judicial Committee put it, to satisfy the legitimate needs and purposed of the *Wakf*. In the *Wakfnama* there is a provision to the following effect: "The *Mutwalli* or the *Mutwallis* may, if necessary, grant permanent or *Mourashi pottahs* in respect of any of the *Wakf* properties or of any part thereof. He or they may also, if necessary, borrow money by mortgaging any of the *Wakf* properties or any part thereof." Under this deed the power of the *Mutwalli* to mortgage *Wakf* properties is limited only to such cases where it may be necessary to borrow money. Both the Courts below have taken the view that, where power is given to a *Mutwalli* to mortgage a *Wakf* property, though saddled with a condition, the mortgagee who advances the money in good faith is not bound to satisfy himself that the condition precedent to the exercise of the power of the *Mutwalli* to mortgage the *Wakf* estate is in fact established; and they have relied on the case of *Moonshee Golam Ali* v. *Sowlantoonissa Bibee* (5). It is not necessary in this case to consider the correctness of this decision as it is obviously distinguishable from the present case. There the mortgagor was empowered under the trust-deed to sell any part of the trust property where such course was deemed advisable in the interests of the trust property. In such a case it may be urged that when the *Mutwalli* considers it advisable to sell a part of the *Wakf* property in order to buy another and more profitable property the creditor has no means of ascertaining what the *Mutwalli's* real intention is. He has to rely upon what the *Mutwalli* tells him. But in the present case the *Mutwalli* is vested with a restricted power to be exercised only when it becomes necessary in the interest of the *Wakf* to borrow money. Though the case of *Golam* v. *Sowlantoonissa* (5), is distinguishable from the present case on the facts, we may point out that it has never been followed and has not even been considered in the numerous cases that have come up both before the Courts in India and the Privy Council; and if it is examined in the light of the principles laid down in the decided cases, it may be difficult to support. The Courts below have not enquired into the question whether defendant No. 2 was under the necessity of borrowing money at all. No such necessity appears to have been even suggested. We have been asked by the learned Vakil for the respondent to remand the case for an enquiry on this point but after a careful consideration of the proceedings and the entire evidence in the case, we are of opinion that no useful purpose will be achieved thereby. In the first mortgage to *Sasi* in 1906 the object for which the money was borrowed was stated to be the payment of Rs. 900 for the puachase of certain property by him. In the second mortgage to *Kasi*, the purpose for which the money was borrowed under the first mortgage is stated to be the *fateha* of the plaintiff's father and other necessities. This is wholly inconsistent with the first mortgage. In the third deed of mortgage which is the subject of this suit the only object mentioned was the satisfaction of the previous mortgage. There is no evidence to show that at the time of the execution of any of these mortgages the *Mutwalli* was under the necessity of borrowing money to carry on the administration of the *Wakf* estate. It has been argued on behalf of the respondent that if the mortgage-deed recites the necessity for a loan the mortgagee is not bound to enquire into its authenticity. We are not much impressed by this contention. It is well-established in law that the exercise of a particular power must be considered in connection with the condition under which the power has been conferred. The *Mutwalli* in this case could only mortgage the *Wakf* property if it was necessary for the purpose of the *Wakf*. The onus is, therefore, heavily upon the mortgagee to prove the existence of any such necessity and we are of opinion that he has failed to discharge it.

It is, however, argued that the burden is upon the plaintiff to establish that there was no such necessity. We think it is no part of the plaintiff's duty to prove a negative proposition. We, therefore, hold that both th Courts

(4) 8 Ind. Cas. 353; 37 C. 179; 11 C. L. J. 317; 14 C. W. N. 535.
(5) W. R. (1864) 242.

below have erred in the view of the law they have taken and that this appeal must be decreed.

In the result, the decree of the Courts below are set aside and the plaintiff's suit decreed. As it has been found that the defendant No. 1 advanced this money in good faith we direct that each party do bear his costs in all the Courts.

M. B.
K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 49 OF 1923.

February 12, 1924.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

KANHAIYA *alias* MOTI LAL—OBJECTOR
versus
KANHAIYA LAL—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Succession Certificate—Court, whether can appoint Receiver—Revision—High Court, whether can interfere—Conditional or provisional order, appeal against.

There is no right of appeal against an order which is either conditional or provisional and does not eventuate in a final order. [p. 364, col. 1.]

It is not competent for a Court sitting as a Succession Certificate Court working the provisions of the Succession Certificate Act, to entertain an application for the appointment of a Receiver. [p. 365, col. 1]

In re Baijamna Bai, 11 Ind. Cas. 534 ; 13 Bom. L. R. 487; 36 B. 20 ; *Asadali Chowdhury* v. *Mahamad Hossain Chowdhury*, 36 Ind. Cas. 177; 48 C. 986; 20 C. W. N. 1009, **distinguished.**

While the general provisions of the Civil Procedure Code do not apply to a Court administering the Succession Certificate Act, they do apply to the High Court sitting as such and the High Court can interfere in revision if the Court below exercises a jurisdiction which it does not possess. [p. 365, col. 1]

Civil revision from an order of the District Judge, Cawnpore, dated the 20th March 1923.

Dr. *K. N. Katju* and Mr. *Indu Bhushan Banerji*, for the Applicant.

Mr. *P. L. Banerji*, for the Opposite Party.

JUDGMENT.—This is a very pretty legislative knot. A dispute has arisen between two alleged members of a family over an apparently substantial estate left by *Musammat* Basanti, the widow of Bansidhar, deceased. Some portion of the property consists of uncollected rents, that is to say, arrears of rent, and also of rents accruing due from the occupiers of various tenancies held under the deceased. *Musammat* Basanti made a Will, which, if it is a valid Will, can, on proper proceedings being taken, be admitted to probate. The present applicant, in September 1922, applied for a succession certificate under the Succession Certificate Act, claiming to be the legal representative of the deceased lady, and that he was desirous of collecting the rent from the tenants, who would be protected in paying their rents to him in the event of his obtaining a succession certificate from the Court. Nor could he obtain a decree in any suit against the tenants for rent due to the deceased's estate without producing a succession certificate in the Trial Court. Unfortunately, as is too often the case, this comparatively simple piece of machinery for obtaining the necessary certificate in a kind of summary way, for which purpose the Succession Certificate Act of 1889 was elaborately devised, hung fire, and owing, either possibly to the Court below having more work to do than it could get through, or to its failure to recognise the urgency of summary applications of this kind, the month of February 1923 arrived, five months having elapsed during which nothing whatever was done. One can understand the applicant after such delay looking round to see how best he could secure that which he really wanted. He complains in the application, with which we now have to deal, that these rents, or some of them, are being improperly withheld and are becoming time barred, or in danger of becoming time barred. It is a fact that the provisions of the law enable a person in such a position to protect himself if he is properly advised. The applicant could have brought suits within the period allowed by limitation against all the debtors, and could have either asked the Court to postpone granting decrees, if he was entitled to decrees, until he had obtained the necessary certificate, or applied to the Certificate Court, as an urgent matter, to expedite the proceedings which had been

already pending, as we have said, five months. Unfortunately, he seems to have been badly advised, or at any rate advised to take the novel procedure which has been accepted by the lower Court, and we have to deal with the matter as it stands. On the 23rd of February 1923 he applied for the appointment of a Receiver to the Court in which the succession certificate matter was still pending. He made that application against the objector who was objecting to his obtaining a succession certificate, and each party filed a statement containing their views of the merits, and a perusal of these documents shows that the real dispute was between these two persons as to who was to collect the rent, and the applicant objected to the objector being allowed to collect rent unless he gave adequate security, he being a person in a Native State, and, generally, according to the applicant's allegation, not to be trusted and impecunious. On that footing the applicant was desirous to have the appointment of a Receiver, and the Court has acceded to that view of the matter, and without actually appointing a Receiver has given the objector the option of giving security. Nobody can doubt that if the application had been made in a pending suit, it was a reasonable application to make, and that on the merits it was both plausible and attractive. But we have to decide whether it was an application which the Court below had any right to entertain at all. The matter being novel and difficult, the objector has brought it before this Court both by way of appeal and by way of revision. With regard to the right of appeal, it seems to be established by a course of decision in this Court that there is no such right where the order of the Court below is either conditional or provisional, and does not eventuate in a final order. The substantial matter, therefore, which we have to decide is whether we have jurisdiction to entertain the revision which challenges the jurisdiction of the lower Court to entertain this application. Taking for convenience sake the latter consideration first, it is argued by Mr. Pearey Lal Banerji in defence of the order, that O.XL, r. 1 of the Code of Civil Procedure which contains the whole of the law in India with reference to the appointment of Receivers, is not now under the Code of 1908, whatever it was before, confined only to cases in which a suit is pending. He cites in justification of that view the case of *In re Bai Jamnabai* (1), in which it was held that a Receiver might be appointed in an application made under section 12 of the Guardians and Wards Act. Section 12 of the Guardians and Wards Act enables the Court under that Act to make orders for the protection of the property, and section 141 of the Code of Civil Procedure applies to the provisions of the Code generally to all proceedings in any Court of Civil Jurisdiction, so far as they can be made applicable. A similar view has been taken in the case of *Asadali Chowdhury* v. *Mahommed Hossain Chowdhury* (2), with regard to an application under section 93 of the Bengal Tenancy Act. These cases, however, do not cover the whole ground. It is necessary to consider the scope of the Succession Certificate Act in order to see whether the general provisions of the Civil Procedure Code can be worked or introduced into the machinery under the Succession Certificate Act, or, in other words, whether section 141 of the Code of Civil Procedure can be made applicable. The Succession Certificate Act is a provision within a very small compass enacted for a specific purpose. The title describes it as " an act to facilitate the collection of debts on successions, and afford protection to parties paying debts to the representatives of deceased persons." Section 1 (4) provides that a certificate is not to be granted in respect of any debt in which a right can be established by probate under two Acts specifically mentioned. It so happens that neither of these cases apply to the Will of *Musammat* Basanti, which is a Will governed by the Probate and Administration Act, but undoubtedly Letters of Administration with a copy of the Will annexed could be obtained of her Will within the meaning of the latter part of section 1 (4). It is, therefore, doubtful whether it is a case in which the Court hsd any right to grant a certificate at all. The procedure appears to us to be very carefully presrcibed and restricted. Where assistance from the Code is required, it is introduced by an express enactment, for example, in section 6 governing the verifica-

(1) 11 Ind. Cas. 554; 12 Bom. L. R. 487; 36 B. 20.
(2) 36 Ind. Cas. 177 ; 43 C. 986 ; 20 C. W. N. 1000.

tion of the application. The provision for service and so on is contained in section 7, and there is no further reference to the Code except in section 19 (3) which applies section 141 (old section 647) only so far as it relates to the provisions for reference and review contained in old Chapters 46 and 47 of the Code. We, therefore, come to the conclusion that we cannot treat this Act as analogous to the other Acts, like the Guardians and Wards Act and the Bengal Tenancy Act, to which the general provisions of the Civil Procedure have been held to apply, and that we are unable to see that section 141 can be made applicable to the Succession Certificate Act except in so far as it is expressly introduced by section 19 (3), and also as a corollary by section 26 (3). The result is that, in our view, it is not competent for a Court sitting as a Succession Certificate Court, working the provisions of the Succession Certificate Act, to entertain an application for the appointment of a Receiver, and that in doing so the Court below acted without jurisdiction.

Mr. Pearey Lal Banerji, however, as a last resort, contended that if this was so, the logical result was that none of the provisions of the Code of Civil Procedure would be applicable at all, including section 115, known as the revision section, and that, therefore, we are prohibited by our own interpretation of the Succession Certificate Act from applying the machinery provided in section 115. The answer to this ingenious suggestion is in our opinion as follows:— We hold that the general provisions of the Code of Civil Procedure do not apply to the Court below sitting as a Court administering the Succession Certificate Act. But in our opinion they do apply to the High'Court sitting as such which is vested with jurisdiction to send for the record in any case decided by an inferior Court, and if it has acted without jurisdiction, to set aside its order. Finally, Mr. Pearey Lal Banerji contended that there was no decision, although the Court granted in substance what he asked. We do not think it is necessary to go so far as to examine the ultimate decision of the lower Court in these proceedings. The difficulty arose at an earlier stage. The Court had no business to entertain this application at all. It ought to have thrown it out on the ground of absence of jurisdiction. It could not have entertained it without first deciding that it had jurisdiction to do so. It has so decided and in our view it has decided wrongly and, therefore, has exercised a jurisdiction which did not belong to it. On these grounds the revision must be allowed and the order quashed. Under the circumstances, both parties will pay their own costs. Let the record be sent back to the lower Court with a copy of this judgment and a direction to such Court to proceed without delay to dispose of the application for a Succession Certificate. We are now in the year 1924, and this application which was started in September 1922 is still pending. We would impress upon the lower Court and all lower Courts the importance of dealing with summary and urgent matters as expeditiously as possible. These continual delays, particularly in, what may be called, interlocutory machinery, are largely responsible for the complaints which are made about the general delay of litigation in this province.

The appeal, of course, will be formally dismissed with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*
Revision allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
NO. 2247 OF 1921.

February 7, 1924.

Present :—Mr. Justice Suhrawardy
and Mr. Justice J. Chotzner.

NEYAJADDIN AND OTHERS—
DEFENDANTS—APPELLANTS
versus
AKAMAT ALI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Decree, construction of—Decree against joint tortfeasors, nature of—Non-executable decree—Attachment of suit—Death of defendant—Sons, appointment of, as legal representatives—Major and minor sons—Guardian ad litem, *omission to appoint—Decree against major defendants whether legal—Civil Procedure, Code (Act V of* 1908) *O. XXII, r.* 4, *O. XXXII, rr.* 3, 4.

NEYAJADDIN *v.* AKAMAT ALI

A decree for recovery of possession against a number of joint tortfeesors is a joint decree, inseparable and undivisible.

A Court should not pass a decree which cannot be given effect to.

Plaintiffs sued for recovery of possession of certain plots of land against seven defendants alleging that they had been dispossessed by defendants Nos. 4, 6 and 7. The first Court declared the plaintiffs' title to two plots but dismissed their claim for possession, which, however, was decreed on appeal. It appeared that defendant No. 1, having died during the pendency of the appeal his heirs were brought on the record but that five of these heirs were minors and no steps were taken for their proper representation. The Appellate Court passed a decree against the major defendants and declared that the minors would not be bound by this decree as they were not properly represented in the appeal. The other defendants appealed to the High Court :

Held, that the appeal before the lower Appellate Court could not proceed in the absence of the representatives of the deceased defendant and no decree could be made under the circumstances.

Kali Dayal Bhattacharjee v. *Nagendra Nath Pakrashi*, 54 Ind. Cas. 822 ; 24 C. W. N. 44 ; 30 C. L J. 217, followed.

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021 (P.C.) ; 30 I. A. 182 ; 7 C. W. N. 774 ; 5 Bom. L. R. 822 ; 8 Sar. P. C. J. 512, distinguished.

Appeal against the decree of the Subordinate Judge, 2nd Court, Tipperah, dated the 24th June 1921 reversing the decree of the Offg. Munsiff, 7th Court, Comilla, dated the 1st May 1920.

Babu *Bhupendra Kumar Roy*, for the Appellant.

Babu *Sasadhar Roy* (*Sr.*), for the Respondent.

JUDGMENT.—In this case the plaintiffs brought a suit for recovery of possession of certain plots of lands against seven defendants on the allegation that the defendants Nos. 6, 4 & 7 had' dispossessed the plaintiffs from them by wrongly recording themselves in the Record of Rights. The first Court declared the title of the plaintiffs to two plots (Nos. 959 and 960 of the *batwra* map) but dismissed their claim for recovery of *khas* possession holding that, in the circumstances of the case, the plaintiffs might have relief in a suit for ascertainment and recovery of rent of the lands. On appeal that decree has been set aside and the lower Appellate Court has passed a decree in favour of the plaintiffs for *khas* possession of those plots. It appears that during the pendency of the appeal before the Appellate Court defendant No. 1 Ahamuddin died and his heirs were brought on the record five of whom were minors. It further appears that these minor children of the defendant No. 1 were not properly represented in the suit, no steps having been taken under O. XXXII, Code of Civil Procedure. The learned Subordinate Judge passed a decree as against the major defendants in these words : " The appeal is accordingly decreed with costs. The minor children of late Ahamud Ali (Ahmaduddin ?) will not be bound by this decree as they have not been properly repesented in this appeal." Some of the heirs of Ahamaddin and the other defendants have appealed to this Court and the ground taken on their behalf is that the Court of appeal below ought to have, in the circumstances of this case, dismissed the appeal inasmuch as it could notproceed under O. XXXII, r. 4, Code of Civil Procedure, in the absence of the minor heirs of defendant No. 1 who were not properly represented in the appeal. We think that this contention should prevail. The suit was for recovery of possession against a member of joint tortfeasors. The decree against the defendants is a joint decree inseparable and indivisable. It is not the plaintiffs' allegation that the defendants individually dispossessed them from different portions of the land. The question that has to be determined in a case like this is whether the appeal can proceed in the absence of the representatives of the deceased party and whether a decree can be made in favour of a party without the representatives of the deceased being placed on the record. This point was discussed at great length in the case of *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (1). The same view has been followed in a recent case to which one of us was a party, namely, the case of *Nagendra Lal Chowdhury* v. *Nezamat Ali* (2). There the suit was brought for possession against two defendants, one of whom was a minor and not properly represented. It was held that the suit would not be decreed as against the other defendant. It is argued on

(1) 54 Ind. Cas. 282; 24 C. W. N. 44 ; 30 C. L. J. 217.

(2) 30 C. 1021 (P.C.) ; 30 I. A. 182 ; 7 C. W. N. 747 ; 5 Bom. L. R. 822 ; 8 Sar. P. C. J. 512.

behalf of the respondents that this defect is covered by sections 99 and 100 (*c*) and ought to be condoned as it does not vitiate the decision of the lower Appellate Court, nor has it produced error or defect in the decision of the case on the mertis. We do not think that the defect in this case is such as can be overlooked on any ground, legal or equitable. The effect of the decree that is passed by the lower Appellate Court in this case is that it can be executed as against some of the defendants whereas it will not be executed as against the others. The plaintiff, therefore, is not entitled in this case to get *Khas* possession of the plots in suit. The decree of the Court below has become infructuous, and it is one of the principles of law that a Court should not pass a decree which cannot be given effect to. Reliance has been placed by the respondents on the case of *Walian* v. *Banke Behary Pershad Singh* (2). The facts of that case are very different from those in the present case. There an application was made for the appointment of the mother as guardian of the minor. The mother appeared on behalf of the minor and her appearance was accepted as representing the minor. The Judicial Committee of the Privy Council, in those circumstances, held that the mere omission to record the order appointing the mother as guardian was not fatal to the suit. We are of opinion that in the present case the ommission to have the minors represented by a guardian is fatal to the hearing of the appeal and the decree of the lower Appellate Court cannot be sustained.

The result is that the decree passed by the lower Appellate Court is set aside and that of the Court of first instance restored. The parties will bear their costs here as also in the Court of appeal below.

K. S. D. *Appeal accepted.*

(2) 30 C. 1021 (P. C.) 30 I. A. 182 ; 7 C. W. N. 774 ; 5 Bom. L. R. 822 ; 8 Sar. P. C. J. 512.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 792 OF 1922.

November 15, 1923.

Present :—Mr. Justice Sulaiman.

NOHAR AHIR—DEFENDANT—APPELLANT
versus
PARTAB AHIR—PLAINTIFF—
—RESPONDENT.

Jurisdiction—Civil or Revenue Court—Suit for declaration of right to joint tenancy—Second Appeal—Fresh evidence, whether can be admitted.

A suit for a declaration that the plaintiff is a joint tenant with the defendant and entitled to joint possession with him is cognizable exclusively by the Civil Court.

Bhup v. *Ram Lal*, 11 Ind. Cas. 268 ; 8 A. L. J. 1009 ; 33 A. 795 ; *Jagan Nath* v. *Ajudhia Singh*, 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 408, followed.

Fresh evidence cannot be admitted in second appeal especially where it was not tendered in the lower Appellate Court and no application was made for tendering it in the High Court.

Second appeal from the decree of the Subordinate Judge of Azamgarh, dated the 15th February 1922.

Mr. *S. S. Sastry*, for the Appellant.
Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for joint possession of the plaintiff's share in certain tenancy lands.

The main defence put forward on behalf of the defendant was that these lands were not joint tenancies at all but belonged exclusively to the defendant and that the plaintiff was the defendant's sub-tenant.

The Court of first instance dismissed the plaintiff's suit but on appeal the decree has been set aside and the suit for joint possession decreed.

It was admitted that, prior to the institution of the present suit in the Civil Court, the defendant No. 1 brought a suit in the Revenue Court for ejectment of plaintiff Pratab under section 58 of the Agra Tenancy Act claiming that Pratab was his sub-tenant. So far as the record before me goes, there is nothing whatsoever to show what ultimately happened in the Revenue Court

NOHAR AHIR *v.* PARTAB AHIR

Mr. Sastry on behalf of the defendant wanted to tender before me a certified copy of an order purporting to have been passed by the Revenue Court on the 13th of May 1921 showing that after the dismissal of the civil suit the Revenue Court had decreed the suit. This order obviously was passed as early as the 13th of May 1921. The appeal was not disposed of by the lower Appellate Court till the 15th of February 1922, *i.e.*, not till after nine months. The defendant made no attempt whatsover to tender this additional piece of evidence which was within his knowledge and power before the lower Appellate Court, nor was the attention of that Court directed to this matter. This not having been done, I am of opinion that it is now too late for the defendant to try to tender it in this Court. Under the circumstances, I am quite unable to hold that the decree of the lower Appellate Court was wrong, because of a certain order, a copy of which the defendant could have tendered, but which was not tendered, before that Court. It is also to be noted that there is no affidavit before me to show that that order of the Revenue Court was in fact the final order of the Revenue Court. For aught one knows, the matter might have been taken to a higher Court or may still be pending in the Revenue Court I am, therefore, not disposed to admit this fresh evidence in second appeal. No such prayer was made in the grounds of appeal, nor was any application filed for tendering fresh evidence, with notice given to the defendant so that he may not be taken by surprise at the eleventh hour.

On the record as it stands, there is nothing to show that the Revenue Court has passed any final decree in favour of the defendant. All that appears is that a suit was filed in respect of this very holding, and in that suit the present plaintiff clearly denied that there was any relation of landlord and tenant between the parties; and pleaded that the Revenue Court had no jurisiction to try the suit. The plaintiff's plaint as framed is a plaint which cannot be entertained by a Revenue Court at all. It asks for a declaration that the plaintiff is a joint tenant with the defendant and is entitled to joint possession. Such a suit is cognisable exclusively by the Civil Court. Vide *Bhup* v. *Ram Lal* (1) and *Jagar Nath* v. *Ajudhia Singh* (2). I am, therefore, unable to hold that the Civil Court has no jurisdiction to entertain this claim. Furthermore, as a suit of this kind is not cognisable by a Revenue Court, section 10 of the Civil Procedure Code cannot apply, and I cannot hold that the Civil Court should have stayed proceedings in the civil suit.

The learned Vakil for the appellant cited before me two cases where it has been held that if, previous to the institution of the civil suit, a final decree had been obtained from a Revenue Court declaring the status of one party as the tenant of the other that decree cannot be re-opened by the Civil Court. That, of course, is quite obvious. The Revenue Court is the proper Court for trying the question whether the relation of landlord and tenant exists or not. Once it has been found by that Court, namely, that such a relation exists it is not open to the party to come to the Civil Court and establish his proprietary title. That, however, is not the case here, and so far as it appears no final decree has been passed in favour of the defendant. The rule of law laid down in *Jaigopal Narain Singh* v. *Uma Dat* (3) applies.

The last point urged on behalf of the appellant was that the finding of the lower Appellate Court that the holding was a joint holding of the parties was incorrect. The question was a pure question of fact. The learned Judge has disbelieved the entire evidence of the defendant. He has believed the evidence for the plaintiff and his witnesses, and there is also the presumption of the Hindu law in favour of the plaintiff. He has also found that the plots where the occupancy lands belonging to the plaintiff's father. This finding cannot be interfered with in second appeal.

The appeal is without force and is hereby dismissed with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

(1) 11 Ind. Cas. 268; 8 A. L. J. 1009; 33 A. 795.
(2) 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 403.
(3) 10 Ind. Cas. 573; 8 A. L. J. 695 at p. 699.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1662 OF 1921.

February 1, 1924.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Page.

SRISH CHANDRA PAL CHOWDHURY
AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

DEBENDRA NATH SINHA ROY
AND OTHERS—DEFENDANTS—
RESPONDENTS.

Construction of document—Lease, darpatni—*Rent fixed in perpetuity*—Darpatnidar *agreeing to pay any new payments levied from* Patnidar—*Increase of rent* —Patnidar, *whether entitled to proportionate increase* —Ejusdem generis, *principle of.*

Under a *darpatni* lease in which the rent was fixed in perpetuity, the *darpatnidar* undertook to pay in addition the road cess and public works cess and "any other new amount or payment that may be fixed and whatever else was payable by the *darpatnidar* according to law." On a re-settlement of the estate the rent was increased and the *patnidar* sued the *darpatnidar* to recover a proportionate amount of the increased rent:

Held, that the *darpatnidar* was not liable to pay increased rent under the lease and the words "any other new amount or payment that may be fixed" must be interpreted *ejusdem generis* with the words "road cess and public cess," etc.

Appeal against the decree of the Subordinate Judge, *Zillah* Nadia, dated the 30th of April 1921, affirming the decree of the Munsif, 2nd Court, Krishnagar, dated the 23rd December 1920.

Dr. *Jadunath Kanjilal*, for the Appellants:—The suit is one for rent and in respect of land within a temporarily settled estate. The plaintiffs and defendants are all co-sharers. The suit is quite maintainable. Defendant No. 1 is a person who is not interested in paying increased rent, which is adverse to his interest. Section 148 does not apply to him. He could not be a party to suit against himself. Both Courts overlooked the Full Bench decisions.

The whole question depends on the interpretation of the contract, which is embodied in the terms of the document. The suit relates to land in a temporarily settled estate. There is nothing in the Act to prevent my exercising my right on the contract. It is irrespective of the Act and section 188, Bengal Tenancy Act, does not apply. Reads portions of translation of the document. Apart from the contract, I have also a right under section 191 and section 192 of Bengal Tenancy Act. This case illustrates that in a temporarily settled estate, the rent of the *darpatnidar* can be altered. Moreover, by the terms of the contract, the rent is not altogether fixed in perpetuity. Reads the translation of a portion of the document. If I am bound to pay increased revenue why should not, on all equitable principles, the man under bear the burden proportionally. An anomolous position may arise, when I may have to pay more than I receive. to Refers *Hem Chandra* v. *Kali Prasanna* (1), *Raja Pramada Nath Roy* v. *Raja Ramani Kanta Roy* (2), *Jatindra Nath Choudhri* v. *Prasanna Kumar Banerjee* (3), also *Gopal Chunder Das* v. *Umesh Narain* (4). Undoubtedly, section 148A does not apply to a pure case for enhancement. Although I get benefit under section 191 and section 192 but as the Judicial Committee pointed out in the last portion of their Judgment in *Jatindra Nath Choudhri* v. *Prasanna Kumar Banerjee* (3) that does not bring me under the Bengal Tenancy Act.

Babu *D. N. Bagchi*, for the Respondents not called upon to reply.

JUDGMENT.

Page, J.—This appeal arises out of a suit for recovery of rent alleged to be due. The plaintiff and the defendants are all co-sharers in a *patni*. The defendant No. 1 is also a *darpatnidar* in respect of these premises under the *patnidars*. The suit has been dismissed by

(1) 26 C. 832 ; 13 Ind. Dec. (N.S.) 1133.
(2) 12 C. W. N. 249 ; 35 I. A. 73 ; 35 C. 331 ; 7 C. L. J. 139 ; 10 Bom. L. R. 66 ; 18 M. L. J. 43 ; 3 M. L. T. 151 (P. C.).
(3) 8 Ind. Cas. 842 ; 38 C. 270 ; 15 C. W. N. 74 ; 9 M. L. T. 1 ; 13 C. L. J. 51 ; 8 A. L. J. 1 ; 13 Bom. L. R. 1 ; 21 M. L. J. 92 ; (1911) 2 M. W. N. 149 ; 38 I. A. 1 (P. C.).
(4) 17 C. 695 ; 8 Ind. Dec. (N. S.) 1004.

both the Courts below on the ground that it is not maintainable in its present form, inasmuch as a suit for relief such as that claimed in these proceedings must be brought by all the co-sharers ; or, at any rate, it must be shown that the co-sharers who are made defendants and not joined as plaintiffs are so joined as defendants because they have refused to be joined as co-plaintiffs. The question before us is as to whether or not the view taken by the lower Courts is correct in law. Dr. Kanjilal, who has argued the case with ingenuity, has urged that the decree of the Court below is wrong because the Court below has misconceived the nature of the proceedings which the plaintiff has begun. His first contention is that the plaintiff's claim is independent altogether of the Bengal Tenancy Act and he urges that he is entitled to the relief which he claims under the terms of the contract between the *patnidar* and the *darpatnidar*. Now, the facts are these. The estate is a temporarily settled estate, when the estate was re-settled an increase of rent was demanded of the *Zemindar* and the *Zemindar* has claimed, as we understand, from the *patnidar* a proportionate sum in respect of the increased rent. Whether that increased rent was paid under the terms upon which that tenure was held we do not know and it is immaterial to enquire. Assuming that it was paid by the *patnidar*, the *patnidar* now claims that he is entitled to recover a proportionate amount of such increased rent from the defendant No. 1, the *darpatnidar* under the registered document which created the tenancy. This registered document has not been officially translated ; but the parties agreed that the material passages of this document provide, firstly, that the rent to be paid by the *darpatnidar* is fixed for ever; secondly, "that the road and public works cesses which are now fixed or which may, in future, be fixed and any other new amount or payment that may be fixed, also whatever is payable by the *darpatnidar* according to law, these sums the *darpatnidar* is liable to pay to us over and above the *jama*." The validity of the first ground taken by Dr. Kanjilal depends upon the true construction of these passages. In my opinion, the above passages mean that the rent as rent is fixed for ever, but that the road cess and public works cess or any other rate or assessment of the same kind whether payable now or payable in the future will be paid by the *darpatnidar* to the *patnidar*. I come to this conclusion by applying the ordinary rules of construction which are applicable to such a clause as that before us: Whereas here, we find a sum, like the sum fixed for rent, which is specifically dealt with, and afterwards special terms followed by a general clause, the general clause is taken to be referable to the subject matter specifically referred to immediately before it, or, in other words, the rule which is to be applied is the rule *ejusdem generis*. For these reasons, in my opinion, it was not permissible for the landlords to vary the rent which had been fixed under the tenancy by applying to the rent the general words which follow road-cess and public cess, etc., "and any other new amount or payment that may be fixed." On the first point, therefore, the appellant fails.

Dr. Kanjilal has, further, contended that if the landlord was not entitled to claim this increased rent under the contract of tenancy, it was inequitable that the *darpatnidar* should escape paying his proportion of the increased rent which fell upon the *patnidar*. That may be unfortunate but in future the *patnidar* must be more careful to see that his legal rights are protected by the terms of the document through which he creates a tenancy. A mere moral claim cannot create a legal right. Therefore, in my opinion, the second ground upon which the appellant relies is without foundation.

Dr. Kanjilal took up a third position, namely, that assuming that the plaintiff had no right in law or in equity to recover the sum as increased rent, he was entitled to recover the same as arrears of rent under section 148-A of the Bengal Tenancy Act, and that in such a case the claim would be outside the ambit of section 188. Whether this sum is to be regarded as arrears of rent or enhancement of rent must depend upon the terms on which the tenancy was created. Having regard to what I have already said with respect to the construction of the registered document of tenancy, it is clear that these sums are not arrears of rent because they are sums claimed in respect of rent which, under the contract as it stands, the landlords are not entitled to recover. In these circumstances, it is

admitted by the learned Vakil that his claim must rest on section 192, Bengal Tenancy Act. But in my opinion the right which he claims is not given to him under that section. The only right which is granted to him under section 192 is conditional upon his fulfilling the conditions set out in sub-sections (*a*), (*b*). He has a right to apply to the Revenue Officer to fix a fair and equitable rent for the land in accordance with the provisions of the Bengal Tenancy Act. Whether or not he has such a right, it is not necessary for us to determine, because this is not a suit which is based upon a fair and equitable rent fixed by the Revenue Officer after an application under section 192. It follows, therefore, that neither at common law, nor in equity, nor under the Bengal Tenancy Act is the plaintiff entitled to recover the increased rent which he has claimed in this proceeding. The result must be that the appeal fails. It is to be observed, even assuming that the plaintiff had been able to establish a claim under section 192, that the suit in its present form would not be maintainable by reason of the provisions of section 188. That would be clearly so on principle and it has been finally settled in that sense by the Judicial Committee of the Privy Council in *Jatendra Nath Chowdhuri* v. *Prosanna Kumar Banerjee* (3). In these circumstances, in my opinion, the appeal fails and must be dismissed with costs.

Suhrawardy, J.—I agree.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1493 OF 1922.

February 18, 1924.

Present :—Mr. Justice Daniels.

FAQIR MUHAMMAD—PLAINTIFF—APPELLANT

versus

BHAGU KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s 116—Tenant in possesion—Kabuliyat in favour of third party—Estoppel—Contract with mutual obligations—Parties, rights and liabilities of.

Where a contract contains mutual obligations, a party who is unable to perform his part of the contract cannot exact performance from the other party.

The mere execution of a *Kabuliyat* by a person already in possession as tenant of a third party does not operate as an estoppel in favour of the lessor.

Second appeal against the District Judge, Farrukhabad, dated the 19th July 1922.

Mr. *N. C. Vaish*, for the Appellant.

Mr. *Saila Nath Mukerji*, for the Respondents.

JUDGMENT :—This is an appeal by the plaintiff Fakir Muhammad against the dismissal of his suit for arrears of rent against the defendants under the following circumstance. The three defendants, Bhaggu Khan, Abid Khan and Yakub Khan, are cultivating the plot in suit probably from the original occupancy tenant under a sub-lease for five years the term of which had not expired. During the pendency of the sub-lease the occupancy tenant gave a lease of the same land to the plaintiff Fakir Muhammad. This lease was contrary to the provisions of section 35 of the Tenancy Act and it is not now disputed that it was illegal. The plaintiff however, got one of the three sub-tenants, Abid Khan to execute a *Kabuliyat* in his favour. In this Court he relies on section 116 of the Evidence Act and urges that Abid Khan having executed a *Kabuliyat* in his favour is precluded from denying his title and, therefore, even though the suit might be dismissed against the other defendants it should have been decreed against Abid Khan.

This argument is good so far as it goes but it does not entitle the appellant to succeed. Where a contract contains mutual obligations, a party who is unable to perform his part of the contract cannot exact performance from the other party. Admitting that a *Kabuliyat* is sufficient to constitute a contract of tenancy [the point was left open in the Full Bench case of *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh*, (1)] the lessor is deemed to contract that he will give

(1) 2 Ind. Cas. 211 ; 31 A. 276 ; 6 A. L. J. 167 ; 5 M. L. T. 347.

the lessee possession as a lessee. This the plaintiff cannot do. Abid Khan remained bound jointly with the defendants to pay rent to the original tenant from whom they were jointly holding. The *Kabuliyat* was a mere paper transaction and intended to strengthen the plaintiff's hand in the dispute regarding the validity of the plaintiff's lease. The estoppel relied on by the plaintiff can only operate against his tenant and a tenancy implies that the tenant has been let into possession of the land by or on behalf of the landlord. Here the defendants have been in possession throughout as sub-tenants of the occupancy tenant. The law is thus stated in Mr. Ameer Ali's Commentary on section 116 of the Evidence Act.

"Where, however, the tenant *being already in possession* has made an attornment or acknowledgment of the tenancy he may show that he did so through ignorance, mistake or the like."

In this view, the mere execution of the *Kabuliyat* by a person already in possession as tenant of a third party does not operate as an estoppel in favour of the plaintiff.

I, therefore, dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 882 OF 1921.

September 7, 1923.

Present :—Mr. Justice Spencer and
Mr. Justice Devadoss.

BURLA APPANNA AND ANOTHER—
PETITIONERS—APPELLANTS
versus
ANALA LATCHAYYA AND OTHERS—
COUNTER-PETITIONERS—RESPONDENTS.

Letters Patent (Madras), clause 16—Civil Procedure Code (Act V of 1908), section 115—Madras Estates Land Act (I of 1908), sections 171, 172—Board of Revenue, orders of—Revision—High Court, jurisdiction of.

The High Court will not interfere in revision under section 115 of the Civil Procedure Code with an order of the Board of Revenue passed in the exercise of its jurisdiction under section 171 of the Madras Estates Land Act, as another remedy by way of a Civil suit is provided in such a case by section 173 of the Act.

Per Spencer, J.:—An order of the Board of Revenue passed under section 171 or section 172 of the Madras Estates Land Act is not a judicial proceeding of a Court subordinate to the High Court and is not open to revision by the latter under section 115 of the Civil Procedure Code.

Per Devadoss, J.—The Board of Revenue as such is not a Court exercising judicial functions subject to the appellate jurisdiction of the High Court but being a Civil Court when it acts judicially under section 171 or section 172 or any other section of the Madras Estates Land Act, it is subject to the revisional jurisdiction of the High Court.

Section 173 of the Madras Estates Land Act provides a separate remedy by suit in a Civil Court and where that is the case there is no power of revision.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Board of Revenue, Madras, in Miscellaneous No. 1936 dated the 26th September 1921, passed on the proceedings of the Revenue Officer, Ganjam, in O. P. No. 48, dated, the 14th June 1921.

Mr. *B. Jagannadha Doss*, for the Petitioners.

JUDGMENT.

Spencer, J.—This is an application to the High Court to revise, under section 115, Civil Procedure Code, the proceedings of the Board of Revenue acting in the exercise of the powers vested in it by rule 21 of the rules made by the Local Government under section 215 of the Madras Estates Land Act, whereby the Board was constituted an appellate authority under section 171 for the purpose of hearing appeals from decisions of Revenue Officers passed under section 169 in the Chapter relating to Record of Rights in Act I of 1908. It is alleged that the Board of Revenue acted illegally in the exercise of its jurisdiction by dismissing the petitioner's appeal without hearing him in person or by Vakil.

It is a question whether the High Court can and should, in the circumstances of this case, exercise its revisional powers under the Civil Procedure Code. At the hearing of this petition the respondents were not represented we have not, therefore, had the advantage of

hearing arguments on both sides of this difficult question.

Under the Rent Recovery Law in force in Madras before Madras Act I of 1908 became law, judgments and orders of Revenue Courts were specially exempted from revision by any higher authority (*Vide* section 76 of Act VIII of 65) and *Velli Periya Mira* v. *Moidin Padsha* (1), *Appandai* v. *Srihari Jaishi* (2) and *Venkatanarasimha Naidu* v. *Suramma* (3).

By section 192 of the Madras Estates Land Act, section 622 of the Code of Civil Procedure of 1882 (corresponding to section 115 of the Code of 1908) has been made applicable to all suits, appeals and other proceedings of the Madras Estates Land Act and, under section 115, the High Court has power to revise the decision of any Court subordinate to it when no right of appeal is provided. The question thus arises whether the Board of Revenue is a Court subordinate to the High Court for the purpose of this section. Section 3 of the Civil Procedure Code defines what subordination of Courts means. The Board of Revenue is not included in this definition. Neither does it answer the test of subordination in section 195 (7) of the Criminal Procedure Code, as appeals do not ordinarily lie to the High Court from its decisions. Nor is the Board of Revenue one of the Civil Courts over which the High Court exercises control by virtue of section 27 of the Madras Civil Courts Act. It is evident that when Civil Courts are mentioned in sections 172, 173, 179 and 189 of the Estates Land Act, Courts which have power to try all sorts of Civil suits are designated, as distinguished from Revenue Courts which only have jurisdiction over the suits and applications detailed in the Schedule to the Act. But the Privy Council has held in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (4) that Rent Courts passing decrees for rent under the Bengal Rent Act are Civil Courts for the purpose of the Civil Procedure Code of 1859; and under clause 16 of the Letters Patent all the Civil Courts in the Presidency have been subordinated to the High Court. Following this ruling, the Calcutta High Court interfered in revision with the order of a Deputy Colletor passed in execution of a decree under the Rent Recovery Act: (See *Chaitan Patjosi Mahapatra* v. *Kunja Behari Parnaik* (5).

From this it follows that Collectors and other Revenue Officers trying suits enumerated under two heads in Part A of the Schedule are disposing of applications described in Part B are Revenue Courts in all cases where an appeal is provided to the District Court, and are also inferior Civil Courts within the meaning of section 3 of the Civil Procedure Code because the High Court hears second appeals from the decrees of District Courts passed in appeals from such Court's decisions and can revise the District Court's proceedings in cases where no second appeal is provided. In has already been held in this Court in *Paramaswami Aiyengar* v. *Alamelu Nathiar Ammal* (6) that the High Court can revise an order made by Revenue Court in the course of trying a suit for rent. Further, these Courts are subject to the superintendence of the High Court by a virtue of the Letters Patent.

It does not, however, follow that the Board of Revenue, when discharging the functions vested in it by the Government Notification No. 159 of April 5th, 1910, is a Court exercising judicial functions.

As an example it could not be contended for a moment that decisions of the Board of Revenue under sections 18 and 23 of Madras Act III of 1895, on appeal from orders made by Collectors upon claims to hereditary village offices, are open to revision by the High Court under section 115, Civil Procedure Code even if there were no specific provision in these sections as to the finality of the decisions. Section 21 of that Act, like section 189 of Act I of 1908, bars the original jurisdiction of Civil Courts. Again, we have been shown no authority for the theory that the Board of Revenue, when proceeding under sections 171, 172 and 205 of the Madras Estates Land Act, is subordinate to the High Court. As an instance of the limita-

(1) 9 M. 332 ; 3 Ind. Dec. (N. S.); 627.
(2) 16 M. 451 ; 5 Ind. Dec. (N. S). 1020.
(3) 17 M. 298 ; 6 Ind. Dec. N. S. 206.
(4) 9 C. 295 ; 12 C. L. R. 361 ; 9 I. A. 174 ; 5 Shome L. R. 120; 4 Sar. P. C. J. 392 ; 6 Ind. Jur. 517; 4 Ind. Dec. (N. S.) 846 (P.C.).

(5) 11 Ind Cas. 207 ; 38 C. 882 ; 15 C. W. N. 868; 14 C. L. J. 284.
(6) 49 Ind. Cas. 11 ; 42 M. 76 ; 35 M. L. J. 632 ; 9 L. W. 26 ; (1918) M. W. N. (107).

tion of the High Court's powers of interference under section 115 I would cite the ruling in *Manavala Goundan* v. *Kumarappa Reddi* (7), that the High Court cannot interfere in revision with the procedings of a District Registrar. *Chatterjee* v. *Tribedy* (8) is distinguishable by the fact that, under the rules framed under the Calcutta Rent Act, a Rent Controller has been constituted a Court of civil jurisdiction. I am of opinion that we should decline to interfere with the order of the Board of Revenue in this case for three reasons. First, because the Board of Revenue's order is not a judicial proceeding of a Court subordinate to the High Court; secondly because the powers vested in the Board of Revenue are powers of a revisional character, as may be seen from section 172 and from the head-note to section 171, and the exercise of revisional powers by two independant authorities would lead to inconvenient conflicts of jurisdictions: (Vide *Ramaswami Naidu* v. *Subbarayalu Naicker* (9), thirdly, because section 173 provides as eparate remedy by suit in a Civil Courts and because this Court has held in *Ittiachan* v. *Vellappan* (10), that where that is the case there is no power of revision.

The petition is, for these reasons, dismissed without costs.

Devadoss, J:—This is an application under section 115, Civil Procedure Code, to revise the order of the Board of Revenue, Madras, passed on a petition of appeal presented by the petitioner against the proceedings of the Revenue Officer who prepared a Record of Rights for Haripuram village in the Mandasa Estate, Ganjam District, under section 166 (1) of the Madras Estates Land Act, 1908. The petitioner appealed to the Board of Revenue, Madras, under section 171 of the said Act, and his petition of appeal was dismissed by the Board of Revenue without hearing him. It is this order of dismissal that is sought to be revised. Though the respondents are not represented here, it is but fair to observe that Mr. Jagannadha Doss who appears for the petitioner has brought to our notice all the cases *pro* and *con* which bear on the points raised by him.

Before considering whether this is a fit case for exercising revisional powers it is necessary to see whether there is revisional jurisdiction in the High Court over orders passed by the Board of Revenue under Chapter 11 of the Madras Estates Land Act. Mr. Jagannadha Doss puts forward three contentions: (1) the Letters Patent of the High Court classifies all Courts into criminal and civil, and, therefore, a Revenue Court is included in the expression 'Civil Court' and the High Court has, therefore, jurisdiction over the Revenue Courts; (2) the Board of Revenue, in exercising jurisdiction under Chapter 11 of the Estates Land Act, is a Civil Court, and, therefore, is subject to the revisional jurisdiction of the High Court; (3) section 192 of the Madras Estates Land Act makes the Civil Procedure Code applicable to proceedings under the Act, and, therefore, the High Court has appellate jurisdiction over the decision of the Board of Revenue.

The first point is not supportable on any authority. It is a fallacy to say that, because the Letters Patent do not specifically refer to Revenue Courts, therefore, they are included in the expression 'Civil Court.' To use the term "Court" with regard to revenue is a misnomer, but where they exercise judicial functions by virtue of the provisions of any enactment, they may be termed Courts. The appellate and revisional powers of the High Court may be sought in section 15 of 24, 25 Vic., Ch. 104, now section 107 of 5 and 6 Geo. V, Ch. 61 and section 16 of the Letters Patent. It cannot be successfully contended that the Board of Revenue as such is a Court exercising judicial functions subject to the appellate jurisdiction of the High Court.

The next point is that the Board of Revenue exercises judicial functions when it decides appeals under section 171 of the Madras Estates Land Act, and, therefore, is subject to the revisional jurisdiction of the High Court. Under Chapter II of the Estates Land Act, a Survey may be made and a Record of Rights may be prepared by a Revenue Officer in respect of an estate or a portion of an estate in certain cases specified in section 164 and an appeal is provided against a record of such rights; and section 172 gives power

(7) 30 M. 326; 17 M. L. J. 313; 2 M. L. T. 267.
(8) 68 Ind. Cas 274; 26 C. W. N. 78; 49 C. 523; (1922) A. I. R. (C.) 427.
(9) 32 Ind. Cas. 567; 3 L. W. 152.
(10) 8 M. 484; 3 Ind. Dec. (N.S.) 351.

to the Board of Revenue to direct the revision of any Record of Rights or any portion of a Record of Rights. Does the Board of Revenue become a Civil Court by reason of its hearing an appeal from the order of the Revenue Officer? Section 192 of the Act makes the Civil Procedure Code except certain sections applicable to proceedings under the Act. The Board of Revenue being governed in its proceedings under the Madras Estates Land Act by the Civil Procedure Code becomes a Civil Court for the purposes of the Act. It is urged that, by section 16 of the Letters Patent, all Civil Courts in the Presidency are subject to the superintendence of the High Court and the Board of Revenue, being a Civil Court when it acts under the Madras Estates Land Act, is subject to its revisional jurisdiction. If the Board of Revenue is a Civil Court for the purpose, however limited, so far as that purpose is concerned, it is subject to the jurisdiction of the High Court. The Estates Land Act does not give a right of appeal to the High Court from the orders of the Board of Revenue. The case relied on by Mr Jagannadha Doss do not help him materially. In *Paramaswami Aiyangar* v. *Alamelu Natchiar Ammal* (6), it was held that the High Court was competent to revise the order of the Revenue Court under section 115, Civil Procedure Code, which is made applicable to proceedings in Revenue Courts by section 192 of the Madras Estates Land Act. In another case *Ramaswamy Goundan* v. *Kali Goundan* (11), the same Bench which decided the case reported at page 310 held that the revision petition to the High Court was competent because section 192 of the Madras Estates Land Act rendered section 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the Act even though section 205 thereof gave a power of revision to the Board of Revenue and the District Collector; but when the petitioner had previously applied to the Revenue Authorities and failed, the High Court would decline to exercise its discretionary power in revision, unless it was imperatively called upon to do so to prevent miscarriage of justice. In *Nilamoni Singh* v. *Taranath Mukerjee* (4) the High Court interfered in revision with the orders of the Deputy Commissioner transferring a decree for rent made by one Court to another. The learned Judges observe at p. 297: "If the orders complained of are passed without jurisdiction, we think we have the power to interfere under section 15 of the Act of Parliament constituting this Court." Their Lordships of the Privy Council "entirely agree with the view taken by the High Court of their own jurisdiction." *Vide* also *Chaitan Patgodi Mahapatra* v. *Kunya Behari Patnaick* (5). The Madras cases lay down that the High Court could interfere in revision with the orders of the Collector under the Madras Estates Land Act, and the cases decided by the Calcutta High Court recognise the jurisdiction of the High Court to interfere in revision with orders passed by the Revenue Courts under the Bengal Rent Recovery Act, X of 1859. It was uniformly held under the Madras Rent Recovery Act, VIII of 1865, that the High Court had no jurisdiction to revise the order of the Revenue Court under section 662 of the old Code, now section 115 of the present Code, vide *Velli Peria Mira* v. *Moidin Padsha* (1), *Appandai* v. *Sarihari Joshi* (2), and *Venkatanarasimha Naidy* v. *Suramma* (3). The present Estates Land Act has removed the bar placed upon the revisional jurisdiction of the High Court by section 76 of Act VIII of 1865, vide *Ramaswamy Naicker* v. *Subbaroyalu Naicker* (9). Section 205 of the Madras Estates Land Act gives revisional powers to the Board of Revenue and Collectors, and it cannot be said that it has denied the same to the High Court. The Act specifically provides for appeals to the District Court in certain cases from the decisions of the Collectors and it follows that under section 100, Civil Procedure Code, a second appeal will lie in proper cases, and the provisions of section 115 will, therefore, apply to cases where an appeal would be incompetent. In *Chatterjee* v. *Tribedi* (8), the Calcutta High Court held that it had jurisdiction to interfere with the order of the Rent Collector's Court under section 107 of the Government of India Act on the ground that "the rules framed by the Local Government under section 23 of the Calcutta Rent Act, lay down that in all proceedings before them under the Act the Controller and the President of the Tribunal shall have all the power possessed by a Civil Court for the trial of suits. See also rule 4 which says that in making inquiries under the Act, the Controller or the President of the Tribunal shall follow, as nearly as may be, the procedure

laid down in the Code of Civil Procedure for the regular trial of suits ; the substance only of the evidence being recorded as in appealable cases." The question that is not free from difficulty is this : Is the Board of Revenue, when it exercises jurisdiction under the Madras Estates Land Act, a Court from which appeals lie to the High Court or a Court subject to its superintendence ? The subordination of Courts is determined according to the Criminal Procedure Code, section 195, by the fact that appeals ordinarily lie from one Court to another. So far as I am aware, in no case does an appeal lie to the High Court from the decision of the Board of Revenue. Section 15 of 24 and 25 Vic., Ch. 104 and section 16 of the Letters Patent have been construed as giving jurisdiction to the High Court over all the Civil Courts of the Presidency. If that construction is correct, it necessarily follows that the Board of Revenue, being a Civil Court when it acts judicially under sections 171 or 172 or any other section of the Madras Estates Land Act, is subject to the revisional jurisdiction of the High Court.

It is unnecessary to consider the third point in the view that I have expressed on the second point. Section 173 of the Madras Estates Land Act gives remedy to a person aggrieved by an entry in a Settlement Record prepared under sections 168 to 171, or by omission to settle a rent by way of suit in a Civil Court. As a rule, the High Court does not interfere in revision with decrees or orders of Subordinate Courts when the party aggrieved has another remedy by way of appeal, suit or otherwise. On this ground the petition fails and is dismissed.

V. N. V. *Revision dismissed.*

N. H.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 5 AND 6 OF 1922.

October 15, 1923.

Present :—Mr. Raymond, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

GOBINDRAM VORHOMAL—APPELLANT
versus
THE ASSISTANT COLLECTOR OF SHIKARPUR—RESPONDENT
AND
KHUSHIRAM DEOOMAL—APPELLANT
versus
ASSISTANT COLLECTOR OF SHIKARPUR—RESPONDENTS.

Land Acquisition Act (*I of* 1894), *s.* 23—*Market-value, meaning of—Best evidence, what is—Adaptability of agricultural land as building site—Compensation, basis for award of.*

The market-value of land may be roughly described as the price that an owner willing, and not obliged, to sell might reasonably expect to obtain from a willing purchaser with whom he is bargaining for the sale and purchase of the land.

Kailas Chandra v. *The Secretary of State for India in Council*, 18 Ind. Cas. 638 ; 17 C. L. J. 34, followed.

The best evidence to prove what a willing purchaser would pay for the land under acquisition would be the evidence of genuine sales effected about the time of the Notification for acquisition, either in respect of the same land or any portion thereof or the sale of lands precisely parallel in all its circumstances to the sale of land under compulsory acquisition.

Trustees for the Improvement of the City of Bombay v. *Karsondas*, 1 Ind. Cas. 451 ; 33 B. 28 ; 10 Bom. L. R. 688, relied upon.

The fairest and most favourable basis on which compensation should be awarded to the owner is to estimate the market-value of the property according to the most lucrative and advantageous way in which such land can be laid out at the time of acquistion but the operative effect of special adaptability or future utility of land must be estimated not by idle speculation and unpractical imagination but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled had the land been exposed for sale when it was to be compulsorily acquired.

Dhareesamma v. *The Deputy Collector of Cochin*, 77 Ind. Cas. 347; 45 M. L. J. 339; 18 L. W. 356; (1923) M. W. N. 682; 33 M. L. T. 48; *Mohini Mohan Bannerji* v. *Secretary of State for India*, 67 Ind. Cas. 25; 25 C. W. N. 1002 34 C. L. J. 188, followed.

GOBINDRAM VORHOMAL *v.* THE ASSISTANT COLLECTOR OF SHIKARPUR

Adaptability of agricultural lands as building sites is a factor to be taken into consideration in fixing the value of land under compulsory acquisition, deductions being made for payment of the ordinary premium and revised assessment which may be leviable on conversion of agricultural lands into building sites.

In the matter of the Land Acquisition Act X of 1870 *Munji Khetsey*, 15 B. 279; 8 Ind. Dec. (N. S.) 189; *Bhujabalappa* v. *The Collector of Dharwar*, 1 Bom. L. R. 454; *Daya Khushal* v. *The Assistant Collector of Surat*, 21 Ind. Cas. 320; 88 B. 37. 15 Bom. L. R. 845, relied upon.

Much importance should not be attached to evidence of offers in ascertaining the market-value of the land.

Government of Bombay v. *Merwanji Muncherji*, 10 Bom. L. R. 907, relied upon.

Appeals by claimants against the judgment and decrees of the District Judge, Larkana, dated the 14th November 1921 on a reference under section 18 of the Land Acquisition Act.

Mr. *Fatehchand Assudamal*, for the Appellants.

Mr. *T. G. Elphinston*, for the Respondents.

JUDGMENT.—These two appeals, Nos. 5 and 6 of 1922, arise out of a reference under section 18 of the Land Acquisition Act.

Portions of Survey Nos. 208|2 and 208|3 in Deh Abdoo in the Sukkur Taluka have been acquired by the Secretary of State for India for the purposes of a District Local Board School.

Survey No. 208|2 belongs to one Khushiram, appellant in appeal No. 6 of 1922, and Survey No. 208|3 belongs to one Gobindomal, appellant in appeal No. 5 of 1902.

Both the Survey Nos. are at present used for agricultural purposes. It is said that as they adjoin the village of Napar they can be used as building sites and as such have a special value.

In the inquiry before the Land Acquisition Officer, Khushiram, appellant, valued his land at Rs. 2,000 per acre the Appellant Gobindomal declined to part with his land or to put any value on it.

The Land Acquisition Officer awarded compensation to both the appellants at the rate of Rs. 425 per acre exclusive of the statutory allowance of 15% His awards were upheld by the District Judge, Sukkur. In the Court below the appellants claimed certain allowances for severance of their holdings, for interest and for the value of trees standing on the portions under acquisition. They have, however, confined the present appeals to the question of fair market-value of their lands. Under section 2, clause (1) of the Act, the market-value of the land under acquisition is to be determined as on the date on which the notice to acquire the land is published.

The "market-value" of land has not been defined in the Act. As said by Sir Lawrence Jenkins in *Kailaschandra* v. *The Secretary of State for India* (1), market-value of land may "roughly be described as the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land."

The best evidence to prove what a willing purchaser would pay for the land under acquisition would be the evidence of genuine sales effected about the time of the Notification for acquisition, either in respect of the same land or any portion thereof or the sale of lands precisely parallel in all its circumstances to the sale of land under compulsory acquisition. Generally, such evidence is not available, and differences exist and it is difficult to state with precision what allowance should be made for them: *In re the Trustees for the Improvement of the City of Bombay* v. *Kersondas* (2). In the present appeals no evidence of precisely parallel sales has been given. The evidence which has been recorded may be classfied into four heads *viz.*, (*a*) sales of agricultural lands, (*b*) sales of building sites, (*c*) offers for purchase of agricultural lands alleged to be similarly situated, and (*d*) the estimated income from the agricultural produce of the lands under acquisition.

The appellants contend that their lands are richer in soil, irrigated by well water, and used at present for potato cultivation yielding a better return and as such have a better selling value as agricultural lands than other surrounding agricultural lands, and that the agricultural value of their lands is much higher than Rs. 425 per acre fixed by the lower Court. They further contend that in addition to this higher agricultural value their lands are suitable for building sites and as such have an additional potential value which should be taken into consideration in fixing their proper value. It may be conceded

(1) 18 Ind. Cas. 638; 17 C. L. J. 34.
(2) 1 Ind. Cas 151; 33 B. 28; 10 Bom. L. R. 688.

that the adapatability of agricultural lands as building sites is a factor to be taken into consideration in fixing value of land under compulsory acquisition ; deductions being made in this Province from the value so fixed for payment of the ordinary premium and revised assessment which is leviable by Government under the Bombay Land Revenue Code on conversion of agricultural lands into building sites. *In the matter of the Land Acquisition Act, X of* 1870, *Munji Khetsey* (3), *Bhujabalappa* v. *The Collector of Dharwar* (4) and *Daya Khushal* v. *Assistant Collector of Surat* (5). It is based on the well established principle that the fairest and most favourable basis on which compensation should be awarded to the owner is to estimate the market-value of the property according to the most lucrative and advantageous way in which such land can be laid out at the time of the acquisition, *Thareesamma* v. *The Deputy Collector of Cochin* (6) and *Mohan Bannerji* v. *The Secretary of State for India* (7), containing an exhaustive resume of both the Indian and English rulings on the point. As, however, pointed out by Sir Ashutosh Mukerji at page 1005 the operative effect of special adaptability or future utility of land must be estimated not by idle speculation and unpracticable imagination but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled had the land been exposed for sale when it was to be compulsorily acquired.

Whether the appellants' lands have such special adaptability or future utility which would weigh with a prudent and willing intending purchaser or not, we shall consider after discussing the evidence of their value as agricultural lands.

Mr. Ladharam, the *Mukhtiarkar* of the Taluqa, and a Government witness, admits that the lands of the appellants being nearer to the village of Napar are more valuable than lands further off, that the lands are watered by a well and as such they are better than "lift" and "flow" lands. He also admits that land has "gone up in value a little since 1918" and that there has been no rise in prices from 1914 to 1918. Mr. Taunton, the Land Acquisition Officer, states that "flow" land is considered inferior to "well" land but superior to "lift" a land and that he generally adds Rs. 100 per acre for "flow" land and another Rs. 100 per acre for "well" land as representing the difference in their prices. He further states that there has been an increase of about 30 per cent. in the price of land between 1913 and 1917 and that land has also gone up in value of late.

The evidence adduced by either side of sales of agricultural lands is scanty and very unsatisfactory. It may be tabulated as under :—

Serial No.	Year of sale.	Description of land sold.	Area sold.	Price paid.	Price per acre.
1.	14—6—1910	Portion of S. No. 314	21 Ghantas	500	995 0 0
2.	31—1—1912	Do. Described as S. No. 537 ...	,,	994	1,895 0 0
3.	1913—1914	Do. S. Nos. 117,127,128 & 183	33 ,,	800	815 12 0
4.	31— 1—1916	Do. S. Nos. 115 & 117	9 ,,	700	3,110 0 0
5.	24— 2—1916	S. No. 116	22 ,,	2,600	3,250 0 0
6.	3— 4—1916	Portion of S. Nos. 101, 102 & 158	22 ,,	200	363 13 0
7.	18— 8—1916	S. No. 149	58 ,,	600	412 13 0
8.	25— 4—1918	Portion of S. Nos. 367, 493 & 497	59p ,,	300	200 0 0
9.	28— 1—1921	A plot in Deh Wahi Majidi.	40 ,,	1,000	1,000 0 0
10.	4—10—1921	Do. Deh Khani	25 ,,	1,000	1,000 0 0
11.	...	Do. Do.	31 ,,	2,000	2,660 0 0

(3) 15 B. 279 ; 8 Ind. Dec. (N.S.) 189.
(4) 1 Bom. L. R. 454.
(5) 21 Ind. Cas. 320 ; 38 B. 37 ; 15 Bom. L. R. 845.
(6) 77 Ind. Cas. 347 ; 45 M. L. J. 339 ; 19 L. W. 356 ; (1923) M. W. N. 682 ; 33 M. L. T. 48.
(7) 67 Ind. Cas. 25 ; 25 C. W. N. 1002 ; 34 C. L. J. 188.

The respondents have led evidence in respect of sales Nos. 3, 6, 7 and 8 and the learned District Judge has taken this evidence of these sales into consideration in arriving at his estimate.

The Tapedar Choithram speaks of sales Nos. 3, 6 and 8 by reference to an entry in certain Revenue Registers. He cannot, however, speak as to the comparative agricultural value of the lands referred to in any of these sales. Whether these lands were "well" "flow" or "lift" lands at the dates of the sales or as to the circumstances under which these sales were effected. Though admittedly there has been a general rise in prices, sale No 8 which was made in 1918 is at Rs. 200 per acre while the sales in 1914 and 1916 are at Rs. 315-12-0 and Rs. 363-13-0 per acre respectively.

Survey Nos. 117, 127 and 132 which are subject matter of sale No. 3 are not contiguous. Only 38 Ghantas out of a large area from Survey Nos. 117, 127, 128 and 132 were conveyed under sale No. 3. It is not unlikely that this sale was by one Mahomdan cosharer in favour of other Mahomedan cosharers. Similarly, Survey Nos. 101 and 158, subject matter of sale No. 6, and Survey Nos. 367, 493 and 497, subject matter of sale No. 8, are not contiguous and the same argument applies to those sales as well. Survey No 117 and the adjacent Survey Nos. 115 and 116 were sold in 1916 at a price exceeding Rs. 3,000 per acre. Though this price may have been exaggerated or paid on account of special consideration-and as such not the fair market-value in 1916, the price of Rs. 315 per acre paid for a portion of Survey No, 117 in 1914 is equally open to the objection that it is much below its market-value in 1914. If the lands referred to in sales Nos. 3 and 6 were "lift" lands at the date of the sale and Rs. 200 extra was added on for the difference in value of "well" land over "lift" land and another 30 per cent. added for rise in prices, the price of the appellants' land would be considerably over Rs. 425 per acre.

Sale No. 7 is in favour of the witness Hisamdin who admits that the appellants' lands are more valuable than his ; that their is no well on his land and that, as a rule, he grows *jowari* crop and occasionally wheat and gram. The map of *Deh Abdoo*, Ex. 61, shows that Survey No 149 is at a considerable distance from the villages of Abdoo and Napar. It is surrounded on all sides by agricultural lands and is further away from the main roads. It is somewhat difficult to accept the price at which Survey No. 149 was sold in 1916 as the price for the appellants' lands in 1920. It is not clear if this Survey number is "lift" or "flow" land ; even if it be "flow" land a sum of Rs. 100 per acre plus a certain percentage for rise in prices and also a certain amount for inferiority of the soil have to be added to Rs. 412-13-0 per acre to arrive at a fair valuation of the appellants' lands.

On the other hand, the evidence of the appellants of sales is equally unsatisfactory. The learned District Judge has very rightly excluded from his consideration sales Nos. 9, 10 and 11 which refer to sales subsequent to the Notification and refer to lands in other *Dehs*.

Sales Nos. 1 and 2 were made eight years prior to the acquisition and are, therefore, not of much evidentiary value. The sale-deed Ex. 41 which refers to the first sale recites that 8-annas share in the land, in the water courses, and in a *pukka* well is being conveyed in addition to the standing Mango trees. The price paid under this deed works out at Rs. 500 per acre. On the other hand, Ex. 36 which refers to the second sale purports to convey only a 0-4-9-pies share in the same survey number and in the rights in a water course, but does not refer to any rights in a *pukka* well, the price per acre paid under this deed is, however, double the price paid under Ex. 41. This is due to the fact that the purchasers under Ex. 36 were prior to mortgagees and were purchasing the lands in part payment of their debts from their debtors and this fact appears from the deed Ex. 36 itself.

The only other sales of agricultural lands relied on by the appellants are sales Nos. 4 and 5.

It is curious that, though the appellants could not have been ignorant of these two sales, Khusiram, appellant, was content with claiming Rs. 2,000 per acre for his lands.

Both the sales are by Mahomedan agriculturists in favour of *Banias*, and though the deeds contains the usual recitals of cash consideration having been paid, it is not unlikely

that the sales were not for cash consideration. Ex. 34, which refers to sale No. 5, recities that the land thereby conveyed had been cultivated by the Mahomedan vendors and that not only the land but the standing crop as well was being sold. This is somewhat unusual. The vendors have not been examined. The lands adjoin the more important and bigger village of Abdoo and the sale includes the price of the *pukka* wells and the trees. in addition to the standing crops which were the subject-matter of sale No. 5.

The two sales were made four years prior to the acquisition, they were solitary instances of such high prices being paid for agricultural lands in that *deh* or the adjoining *dehs* of Wahi Majidi and Khahi. It is likely that such high prices were paid by purchasers at the time of a temporary boom and also probably towards satisfaction of prior debts.

We are of opinion that the learned District Judge was right in not taking the evidence of these two sales into consideration.

The evidence of sales of building sites in the village of Napar has also been rightly excluded. Such evidence cannot form the basis of fixing the market-value of agricultural land outside the village though adjoining to it and which is liable to payment of a fine or premium and of a revised assessment. The evidence on this point is further more unreliable. It consists of the witness Santoomal who says that he bought a plot with a building thereon in December 1911 for Rs. 300 and values the building at only Rs. 5 or Rs. 6 and the witness Shevomal who speaks of having purchased another house in 1914 for Rs. 560 and values his building at the date of the purchase at Rs. 60. The recitals in the two sale-deeds Exs. 48 and 43 respectively, contain a detailed description of the structures on the two plots. In view of those recitals there is no doubt that the buildings on the two plots were of considerable value and that their statements as to the buildings being worth Rs 6 and Rs. 60 are false. The evidence of offers for lands adjoining the village is also of a shadowy nature. It depends on the statement of one solitary witness, Soomomal Ex. 57. He says he received an offer for 12 *Ghantas* of land recently converted into a building site which works out to Rs. 6,000 per acre and of another offer of the adjoining agricultural land not yet converted as a building site but suitable as such at Rs. 4,000 per acre.

Too much importance cannot be attached to evidence of offers in ascertaining the market-value of the land cf. *Government of Bombay* v. *Merwanji Muncherji* (8). In the present case we can attach no importance whatsoever to the uncorroborated evidence of Shevomal who does not disclose the names of the persons who have made the offers. He is interested in the appellants and according to the learned Judge was enthusiastic in supporting the appellants.

There is, however, evidence on the record to show that Government acquired 4½ *Ghantas* of land from the witness Soomomal though at some distance from the village of Napar and paid him Rs. 296. This price is said to include 15% compulsory allowance as also to include interest. Soomomal was not prepared to deny that half of it was interest. This would work out to more than Rs. 1,000 per acre. There is also evidence of the *Mukhtyarkar Ladharam* that he estimates the net profit of the owner from potato lands at Rs. 50 to Rs. 100 per *jireb* when the price of potatoes is from Rs. 6 to Rs. 8 per maund and at half that amount in ordinary years when the price of potatoes is from Rs. 3 to Rs. 4 per maund. The appellants have led evidence of the estimated income from potato lands which has been disbelieved by the learned Judge. It is true that the evidence of the witnesses for the appellants shows only the gross income of potato lands and that it is not quite easy to fix the net income from such evidence. This evidence does, however, show that the income from potato cultivation is substantial and is not less than the sum Rs. 50 per acre as indicated by the *Mukhtyarkar*. The net income realized by the withess Hisamdin from his wheat crop in Survey No. 497 was about Rs. 40 per acre. The net income from potato lands may fairly be estimated at Rs. 50 per year. And if this income is capitalised at 20 years' purchase it works out at Rs. 1,000 per acre. The appellants have failed to prove that their lands have any potential value as building sites. It is true that there is no waste land available in the village of Napar which can be used as a build-

(8) 10 Bom. L. R. 907.

ing site. The village has got 8 or 10 *Pukka* houses of banias and a population of 950 persons. It is, however, surrounded on all sides by agricultural lands which are not as rich as the appellant's lands. It would not be difficult for intending purchasers to buy the other surrounding agricultural lands on payment to the owners of the agricultural value of such lands. The village of Napar is also very close to the village of Abdoo which has a population of 1,679 persons. Waste land is available in the village of Abdoo which can be obtained from Government for building purposes at the rate of Rs. 5 per *Ghanta* or Rs. 200 per acre. This fact would necessarily prevent a rise in prices of land in the village of Napar as also of the agricultural lands adjoining Napar. It is not likely that a prudent purchaser would be prepared to take into account the alleged future utility of the appellants' lands as building sites in making an offer for the purchase of the appellants' lands. As their Lordships of the Judicial Commitee observe *In re The Secretary of State for Foreign Affairs* v. *Charlesworth Pillink & Co* (9): "In such an enquiry relating to subjects abounding with uncertainties, there is more than ordinary room for guess work and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at." In the present case though the evidence is scanty, we think that, taking into consideration the evidence of the income from potato and other agricultural lands, the evidence of the price paid by the Land Acquisition Officer to Soomomal as also the evidence of some of the sales and adding on to the prices paid a certain percentage for the rise in value as also a sum of Rs. 200 extra as difference in the price of "well" land over" lift," we should fix the value of the appellants' lands at Rs. 1,000 per acre.

We, accordingly, vary the award of the learned District Judge and allow compensation to the appellants at the rate of Rs. 1,000 per acre plus 15 per cent. for compulsory allowance. This amount shall include the claim for interest, if any, up to date.

(9) 26 B. 1 at p. 21 (P. C.) ; 28 I. A. 121 ; 8 Sar. P. C. J. 1.

As the appellants have grossly exaggerated their claim both in the Court below and in the appeal we make no order as to costs.

P. B. A.

K. S. D. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 746 OF 1922.

November 6, 1923.

Present :—Mr. Justice Sulaiman.

MIRZA ABDULLAH BEG AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAMZAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree against some defendants—Appeal by contesting defendants—Subsequent application by absentee defendants to set aside decree—Original Court, jurisdiction of.

A decree was passed *ex parte* against some defendants, and the contesting defendants preferred an appeal against it making the *absentee* defendants *pro forma* respondents. While the appeal was pending the absentee respondents applied to the original Court to have the *ex parte* decree set aside:

Held, that the jurisdiction of the Original Court to entertain the application was not ousted by the appeal.

Gajraj Mati Tewarin v. *Swami Nath Rai*, 36 Ind. Cas. 307 ; 39 A. 13 ; 14 A. L. J. 853; *Palaniappa Chetty* v. *Subramania Chetty*, 62 Ind. Cas. 755; 44 M. 731; 13 L. W. 519; (1921) M. W. N. 309; 41 M. L J. 90; 30 M. L. T. 151; *Kumud Nath Roy Chowdhry* v. *Jatindra Nath Chowdhry*, 9 Ind. Cas. 189 ; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399, relied on.

Palakdhari Rai v. *Mankaran Rai*, 6 Ind. Cas. 205; 7 A. L. J. 598; *Mathura Prasad* v. *Ramcharan Lal*, 28 Ind. Cas. 261; 37 A. 208 ; 13 A. L. J. 282, distinguished.

Second appeal from the decree of the Subordinate Judge of Jaunpur, dated the 11th January 1922.

MIRZA ABDULLAH BEG *v.* RAMZAN KHAN

Mr. A. Sanyal, for the Appellants.

Mr. *Mushtaq Ahmad*, (with him Mr. *M. A. Aziz*), for the Respondents.

JUDGMENT:—This is a plaintiffs' appeal arising out of a suit for possession and arrears of rent. The suit was originally decreed on the 3rd September 1920 against defendants Nos. 1, 5. On the 25th October 1920 defendants Nos. 1, 2 and 3 only appealed to the lower Appellate Court. The proceedings had been *ex parte* against defendants Nos. 4 and 5 and they preferred an appeal; they, were, however, made *pro forma* respondents in the appeal. While the appeal preferred on behalf of defendants Nos. 1, 3, to which defendants Nos. 4 and 5 were parties, was pending an application was presented in the original Court on behalf of defendants Nos. 4 and 5 on the 30th October 1920 for setting aside the *ex parte* decree. Certain objections were filed by the plaintiffs on the 15th November 1920, but in these objections no plea was taken that the Trial Court had no jurisdiction to set aside the decree on the ground that an appeal was already pending. On the 7th May 1921 the Court of first instance, apparently on the ground that the defence raised by the defendant was a common one, set aside the decree not only against the two defendants who had applied but against all the defendants and revived the suit. The suit having been revived the defendants who had appealed to the District Judge got a statement made through their Vakil before the District Judge that there was no longer any necessity for deciding the case and that the appeal should be struck off. The order passed by the Appellate Court was "appeal is dismissed according to the above statement."

When this suit was re-tried by the first Court it was dismissed on the merits. An appeal was preferred by the plaintiffs to the lower Appellate Court; but in the grounds of appeal again no point was taken that the order setting aside the decree was *ultra vires*, nor does it appear to have been argued before the lower Appellate Court as there is no reference to the point anywhere in the judgment. The appeal was dismissed on the merits, the lower Appellate Court coming to the conclusion that the plaintiffs had no right to the land and had never been in possession of it.

A second appeal has been preferred on behalf of the plaintiffs and two main points have been urged on their behalf. One is that the order setting aside the *ex parte* decree was *ultra vires* inasmuch as an appeal had been preferred from that decree and was then pending and the second is that the Court below has erred in interpreting the document filed by the parties.

As regards the second point, there is obviously no force in it. No question of an interpretation of any document arises in this case. The lower Appellate Court, after considering all the documentary and oral evidence, has come to the conclusion that the plaintiffs have no right to the land and have never been in possession of it. The finding is one of fact and cannot be challenged.

The main contention of the plaintiffs, however, is that the Court of first instance had no jurisdiction to interfere with the decree which was then under appeal.

Order IX, r. 13 of the Code of Civil Procedure expressly states that in a case in which a decree is passed *ex parte* against a defendant the latter *may apply to the Court by which the decree was passed for an order to set it aside, etc.* If there were no rulings to the contrary, I would have no hesitation in holding that an application under O. IX, r. 13 had to be made to *the Court which passed the decree.* The opinion prevailing in the various High Courts, however, has by no means been uniform. The view taken in the Madras High Court sometime ago was certainly to the effect that the mere presentation of an appeal to an Appellate Court ousts the jurisdiction of the Court of first instance. Aid appears to have been sought from section 107 of the Code, which gives to the Appellate Court the same powers as are ordinarily performed by the Court of original jurisdiction. This view, however, was dissented from in case after case by the Calcutta High Court, where the opinion was expressed that such an application can be made only to the original Court. In one case the Calcutta High Court went even to the length to which a Bench of this Court in *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1)

(1) 36 Ind. Cas. 307 ; 39 A. 13 ; 14 A. L. J. 853.

was not prepared to go. None of the reported cases of this Court which have been brought to my notice are exactly on all fours with the present case. In the present case there are two circumstances to be noted,—

1. That the appeal had not been disposed of when the first Court's decree was set aside.

2. That the applicants for setting aside the decree were parties to the appeal.

In two earlier cases, namely, those of *Palakdhari Rai* v. *Mankaran Rai*, (2) and *Mathura Prasad* v. *Ramcharan Lal*, (3) it was held that after the decree of the first Court had been affirmed in appeal the first Court had no jurisdiction to set it aside. These cases are distinguishable on the ground that the appeal had been disposed of and the decree of the first Court had been affirmed. On the other hand, the case reported in *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1) lays down that where the applicants for setting aside the decree are not made parties to the appeal, the jurisdiction of the first Court to set aside the *ex parte* decree is not ousted. In the latter case there in an exhaustive review of the previous authorities and it is noteworthy that at pp. 25 and 31 the learned Judges were inclined to the view that the opinion prevailing in the Madras High Court was not supported by any provision of the Code of Civil Procedure and was erroneous. The Madras High Court has, however, since wavered very much. The first case, namely, that of *Ramanadhan Chetty* v. *Narayanan Chetty* (4), has since been overruled by a Full Bench of that High Court *vide Sankara Bhatta* v. *Subraya Bhatta* (5) and in a later case reported in *Palaniappa Chetty* v. *Subramania Chetty* (6) it has now been conceded that the mere presentation of an appeal does not necessarily take away the jurisdiction of the original Court. On the facts, that was a case clearly in point. There a decree was passed *ex parte* against one of the defendants and an appeal against the decree was preferred by another defendant and was pending in the Appellate Court when an application by the former defendant to set aside the *ex parte* decree passed against him was made to the original Court and not to the Appellate Court. It was held that such an application was not barred. I have already noted that the view prevailing in the Calcutta High Court has consistently been against the appellant. The case of *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (7), is a case which on facts is very similar to the present one. That also was a case where the appeal was still pending and had not been disposed of. At page 401 the learned Judges remarked that, inasmuch as the appeal was still pending, the decree of the original Court was still in force and in operation ; it had not been superseded by any decree on appeal or merged therein. Under those circumstances, it was difficult to appreciate how on principle the view could be maintained that the jurisdiction of the original Court to entertain the application to set aside the decree in so far as it was *ex parte* had been taken away. The view that the immediate effect of the presentation of an appeal to a superior Court is to destroy the jurisdiction of the Subordinate Court to deal with the judgment was not accepted as a proposition well-founded on principle.

There is thus the authority of the Madras High Court in *Palaniappa Chetty* v. *Subramania Chetty* (6), and of the Calcutta High Court in *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (7) and there are observations in *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1) supporting the Calcutta view. The earlier cases in *Palakdhari Rai* v. *Mankaram Rai* (2) and *Mathura Prasad* v. *Ram Charan Lal* (3) are clearly distinguishable on the ground that in those cases the appeal had been disposed of and the decree of the first Court confirmed.

In view of this state of the authorities, as well as in view of the clear wording of O. IX, r. 13 of the Code of Civil Procedure, I am of opinion that the contention urged on behalf of the plaintiffs-appellants is without any force. The result is that this appeal fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

(2) 6 Ind. Cas. 205 ; 7 A. L. J. 598.
(3) 28 Ind Cas. 261 ; 37 A. 208 ; 13 A. L. J. 283.
(4) 27 M. 602.
(5) 30 M. 535 ; 17 M. L J. 436.
(6) 62 Ind. Cas. 755 ; 44 M. 731 ; 13 L. W. 519 ; 21 M. W. N. 809 ; 41 M. L. J. 90 ; 30 M. L. T. 19.

(7) 9 Ind. Cas. 189 ; 38 C. 394; 13 C. L. J. 221 ; 15 C W. N. 399.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 541 of 1918.

April 24, 1923.

Present :—Mr. Raymond, A. J. C.

THAWERDAS JETHANAND, BY THE OFFICIAL RECEIVER, AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
R. B. SETH VISHENDAS NIHALCHAND —DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882) s. 6 (e)—Property, meaning of—Partner's right to sue for accounts—Transfer, validity of.

The term 'property' includes any property over which or the profits of which any person has disposing power which he may exercise for his own benefit. [p. 387, col. 1.]

A partner's right to sue for an account of a dissolved partnership is moveable "property" which, on his being adjudicated an insolvent and a vesting order made by the Court, vests in the Official Receiver. [p. 387, col. 2.]

Jagat Chunder Roy v. *Iswer Chunder Roy*, 20 C. 693; 10 Ind. Dec. (N. S.) 468, relied upon.

Such a right is not a mere right to sue but can be assigned as an actionable claim.

Parvatheesam v. *Bapana*, 13 M. 447 ; 4 Ind. Dec. (N. S.) 1023 relied upon.

Gerimal Hariram v. *Rughnath Kalianji*, 66 Ind. Cas. 873 ; 16 S. L. R. 71; *Abu Mahomed* v. *S. C. Chunder*, 1 Ind. Cas. 827 ; 36 C. 345 ; 13 C. W. N. 384 ; *Jewan Ram* v. *Rattan Chand Kissen*, 70 Ind. Cas. 498; 26 C. W. N. 285 ; *Shersing* v. *Sriram*, 30 A. 246; A. W. N. (1908) 601 ; 5 A. L. J. 251 ; 4 M. L. J. 10 ; *Haridas* v. *Baroda Kishore*, 27 C. 38 ; 4 C. W. N. 87 ; 4 Ind. Dec. (N. S.) 126; *Madhodas* v. *Ramji Pattak*, 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N.S.) 186; *Syud Tuffuzzooe Hussain Khan* v. *Rughoonath Pershad*, 14 M. I. A. 40; 10 L. R. 186 ; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; Rafique & Jackson's P. C. N. 10; 20 E. R. 701, distinguished.

Mr. *Kalumal Pahlumal*, for the Plaintiff.

Mr. *Kimatrai Bhojraj*, for the Defendant.

JUDGMENT.

Plaintiff No. 1, Thawerdas Jethanand, who has been declared an insolvent since the suit was originally filed by him sues through the Official Receiver. Plaintiff No. 2 is Khemchand Daryanomal, and the suit is for partition of partnership assets which plaintiff No. 1 values at Rs. 10,000. The allegation of the plaintiff No. 1 is that by a deed of partnership, dated the 31st of October 1917, he and defendant became partners in a contract obtained for supplying fuel to the Military Authorities at Kiamari. The plaintiff No. 1's share was four-annas and defendant's twelve-annas in the rupee. It appears from the evidence of Thawerdas Jethanand that two tenders were submitted, one in the name of Thawerdas Jethanand and the other in the name of the defendant, the latter being for a lower amount than the former and the fuel to be supplied was 575,000 maunds. The tender of the defendant was accepted at Re. 0-13-9 per hundred maunds and it is common ground that the profits arising out of this contract were to be divided between plaintiff No. 1 and defendant in proportion to their share. Admittedly, the quantity of fuel to be supplied under this tender was to be between the 6th of November 1917 and 15th February 1918, and during this period fresh tenders were invited for the supply of 120,000 maunds of fuel and the defendant's tender for this amount was also accepted at fifteen annas per hundred maunds. The dispute between plaintiff No. 1 and the defendant converges on this one point that plaintiff claims a quarter share of the profits realised by the defendant out of the tender for 120,000 maunds, as he alleges that he was a partner in the second contract with the same share as in the first. Defendant, however, denies the partnership and says that neither plaintiff nor anybody else had any interest whatever in the contract for the supply of 120,000 maunds of fuel and that the benefit of the second contract was to be his exclusively. The following issues were framed in the case :—

1. Is plaintiff entitled to a 0-4-0 annas share in the 120,000 maunds of fuel supplied to the Military Authorities by defendant at the rate of 0-15-0 annas per 100 maunds ?
2. Was the sum of Rs. 31,500 paid to plaintiff by defendant as a loan or in satisfaction of his share ?

3. On accounts being taken, what is due to either party ? (covers para. 3 of W. S.)

4. General.

Mr. Kimatrai who appeared for the defendant relinquished issue No. 2 and asked for the following additional issue which was framed with the consent of the parties :—

5. Has the Official Receiver any right to assign the claim in suit to plaintiff No. 2 and is the assignment, therefore, valid ?

I shall first discuss issue No. 1.

But, before I proceed with the consideration of this issue, I may mention that plaintiff No. 2 has been brought on the record inasmuch as by a deed of assignment the Official Receiver has assigned to him all the right, title, and interest of the firm of Thawerdas Jethanand after they were adjudicated insolvents. Mr. Kalumal for the plaintiffs has examined two witnesses, *viz.*, (1) the managing proprietor of the firm of the insolvents Thawerdas Jethanand, and (2) Khemchand Daryanomal, plaintiff No. 2. After Thawerdas was examined, I permitted Mr. Kimatrai to reserve his cross-examination and asked Mr. Kalumal who appeared for the plaintiff to adduce all the evidence that he had to substantiate the partnership in the contract for the supply of 120,000 maunds of fuel to the Military Authorities. In order to save time I also examined the defendant Vishindas Nihalchand, for I wanted to ascertain from him whether he was prepared to deny the partnership outright or whether there may not be some means of arriving at some sort of understanding between the parties, particularly in view of the admitted fact that plaintiff No. 1 was a partner of his in the first contract. Seth Vishindas Nihalchand, however, repudiates the second partnership entirely and states that if there was one there would certainly have been a partnership-deed as between the parties. Now, Thawerdas Jethanand states that he had a four-annas share in the contract for the additional quantity of fuel that was to be supplied to the Military Authorities, and Mr. Kalumal's main contention on this point seems to be that, inasmuch as the second tender was made and accepted during the continuance of the first contract with the Military Authorities, it must, therefore, be taken that Thawerdas Jethanand were equally to have a share of four-annas in the second contract as they had in the first. Now, as it is plaintiff No. 1 that alleges that he was a partner in the four-annas share in the contract for the supply of 120,000 maunds of fuel to the Military Authorities, the burden of proof heavily lies upon him to prove his assertion, and I cannot admit for a moment the argument that, because the supply of fuel under the second contract was during the period of the supply of fuel under the first contract, therefore, the rights and liabilities of the parties in the second contract were the same as in the first. The partnership-deed between the parties has been filed in the case and is Ex. 8, and that relates to the partnership only with reference to the 575,000 maunds of fuel that were to be supplied under the first contract. There is no reference in it whatever to the fresh supply of 120,000 maunds of fuel under the second contract. Now, the probabilties of the case seem to me to be that as the first tender was accepted in Vishindas Nihalchand's name and the Military Authorities felt the need for a larger supply of fuel, they wrote to Vishindas Nihalchand accordingly who tendered for the fresh supply. Having done so, he contends that the fresh supply was intended for his own individual benefit and that plaintiff No. 1 has no interest in it. It was certainly the duty of the plaintiff not to rely on whatever talk there might have taken place between the parties, but to embody in writing any terms or any settlement that may have been come to with respect to the supply of the additional quantity of fuel. Not having done so, they must take the risk. Mr. Kalumal, as I have remarked already, has also examined Khemchand Daryanomal, who, naturally, in the circumstances of this case, is an interested witness. Khemchand Daryanomal states that in the first contract for the supply of 575,000 maunds of fuel he had a six-annas share. This may or may not be. He has not produced any partnership-deed to show it. He further goes on to say that he had an equal share in the second contract in the supply of 120,000 maunds, and that he had also a six-annas share in this. I asked him if there was any documentary evidence to prove his assertion as to his six-annas share in the profits that may be realised out of the

575,000 maunds of fuel being supplied. He said he had a letter from the defendant which now he cannot find. At any rate, this has not been produced by him. But he further states that the account between him and the defendant has been entirely settled both with regard to the first as well as with regard to the second contract. Defendant Vishindas has equally denied Khemchand's share of six-annas in the second contract, and if the account as Khemchand alleges was settled with him allowing him six-annas in the second contract, and if that were proved, it will certainly be a very damaging piece of evidence against the defendant. I, therefore, asked Khemchand if he had any entries in his books of account, which would go to show that he was allowed six-annas share in the second contract. He confessed he had none, and this is rather an important admission. It really goes to show that, even if the defendant had a contract with Khemchand with respect to six-annas share and was a partner with plaintiff No. 1 in respect of a six-annas share in the first contract, both these two gentlemen are led away by the idea that, therefore, they are necessarily entitled to their shares in the second contract for 120,000 maunds. But it has not been established by any evidence on the record, that there was any partnership between plaintiff No. 1 or plaintiff No. 2 and defendant in the second contract. Mr. Kalumal relied on a letter dated the 9th of March 1918 which was addressed by defendant to plaintiff No. 1 and in which the former complains to the plaintiff as to his not having delivered the fuel required to be supplied between the 16th of November 1917 and 15th February 1918. There is nothing in this letter, which I have carefully read, which would go to show that the defendant called upon the plaintiff to deliver any portion of the fuel that was required under the second contract for 120,000 maunds, and this letter, therefore, throws no light whatever on the case. Mr. Kalumal further relied on a document showing the quantity of fuel that was supplied by his client to the Military Authorities, Ex. 10, and his argument was that, according to that, the fuel supplied exceeded the share which his client had to supply in terms of the first contract. Even if this be the case, I cannot found upon it, particularly in a case of this description where the onus lies heavily upon the plaintiff to prove his partnership, any inference that there was a partnership between the parties in respect of the second contract. It appears to me perfectly clear that the plaintiffs have failed to prove that plaintiff No. 1 was a partner of the defendant and entitled to four-annas share in the 120,000 maunds of fuel that were to be supplied to the Military Authorities, and, therefore, my finding on issue No. 1 in the case must be in the negative.

Issue No. 2, has been relinquished by the plaintiffs.

Issue No. 3, I answer in the negative.

There remains for decision the additional issue : " Has the Official Receiver any right to assign the claim in suit to plaintiff No. 2, and is the assignment, therefore, valid ?" For, though I have held that plaintiff No. 1 has not succeeded in establishing that he was a partner of the defendant in the contract for the supply of 120,000 maunds of fuel to the Military Authorities, yet, as plaintiff No. 1 alleges that he has not received his share of profit in the first contract, the partnership in which is admitted, for the supply of 575,000 maunds of fuel the accounts must be referred to the Court Commissioner. Now, after the filing of the suit, plaintiff No. 1 were adjudged insolvents in Insolvency Application No. 11 of 1920 and their estate was vested in the Official Receiver. On the 4th December 1920 the Official Receiver sold at a public auction the right, title and interest of the insolvents in this suit which was purchased by plaintiff No. 2 for the sum of Rs. 5,015. On the 13th January 1921 the Official Receiver conveyed to plaintiff No. 2 by a deed of assignment, the validity of which is not impugned, the right, title and interest of the insolvents in the subject-matter of this suit. Mr. Kimatrai for defendant, in the first place, contends that the right of plaintiff No. 1, to sue for damages does not vest in the Official Receiver on their being adjudicated insolvents. I had occasion to consider the question as to the significance of the word " property," as used in section 2, clause (*d*), of the Provincial Insolvency Act, in the case

of *Chellaram* v. *Official Receiver* (1), and I there discussed at some length the provisions of section 28 of the Provincial Insolvency Act of 1920, which enacts that " on the making of an order of adjudication the whole of the property of an insolvent shall vest in the Court or in the Receiver," and pointed out that the only restriction that is imposed, is by clause (5) of section 28 that the property of the insolvent shall not include any property which is exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree. No doubt, the question before me in the case cited was whether the power of a Hindu father in a joint undivided Hindu family governed by the *Mitakshara* to dispose of ancestral property for his antecedent private debt not being of an immoral character fell within the purview of the definition of the term 'property' as explained in section 2, clause (*d*), of the Provincial Insolvency Act, and I held that it did and that a vesting order vested that right in the Official Receiver on the father being declared insolvent. The present case is one with regard to the right of a partner to sue for an account in a partnership that has been dissolved. The partnership is admitted and it is not alleged that the partnership accounts have been settled in respect of 575,000 maunds of fuel supplied to the Military Authorities. Undoubtedly, plaintiff No. 1 have a right to an account and, equally, there can be no manner of doubt that this right is a vested and a heritable interest. The term property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. The right to sue for an account is moveable property and is not exempted by section 60, Civil Procedure Code, from attachment and sale. It is saleable property within the meaning of those words in section 60 and is liable to attachment and sale in execution of a decree. In *Jagat Chandar Roy* v. *Iswar Chander Roy* (2), it was held that the share of a partner in a partnership business was saleable property and could, therefore, be attached and sold by an execution creditor in execution of a decree against that partner, the partnership in this case was, of course, a going concern but I can conceive on distinction in principle between it and in the right to sue for an account in a dissolved partnership. I have no hesitation in holding that the right to sue for an account of a partnership that has been dissolved is property which, on the plaintiffs being adjudicated insolvents and a vesting order made by the Court, vested in the Official Receiver. Mr. Kimatrai for the defendant did not appear to me to seriously contest the proposition that the right to sue for an account would vest in the Official Receiver but it may be that, in view of my judgment in the case above referred to, he thought it would not be profitable to press the point. His main argument was that, even on the assumption that the right did vest in the Official Receiver, the latter could not assign it as he was barred by the statutory law. I pointed out to him that even if his argument was sound all that it would mean is that the assignee could not sue but that the suit would be still maintainable as the plaintiff No. 1 sued by the Official Receiver and, therefore, the discussion on this point would be purely acadmic. Mr. Kimatrai however, in spite of this observation, was determined to urge his point and though he expressed his willingness to render an account to plaintiff No. 1 he stoutly objected to plaintiff No. 2 having a finger in the pie. In support of his argument Mr. Kimatrai has mainly relied on the provisions of clause (2) to section 6 of the Transfer of Property Act which enacts that a mere right to sue is not transferrable. He also invoked the aid of clause E to section 60 Civil Procedure Code which exempts from attachment and sale 'mere right to sue' for damages. There can be no doubt as to the correctness of the proposition of law that a mere right to sue for damages is not assignable. I have so held in *Gerimal Hariram* v. *Rughnath Killianji* (3). *In Abu Mahomed* v. *S. C. Chunder* (4) it was held that a claim for damages for breach of contract after breach is a mere right to sue and, therefore, cannot be transferred. Also in *Jewan Ram* v. *Ratan Chand Kishen Chand* (5), it was held

(1) 75 Ind. Cas. 497 ; 16 S. L. R. 226 ; (1923) A. I. R. (S.) 20.
(2) 20 C. 693 ; 10 Ind. Dec. (N. S.) 468.
(3) 66 Ind. Cas. 873; 16 S. L. R. 71.
(4) 1 Ind. Cas. 837; 36 C. 345; 13 C. W. N. 384.
(5) 70 Ind. Cas. 498; 26 C. W. N. 285.

that as the claim was for unascertained damages for breach of contract and the assignment was one of a mere right to sue the suit was not maintainable. Mr. Kimatrai also cited the case of *Sher Singh* v. *Sriram* (6), where it was decided that a mere right to receive profits, the porfits in question not having yet accrued due is not susceptible of attachment in execution of a decree and the case of *Haridas v. Baroda Kishore* (7), where it was held that the word 'debt' as used in section 266, Civil Procedure Code, corresponding with section 60 of the present Code, meant an actually existing debt, that is, a perfected and absolute exisiting debt and not merely a sum of money which may or may not become payable at some future time or depends upon contingencies which may or may not happen. With regard to the last mentioned case I may refer to the case of *Madhowdas* v. *Ramji Patak* (8), where it was said that 'where money is due by an agent or vendee to his principal or vendor, the principal or vendor's claim may be attached and sold in execution of a decree against the principal or vendor as a debt under section 266, Civil Procedure Code and it is not necessary that the exact amount due to the principal on vendor should be ascertained prior to attachment or sale.'

Lastly, the Privy Council case of *Syed Tuffuzzol Hossein Khan* v. *Rughoonath Pershad* (9), was also referred to, where the attachment was of a claim of a future award as to which it was wholly uncertain until the award was made to what the debtor would be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*. It was wholly uncertain in what the arbitration might terminate. It appears to me that the cases cited at the bar have a very remote resemblance to the case befeore me and the only case which appears to throw light on the point before me is that of *Parvatheesam* v. *Bapana* (10), In this case the plaintiff had purchased at an execution sale the interest of the judgment-debtor in a partnership and he sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him. It was held that the execution-sale was not bad in law and the suit was maintainable. In the judgment it was observed that, 'It is not correct in principle to say that a partner's unascertained interest in partnership business is not his saleable property or that a Court is not entitled to sell it though he himself can do so during his life. It was further observed that the interest of a partner is one growing out of a pre-existing contractual relation and though under certain circumstances it may turn out infructuous in common with several other recognised forms of saleable property, it does not on that account cease to be saleable, and that a distinction must be drawn between such an interest and a mere expectancy or contingent or possible right or interest which is not liable to be attached in execution. There is no doubt that the right of an undivided coparcenery may be attached and sold in execution though it may be very uncertain in quantity, equally the right, title and interest of a judgment-debtor in certain property whatever its *quantum* may be. In the present case the plaintiffs No. 1 had by their contractual relationship with the defendants a right to call upon him to for an account in respect of the partnership; this is a not a mere right to sue for damages, nor an expectant or contingent right. It is true that it is difficult to define with any degree of certainty the amount that may be due to the plaintiff on accounts being taken but the right to call for an account is a right that is vested in him as much as a in principal to demand accounts from his agent, and one partner is the agent of the other. Section 6 clause (3) of the Transfer of Property Act enacts that, a mere right to sue cannot be transferred' and the essence of this restrictive clause was to repress gambling in litigation, and to forbid agreements which partook of a champertous character. But in the present case the right of plaintiffs No. 1 is not a mere right to sue for damages of an unascertained amount resulting from a breach of contract, it rather answers the definition of an actionable claim as stated in section 3 of the same

(6) 30 A. 246 ; A. W. N. (1908) 101 ; 5 A. L. J. 251 4 M. L. J.
(7) 27 C. 38 ; 4 C. W. N. 87 ; 14 Ind. Dec. (N.S.) 26.
(8) 16 A. 286 ; A. W. N. (1894) 84 ; 8 Ind. Dec. (N. S.) 186.
(9) 14 M. I. A. 40 ; 7 B. L. R. 186 ; 2 Suth. P. C. J. 431 ; 2 Sar. P. C. J. 656 ; P. C. No. 10 ; 20 E. R. 701.
(10) 13 M. 417 ; Ind. Dn. (N.) 1023.

Act as meaning 'a claim to any beneficial interest in moveable property not in the possession either actual or constructive of the claimant which the Civil Courts recognise as affording grounds for relief whether such interest be existent accruing, conditional, or contingent, and an actionable claim is transferrable. I am, therefore, of opinion in the present case that the right to an account in the circumstances of the relationship existing between plaintiffs, No. and defendant was a right that was transferrable though the amount due on the account may not be ascertained, and the issue must be answered in the affirmative.

Issue 3 is referred to the Court Commissioner for taking accounts. Report within a month. Mr. Kalumal to deposit Rs. 30 as Commissioner's fee.

K. S. D. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 731 OF 1922.

March 6, 1924.

Present :—Mr. Justice Sulaiman and
Mr. Justice Mukerji.

Pandit LAKSHMI NARAIN MISR AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Musammat SUMARNI KUAR AND OTHERS DEFENDANTS—RESPONDENTS.

*Will, construction of—Bequest by Hindu father to wife and daughters—Absolute estate—Hindu Law—*Stridhan*—Inheritance by females—Estate taken.*

A Hindu testator made a bequest of his property in favour of four persons, his widow, his two daughters and his nephew in four equal shares, with a provision that in case any of the daughters, had a son born he should get the property of the two daughters, in case of there being no son the property to go to the nephew and his heirs :

Held that the Will gave an absolute estate to all the legatees.

Under the Hindu Law a female inheriting the *stridhan* property of a female takes in it only a limited estate, which on her death goes not to her own heir, but to the *stridhan* heir of the original female owner.

Sham Behari Lal v. *Ram Kali*, 74 Ind. Cas. 495 ; 21 A. L. J. 656; (1924) A. I. R. (A) 15; 45 A. 715, followed.

Second appeal from the decree of the District Judge, Moradabad, dated the 10th of February 1922.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *N. P. Asthana* and Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for recovery of possession. Both the Courts below have dismissed the claim.

The property in dispute belonged originally to one Kesri Mal *alias* Kesri Singh, who admittedly died some time before the Mutiny. On his death he left a widow *Musammat* Chunno and two daughters *Musammat* Durga and *Musammat* Cheno and also a sister's son Baijnath. Before his death Kesri Mal is said to have executed a document, dated the 28th of January 1838, the genuineness of which was challenged by the plaintiffs in the Court below. Both the Courts below, however, have found that this was a genuine document and that finding is a finding of a fact.

The terms of this document are admittedly very vague and ambiguous, we have had the original read over to us and there can be no doubt that the language of this document is at places ungrammatical and not quite clear. On the whole, however, I do not find it possible to differ from the interpretation put on it by the Courts below. What the lower Appellate Court has understood this document to mean is as follows :—The testator made a bequest of his property in favour of four persons, his widow, his two daughters and his nephew Baijnath in four equal shares. There was a provision that in case any of the daughters had a son born he would get the property (of the two daughters). In case of there being no son born to the daughters that property would go to the nephew Baijnath and his heirs.

It is not disputed that on the death of Kesri Mal his widow did not take possession over any definite portion of this property but the entire estate was divided in the ratio of one-

third each between Bijnath and the two daughters. I may here mention that one of the arguments put forward before us was that it must be assumed that the widow *Musammat* Chunno had made a gift of her interest in favour of her daughters and Baijnath. As to this the learned Judge has remarked that there is no evidence in support of it and he has refrained from drawing this inference from the mere fact that there was no mutation of names in favour of *Musammat* Chunno. The case of a gift by *Musammat* Chunno not having been put forward in the pleadings we cannot make any such assumption in favour of the respondents. It may, therefore, be taken for granted that for some reason or other *Musammat* Chunno did not take possession of the one fourth estate to which she was entitled under the will. *Musammat* Chunno died shortly after Kesri Mal and on her death two-thirds share remained in possession of her daughters *Musammat* Chunno and *Musammat* Durga while the other one-third share remained in possession of Baijnath. *Musammat* Durga died some 40 years ago. During the life time of the two daughters a son named Bhagwan Das was born to *Musammat* Chunno; and Harcharan Das whose widow, *Musammat* Sumarti Kunwar, is defendant No. 1, was the son of this Bhagwan Das. In 1907 *Musammat* Chunno's son Bhagwan Das died. After his death *Musammat* Chunno executed a deed of gift of the property which had remained in possession of herself and her deceased sister *Musammat* Durga, in favour of her grand-son Harcharan Das. *Musammat* Chandan Kunwar, the mother of Harcharan Das, acting as his guardian, then transferred this gifted property to Shib Charan Das, defendant No. 3. Onthe other hand, Baijnath's grand-son Shib Charan and grand-daughter *Musammat* Lareti are said to to be in possession of the one-third share which he had got under the Will.

The plaintiffs' case was that the estate held by Musammat Chunno and after her death by her two daughters Musammat Durga and Musammat Chunno, was the estate of Hindu widows, which passed to the reversioners of Kesri Mal on the death of Musammat Chunno in 1907, and that the suit having been brought within 12 years of her death the claim was maintainable.

The plaintiffs, however, admitted that on the death of Musammat Chunno the two collaterals to whom succession opened were Sri Kishen and Mukh Ram. Sri Kishen has a daughter who is still alive. The property having been inherited by collateral succession it is clear that the plaintiffs cannot in any case succeed to the half share inherited by Sri Kishen so long as his daughter is alive. They would be only entitled to the one-half share which was inherited by Mukh Ram, their father. We may also add that the lower Appellate Court has found that Sri Kishen and Salig Ram were not members of a joint Hindu family but were separate. In this view it is quite clear that the plaintiffs' claim with regard to the one-half of the estate which ought to go, if at all, to Sri Kishen's daughter, cannot succeed.

Under the Will there can be no doubt that Baijnath got one-fourth of the estate. His grandson is now in possession of it. Is is impossible to see how the plaintiffs can ever succeed with regard to this share.

As regards the estate taken by the two daughters, there can be no doubt that before they died a son Bhagwan Das was born. Under the defeasance clause contained in the Will the interest of *Mst.* Durga and *Mst.* Cheno came to an end and the estate became vested in Bhagwan Das. On the death of Bhagwan Das his son Harcharan Das would be the owner of this property. The plaintiffs are, by no means, the heirs of Bhagwan Das. The claim with regard to the two shares must, therefore, also fail.

There remains the half of one-fourth share which ouget to have gone to *Mst.* Chunno. The first point which we have to consider is the nature of the estate taken by *Mst.* Chunno. It has been contended before us that she got only a limited estate, that is to say, a Hindu widow's estate under the Will and not an absolute estate. I am not prepared to accept this contention. When we find that Baijnath, one of the legatees, was given an absolute estate and that the two daughters also were given estates which were obviously antagonistic to the interest of *Mst.* Chunno, the natural inference would be that the nature of the estate given to *Mst.* Chunno was also the same. Having considered the language of the document I have come to the conclusion

that the testator intended to confer an absolute estate on *Mst.* Chunno with respect to the one-fourth share in the estate.

This, however, does not dispose of the appeal. Assuming that *Mst.* Chunno got an absolute estate, this would be her *stridhan* which on her death would be inherited by her daughters *Mst.* Durga and *Mst.* Cheno. Although the daughters obtained possession during her life-time yet it is clear that *Mst.* Chunno herself died within a few years of the death of her husband and even adverse possession against her has not been completed. The question we have then to consider is whether the estate taken by *Mst.* Durga and *Mst.* Cheno from Chunno was such *stridhan* estate as could be disposed of by them freely or whether it was a limited estate of a Hindu daughter which, though subject to alienation under certain circumstances, would revert to the heirs of their mother after their deaths.

Dr. Sen on behalf of the respondents has strongly urged that the estate taken by the two daughters was their absolute estate. He has argued that under the Hindu Law there is a clear distinction between succession to property acquired before or at the time of the marriage and property acquired by a woman after her marriage, and he has urged that, so far as the latter kind of property is concerned, it is inherited by sons and daughters jointly and they got the property as absolute owners and not only as limited owners. On the other hand, Mr. Banerji has relied on two cases of their Lordships of the Privy Council and a case decided recently by a Division Bench of this Court, and contended that, although the rule of succession may be different, nevertheless the nature of the estate taken by a female is always the same whether she inherits it from a male or a female. In the case of *Sheo Shankar Lal* v. *Debi Sahai* (1) their Lordships of the Privy Council held that on the death of the daughter who had inherited certain property from her mother and which was her mother's *stridhan* the property ought to go to her son in preference to her daughter. In the case of *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (2) their Lordships of the Privy Council remarked that 'under the Hindu Law of the Benares School there is no distinction, as to the nature of the estate taken, between property inherited by a woman from a male, and property inherited by her from a female. In both cases she takes it not absolutely as her *stridhan*, but for a qualified estate alienable only under the condition applicable to such an estate and with reverter after her death to the heirs of her predecessor-in-title.' The question has been recently considered by this Court in the case of *Sham Behari Lal* v. *Ram Kali* (3). In that case a Hindu lady owned certain *stridhan* property which after her death descended on her daughter. After the daughter's death there was competition between her daughter and a grandson of the original female owner. This High Court relying on the observation of their Lordships of the Privy Council in the last-mentioned case held that the estate held by the deceased daughter was a limited one which on her death would not go to her own heir but would go to the *stridhan* heir of her own deceased mother, who in that case was, the original female owner's grand-daughter, *i. e.*, the deceased daughter's daughter. The point having been so recently considered we must accept it as laying down the correct rule of succession.

It follows, therefore, that on the death of *Mst.* Chunno her two daughters *Mst.* Durga and *Mst.* Cheno got a limited interest in the estate and not absolute rights. When *Mst.* Durga died her half share again went to *Mst.* Cheno either as the surviving sister or as the heir of *Mst.* Chunno. *Mst.* Cheno again held the estate as a limited owner and the nature of that estate continued as such till the 6th of October 1907 when she died. On her death Sri Kishun and Mukh Ram, being the nearest *sapindas* of the husband of *Mst.* Chunno, were the next heirs. There is no suggestion that any daughter's daughter or any other heir nearer than those *sapindas* was then alive. The deed of gift made by her in her life-time could, in no way, affect the

(1) 25 A. 468 ; 13 M. L. J. 330 ; 5 Bom. L. R. 828 ; 7 C. W. N. 831 ; 30 I. A. 202 ; 8 Sar. P. C. J. 465 (P. C.).

(2) 25 A. 476 ; 7 C. W. N. 840 ; 23 M. L. J. 336 ; 5 Bom. L. R. 833 ; 30 I. A. 209 ; 8 Sar. P. C. J. 535 (P. C.).

(3) 74 Ind. Cas. 495 ; 21 A. L. J. 656 ; (1924) A. I. R. (A.) 15 ; 45 A. 715.

interest of the nearest reversioners to the estate. The present suit was brought within 12 years of *Mst.* Cheno's death. I am, therefore, of opinion that the plaintiff's claim with regard to a half share in the estate inherited by *Mst.* Durga and *Mst.* Cheno from M*st.* Chunno must succeed, that is to say, the plaintiffs' claim with regard to the one-eighth share of the entire estate should be decreed. I may note here that item No. 4 which was included in the list given in the plaint has been found by the Courts below not to have belonged to Kesri Mal and not to have been covered by his Will. The claim as regards this particular item will stand dismissed *in toto.*

Mukerji, J.—This appeal relates to the property of one Kesri Mal *alias* Kesri Singh. He made a Will and disposed of the property in favour of four persons, namely, his widow, two daughters and his sister' son Baijnath. The Will has been found to be genuine. Its interpretation has caused some difficulty, but, agreeing with my learned brother, I have come to the conclusion that it gave an absolute estate to all the four persons. There is a clause in the Will which may be interpreted as meaning this : "On the death of any of the daughters without an issue her share would go to the remaining two persons, namely, the remaining daughter and the nephew or to the nephew and his descendants. As a matter of fact one of the daughters had a son Bhagwan Das. On his birth his mother's share would go to him. The other daughter died about 40 years ago and her share would go to her sister, and cousin Baijnath or to Baijnath's heirs. It follows that, in respect of the estate of three persons, namely, the two daughters and the nephew Baijnath, the reversioners to the estate of Kesri Singh cannot have any claim.

There remains now to consider the case of the estate of the widow. It appears that, on the death of the last daughter there were two persons entitled to the property of Kesri Singh, namely, Sri Kishen and Mukh Ram. Sri Kishen's daughter is alive and is not one of the plaintiffs in the suit. The plaintiffs are Mukh Ram's sons. Thus, the plaintiffs can claim only one-half of such property as may be called the property of Kesri Singh. The property of the widow was inherited under the law by the two daughters. It appears that, although they got the property as a *stridhan* of their nother, they got only a life estate in the property. On the death of the last of the daughters the property would revert to the *stridhan* heirs of the widow and these would be the heirs of Kesri Singh himself. Thus one-half of the one-fourth share given to the widow would come to the plaintiffs. For, these reasons I agree to the order which has been proposed by my learned brother.

By the Court :—We allow this appeal and modify the decree of the Court below to this extent that we dismiss the plaintiffs' claim with regard to item No. 4, but we decree the claim for possession with regard to one-eighth share in the remaining properties as against the present defendants. The parties shall pay and receive costs in proportion to their respective failure and success throughout including, in this Court, fees on the higher scale.

As there has been no determination of the amount of the mesne profits to which plaintiffs would be entitled, we direct an enquiry to be made by the Court of first instance as to the exact amount of mesne profits to which the plaintiffs are entitled for a period of three years prior to the suit. The amount of mesne profits payable to the plaintiffs under cl. (*c*) r. 12, O. XX, Civil Procedure Code will also be determined. The case for this purpose is remanded to the Court of first instance through the lower Appellate Court.

N. H. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 299 OF 1922.

June 16, 1923.

Present :—Mr. Baker, J. C.

GANPATLAL AND ANOTHER—
PLAINTIFFS—APPLICANTS
versus
THE FIRM OF BILASRAI—
DEFENDANT—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 20—Sale of goods—Goods despatched from one place to another—Contract to pay price on taking delivery—Breach of contract—Suit for damages—Jurisdiction.

Defendants having ordered the plaintiffs to send to them at *A* certain bags of grain, the plaintiffs sent the bags by train and sent the Railway Receipt to one *S*, giving notice to the defendants to take delivery of the goods and pay the money to *S*. On defendants' default, plaintiffs ordered *S* to sell the goods and these having been sold at a loss, they brought a suit to recover damages in the Small Cause Court at *K*, the place, where they carried on their business :

Held, that as the delivery of the goods and the payment of the price had to be made at *A*, the cause of action arose wholly at *A* and the Court at *K* had no jurisdiction to try the suit.

Application for revision of the order of the Small Cause Court, Khurai, dated the 31st October 1922.

ORDER.—This is an application for revision of the order of the Judge of the Small Cause Court at Khurai returning the applicants' plaint for presentation to the proper Court on the ground of want of jurisdiction.

The applicants who carry on business at Khurai in Saugor district brought a suit against the non-applicants who carry on business at Akola, alleging that the defendants had by wire ordered the plaintiffs to send to them at Akola certain bags of grain and subsequently sent their *Munim* to Khurai for the same purpose. The price was agreed to be paid at Khurai. The plaintiffs sent the bags by train to Akola and also sent the invoice, but as the defendant did not send the money they sent the Railway Receipt to one Sevalal of Akola, and gave a notice to defendants to take delivery of the goods and pay the money to Sevalal. As defendants failed to pay the money to Sevalal the plaintiffs ordered him to sell the goods. The goods were sold at a loss for which the plaintiffs brought the suit. The Small Cause Court Judge at Khuari returned the plaint holding that he had no jurisdiction as the breach of contract took place at Akola, where the delivery was refused, and the damages occurred there as the grain was sold there. Plaintiffs apply in revision against this order.

A number of cases have been quoted in arguments, but they are not of much assistance as every case of this kind must be decided on its particular facts. Whatever the terms of the original contract may have been the plaintiffs ultimately sent the goods to Sevalal their Agent at Akola and instucted the defendants to take delivery from him and pay the price to him. The defendants did not do so. The breach of contract occurred at Akola. The dslivery of the goods and the payment of price was to be made there. Owing to defendants' failure to take delivery of the goods and pay for them the goods had to be sold at a loss at Akola. The cause of action in this case is the defendants ' failure to pay for the goods at Akola and the loss sustainted by selling the goods there. The cause of action arose wholly at Akola and the Small Cause Court at Khurai had no jurisdiction.

The order of the Judge of the Court of Small Causes at Khurai is, therefore, correct and the application is dismissed with costs.

K. S. D. *Application dismissed.*

DAYA RAM *v.* SITA RAM

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1534 OF 1922.

February 18, 1924.

Present :— Mr Justice Daniels.

DAYA RAM—PLAINTIFF—APPELLANT
versus
SITA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) s. 54—Sale by unregistered document—Delivery of possession—Property of value below one hundred rupees—Sale, validity of—Sale-deed, whether can be referred to.

Where there has been a sale or mortgage with delivery of possession of property less than Rs. 100 in value the effect of the transaction is not destroyed because an unregistered sale-deed was executed at the same time.

Habibul Rahman v. *Musammat, Rasul Bandi*, 62 Ind. Cas. 859; 19 A. L. J. 376; *Gunga Narain Gope* v. *Kali Churn Goala*, 22 C. 179; 11 Ind. Dec. (N. S.)121, followed.

In such a case the unregistered sale-deed can be referred to in order to ascertain the nature of the possession sought to be disturbed.

Qadar Bakhsh v. *Mangha Mal*, 73 Ind. Cas. 889; 4 L. 249; 5 L.L. J. 175; (1923) A. I R. (L) 495; *Jhamphu* v. *Kutramani*, 42 Ind. Cas. 713; 15 A. L. J. 761, 39 A 696, followed.

Second appeal against the decree of the Additional District Judge, Meerut, dated the 15th July 1922.

Mr. *N. C. Vaish*, for the Appellant.

Mr. *S. N. Gupta*, for the Respondents.

JUDGMENT.—In this case the father of the appellant sold the house in suit to the defendant Shankar Das in 1912 by an unregistered sale-deed for a sum of Rs. 90. Shankar Das mortgaged the house and the mortgagees who are the respondents in this case obtained a decree against Shankar Das on their mortgage. The plaintiff brought the present suit for a declaration that the house still belongs to him and is not liable to sale under the decree against Shankar Das. His contention was that Shankar Das's possession was purely permissive. On the evidence both Courts have rejected plaintiff's case. The sole question urged in support of the appeal to this Court is that the sale-deed in favour of Shankar Das being unregistered was inadmissible in evidence even for the purpose of showing the nature of Shankar Das's possession. It may be noted that the Court below has merely used it to corroborate other evidence given by the defendants which the Court has believed. The property having been of the value of under Rs. 100 at the time when the sale took place could, under the provisions of section 54 of the Transfer of Property Act, be sold either by a registered sale-deed or by delivery of possession. In this case there unquestionably was delivery of possession, and it has been held by Tudball, J, in *Habibul Rahman* v. *Rasul Bandi* (1), that where there has been a sale or mortgage with delivery of possession the effect of the transaction is not destroyed because an unregistered sale-deed was executed at the same time. There is authority of the Calcutta High Court to the same effect in *Gunga Narain* v. *Kali Churn* (2). There is also authority for the view that in such cases an unregistered sale-deed can be referred to in order to ascertain the nature of the possession sought to be disturbed. The case of *Qadar Bakhsh* v. *Mangha Mal* (3), is a recent authority to this effect and *Jhamphu* v. *Kutramani* (4), is a case of this High Court to the same effect. On the authorities, the case was rightly decided by the Court below and I dismiss the appeal with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

(1) 62 Ind. Cas. 859 ; 19 A. L. J. 376.
(2) 22 C. 179 ; 11 Ind. Dec. (N.S.) 121.
(3) 73 Ind. Cas. 889; 4 L. 249; 5 L. L. J. 175; (1923) A. I. R. (L.) 495.
(4) 42 Ind Cas. 713 ; 15 A. L. J. 761 ; 39 A. 696.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 90 OF 1922.

August 30, 1923.

Present :—Mr. Justice Spencer and Mr. Justice Devadoss.

PANNAI ANANTHANARAYANA AIYAR—PETITIONER—APPELLANT

versus

PANNAI RAMASUBBA AIYAR AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Provincial Insolvency Act (*V of* 1920), *ss.* 53, 54, 68 75, 78—"*Act*," *Meaning of—Application for leave to appeal—Delay, whether excusable—Alienation in fraud of creditors—Receiver, duty of—Notice, what is—Receiver, refusal of, to move Court—Creditor, whether can apply—Order refusing to entertain application—Creditor, whether "person aggrieved"—Appeal.*

Where an appeal is filed in time under section 75 of the Provincial Insolvency Act the mere fact that an application for leave to appeal under cl. (3) was not filed in time does not render the appeal itself out of time. In any case, section 78 empowers the Appellate Court in a proper case to excuse the delay in the presentation of the appeal or application.

A mere omission or refusal to take action at the request of a creditor does not amount to "an act" within the meaning of section 68 of the Act.

Ordinarily, the Receiver is the person to impeach any fraudulent transfer or conveyance by the insolvent of his property. But if the Receiver refuses to move the Court under sections 53 or 54 of the Provincial Insolvency Act even though a creditor offers to indemnify him against costs in the event of an adverse order against him, such creditor can apply to the Court to permit him to use the Official Receiver's name or make him a party to the proceedings and may move for an order under section 53 or 54 and if the order is against him, if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal. [p. 399, col. 1.]

Ishar Das v. *Ladha Ram*, 62 Ind. Cas.924: *Kumarappa Chettiar* v. *Murugappa Chettiar*, 36 Ind. Cas. 771 ; *Nikka Mal* v. *Marwar Bank Ltd*,. 52 Ind. Cas. 188; 151 P.R. 1919 ; *Appi Reddi* v. *Appi Reddi* 66 Ind. Cas. 271; 45 Mad. 189 ; 14 L. W. 639 ; 41 M. L. J. 606 (1921) 1 M. W. N. 816 ; (1922) A. I. R. (M.) 246 ; *Ex parte Sidebotham, In re, Sidebotham*, (1880) 14 Ch. D. 458 ; 49 L. J. B. K. 41 ; 42 L. T. 783 ; 28 W. R. 715; *In re Webb*; *Ex parte Walter* (1876) 2 Ch. D. 326; 45 L J. Book 105 ; 74 L. T. 701 ; 24 W. R. 834 ; *Khushaliram* v. *Bholar Mal*, 28 Ind. Cas. 573 ; 27 A. 252 ; 13 A. L. J. 270 *Hamraj Champa Lall* v. *Ram-Kishan Ram*, 38 Ind. Cas. 369 ; 2 P. L. J. 101 ; 1 P. L. W. 752; (1917) Pat. 304; Ex parte *Kearsley*; *In re Genese*. (1886) 17 Q. P. D. 1; 55 L. F. Q. 325 ; 34 W. R. 474 ; 3 *Morrell*, 57, followed.

Mariappa Pillai v. *Raman Chettiar* 57 Ind. Cas. 519 ; 42 M. 322 ; 10 L. W. 59 ; *Thabba Lal* v. *Shib Charan Das*, 37 Ind. Cas. 76 ; 39 A. 152 ; 15 A. L. J. 1 distinguished.

When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation.

A general notice, which is sent as soon as a person is adjudicated insolvent asking the creditors to prove their claims, is not such a notice as should be given to a creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should fix a date for enquiring into the *bona fides* of the particular transaction of the insolvent and should give notice to the creditors and othars concerned to appear before him and state their objections. If, after examination, he finds that a certain alienation or other transaction is in fraud of creditors he should himself move to have it set aside by a Court. But if he is not satisfied that such is the case and, if a creditor is willing to indemnify him against costs in the event of failure, it is his duty to move the Court for setting aside the alienation or other transaction as being in fraud of creditors. [p. 400, col. 1.]

The Official Receiver should not consider it the duty of the creditors alone to bring to his knowledge the nature of any doubtful transaction, but it is his duty to enquire into the nature of every transaction which *prima facie* does not appear to be proper and *bona fide* and valid.

Where a District Judge refuses to entertain an application of a creditor under section 53 or 54 of the Provincial Insolvency Act the creditor is a "person aggrieved" within the meaning of the Act and is entitled to appeal.

A creditor can at any time during the pendency of Insolvency proceedings move the Court under section 53 or 54 on the ground that the Official Receiver has refused to move in the matter, as there is no period of limitation provided for such an application. [p. 397, col. 2.]

Appeal against the order dated the 11th October 1921 of the District Court, Tinnevelly, in O.P. No. 220 of 1920.

Messrs. *P. N. Appuswamy* and *P.V. Krishnaswamy Aiyar*, for the Appellant.

Mr. *T. L. Venkatarama Iyengar*, for the Respondent.

JUDGMENT.

The appellant is one of the two petitioning creditors who applied to the District Court of

Tinnevelly in I. P. No. 12 of 1919 to have the third respondent in this Court adjudicated an insolvent. One of the allegations in the petition was that the hypothecation in favour of the second respondent was in fraud of creditors. The Official Receiver, Tinnevelly, who is the fourth respondent, sold the hypotheca free of encumbrance and paid the second respondent in full. The petitioning creditors applied to the District Court Tinnevelly, to have the hypothecation declared void under sections 53 and 54 of the Act of 1920. The District Judge held that the application was an appeal against the act of the Official Receiver under section 68 of the Act and dismissed it with costs as being barred by limitation, it not having been presented within 21 days of the order of the Receiver. This appeal is against the judgment of the District Judge.

The appeal came on for hearing on 1st August 1923, when the appellant's Vakil Mr.P. V. Krishnaswsmy Aiyar asked for time to file an application for leave to appeal under section 75 cl. (3). Time was granted and the application for leave to appeal was filed on 6th August 1923. Mr. K. V. Krishnaswamy Aiyar objected to leave being granted as the affidavit on behalf of the appellant was not satisfactory; and he further contended that, even if leave were granted, the appeal would be out of time as it was presented on 10th January 1922 without obtaining leave. As the new Provincial Insolvency Act came into force only in 1922 and as the Insolvency law is not well understood in the moffusil, we deemed it proper to grant leave under section 75, cl. (3) to file an appeal against the District Judge's order. The appeal as presented under section 75 (2) having been presented in time, there is no substance in the objection that the appeal is under section 75, (3) out of time. Even if it is, section 78, which is a new provision not contained in the old Act, empowers the Court to execuse delay in the presentation of an appeal or application. This being a fit case for excusing delay the appeal was heard on the merits after excusing the delay.

Mr. K. V. Krishnaswamy Aiyar raised a preliminary objection that no appeal lay to this Court as the application to the lower Court was under section 68 of the Provincial Insolvency Act of 1920 and as it was not open to a creditor to move the Court for an order under section 53 or 54 of the Act against an alienee or a creditor, and he relied on *Mariappa Pillai* v. *Raman Chettiar* (1) and *Thabba Lal* v. *Shib Charan Das* (2). The application to the District Court was not made under section 68, as is clear from a perusal of the petition. It follows that the District Judge was wrong in treating it as out of time under that section. The question for consideration is, can a creditor move the Court under section 53 or 54 of the Act? None of the decisions relied on by him go the length of holding that a creditor could not move the Court at all to set aside a voluntary transfer, or to avoid a fraudulent perference, whatever the circumstances might be. The main point decided in *Mariappa Pillai* v. *Raman Chettiar* (1) was, "No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference, or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, an insolvent by a petition duly presented under the Act." In the course of the judgment there is an observation, "it is the Official Receiver who must set the Court in motion to annul a transfer under section 36 or 37." This observation has to be read in connection with the facts of that case. It is neither laid down, nor intended to be laid down, in that case that, under no circumstances, could a creditor move the Court for an order section 53 or 54 of the Provincial Insolvency Act of 1920.

In *Thabba Lal* v. *Shib Charan Das* (2) the petitioning creditor applied to the Insolvency Court for attachment of a certain property as being that of the insolvent. It did not appear that he had ever moved the Receiver to take steps for attaching the property. The Court gtanted the application and directed the Receiver to attach the property which was done. The sons of the insolvent claimed the property as their own. The Court allowed part of the claim. Both the creditor and the sons appealed to the High Court. Walsh, J., observes at p. 155: "Creditors have a right to prove for their own claims, a right to supply the Receiver with information relating to claims

(1) 52 Ind. Cas. 519; 42 M. 322; 10 L. W. 59.
(2) 37 Ind. Cas. 76; 39 A. 152; 15 A. L. J. 1.

which the insolvent's estate may have against other persons ; and they have a right to bring the Receiver's conduct and decisions before the Court if he declines to act or neglects his duties, but they have no legal interest in the insolvent's estate and no title to represent it. If they want the Receiver to litigate the question, they can supply him with funds or indemnify him against the costs in the event of failure, if he is unable to proceed for want of funds ; but it would be contrary to the whole scheme of the Insolvency Act, if any one out of a large number of creditors was at liberty to start all kinds of questions and set the law in motion independently of the Receiver. The proper course, if a creditor is desirous of supporting the Receiver and securing a decision in his favour, is to attend the Court to watch the proceedings, or obtain the permission of the Court to intervene as *amicus curiae*." The learned Judge observed that if the Receiver declined to move in the matter the proper course for the creditor was to apply to the Court under section 22 of Act III of 1907. Section 22, now section 68, gives a right of appeal to a person aggrieved by any act or decision of the Receiver. The word "act" must be understood in its ordinary sense. It cannot mean a mere omission or refusal to take steps at the request of a creditor. It is not defined in the Act. The General Clauses Act defines the word "act" as including illegal omissions when it is used with reference to an offence or a civil wrong. A mere refusal of the Official Receiver to take action at the request of a creditor cannot, therefore, be called an "act" of the Official Receiver as contemplated by section 68 of the Act. It would be a different matter if, after hearing the parties, he passes an order that the transaction is a valid one. What he does then would amount to a decision against which there is an appeal provided section 68 contemplates acts of the Official Receiver. such as selling the property of the insolvent, taking possession of property and decisions on creditor's proofs of debt, either admitting them or rejecting them. The whole tenor of section 68 is against the view of the learned Judge that a creditor's only remedy against the refusal of the Official Receiver to take action under section 53 or 54 of the Act is by way of appeal under section 68. A creditor can at any time during the pendency of the Insolvency procedings move the Court under section 53 or 54 on the ground that the Official Receiver has refused to move in the matter, as there is no period of limitation provided for such an application. It may be seen from the recital of the facts in *Thabba Lal* v. *Shib Charan Das* (2) that what the creditor did in this case was to go over the head of the Receiver and apply to the Court to attach property claimed by persons who were not parties to the Insolvency Proceedings. The creditor's application is not described as one under section 53 or 54. The Insolvency Court exercised powers of taking possession of property similar to those conferred by section 56 (3). There is an earlier decision of the same Court in *Khushramali* v. *Bholar Mal* (3) to the effect that one creditor can impeach the validity of another creditor's debt and that the Judge is bound to enquire into his petition. The earlier case is not overruled in the latter one and must, therefore, we regarded as representing the prevailing law in the United Provinces.

It is no doubt, the policy of the Insolvency Law to prevent a scramble among creditors, to avoid a multiplicity of actions and to have the insolvent's estate wound up with the best possible expedition and the least amount of expense, in the interests of the creditors as well as the insolvent. The jurisdiction of the Court, to make an order under section 53 or 54 of the Act, on a proper consideration of the facts, no matter who moved the Court, is not restricted by any of the provisions of the Provincial Insolvency Act. Any order made under section 53 or 54 enures for the benefit of all creditiors and not merely for the benefit of any particular creditor. There is no rule that the Official Receiver alone and nobody else can move in the matter. The sections lay down in what circumstances transfers and preferences shall be deemed void against the Official Receiver. It was held by the Patna High Court in *Hamraj Champa Lall* v. *Ramkishen Ram* (4) that "what was contemplated by the procedure provided for by this statue was, that the Receiver was the person to impeach any

(3) 28 Ind. Cas. 573 ; 37 A. 252 ; 13 A. L. J. 270.
(4) 38 Ind. Cas. 369; 2 P. L. J. 101 ; 1 P. L. W. 752; (1917) Pat. 303.

fraudulent transfer or conveyance by the insolvent of his property. If the Receiver refuses to do so, then it would be open to any creditor to apply to the Judge for leave to institute a proceeding under section 36 on his own behalf and on behalf of the other creditors. But until the Receiver refuses or declines to act no one else can do so, because he is the person to set the proceeding under section 36 in motion." *In ex parte Kearssley: In re Genese* (5) Cave, J., laid down the course to be pursued by a creditor if the trustees refused to act. "Now the proper course for creditors, if the trustee refuses to act, or to allow his name to be used, is for them to come to the Court and apply for leave to use the name of the trustee on giving an indemnity against costs. On such an application the Court will consider the nature of the proposed proceedings, and, if satisfied that there are *prima facie* grounds for allowing the creditors to proceed, will grant the application" (*See also* Williams on Bankruptcy, 10th Edition, p. 373). The practice in English Bankruptcy Courts appears to all intents and purposes the same in India. The petition of the appellant in this case is, in substance, such an application. The petitioners alleged that the Official Receiver not only failed to move the Court to set aside the alienation in question, but also that he acted against the interests of the creditors. In the absence of any rules framed under the Act in regard to this matter, when an Official Receiver declines to assert his rights, a creditor can apply to the Court to allow him to use the Official Receiver's name in order to recover the insolvent's property, or to set aside a voluntary transfer or to avoid a fraudulent preference, for the benefit of the creditors. In this case, the requirements of law have been satisfied by making the Official Receiver a party to the application and the respondent's contention fails.

It is next contended that no appeal lies against the order of the lower Court, as the appellant is not a "person aggrieved" by the order, and reliance is placed in support of this contention upon *Thabba Lal* v. *Shib Charan Das* (2) and *Ishar Das* v. *Ladha Ram* (6). In *Thabba Lal* v. *Shib Charan Das* (2) the Court held that the appellant was not a proper party to the application and he could not appeal against the order except in the event of an order for costs being made against him which ought not to have been made and he was not a "person aggrieved" under section 46 of the old Act. In *Ishar Das* v. *Ladha Ram* (6) the Lahore High Court followed the decision in *Thabba Lal* v. *Shib Charan Das* (2). In *Kumarappa Chettiar* v. *Murugappa Chettiar* (7), Oldfield and Krishnan, JJ., held that a creditor was a person aggrived by an order in favour of another creditor in a proceeding under section 36 of the Provincial Insolvency Act, III of 1907, to which the Official Receiver and the appellant and the other creditor were parties. This decision was followed in another decision by Oldfield and Seshagiri Ayyar, JJ., in *Jaggannatha Ayyangar* v. *Narayana Ayyangar* (8). We see no reason why we should not follow these decisions of our Court and hold that a creditor can appeal when he is a party to the decision appealed against. In *Nikko Mal* v. *Marwar Bank Ltd.*, (9) a creditor applied to have a sale by the insolvent declared null and void against the Official Receiver. Though his attention was called to the matter by the Court, the Official Receiver took no action. It was held that the Court, under the circumstances, "had power to entertain the application and, further, that it was the duty of the Court to judicially enquire into the matter when it was brought to its notice. This view is strongly supported by the decision in *Khushali Ram* v. *Bholar Mal* (3) already referred to." In *Appireddi* v. *Appireddi* (10) Ayling, Offg. C. J., and Odgers, J., refer to *Nikko Mal* v. *Marwar Bank Ltd.* (9) and remark with reference to an application to set aside a transfer: "It may well be that, when the Receiver fails to move in the matter, a creditor may do so."

In the face of these authorities, it cannot be contended successfully that a creditor can never apply to the Court under section 53 or 54 of the Provincial Insolvency Act when

(5) (1886) 17 Q. B. D. 1; 55 L. J. Q. B. 325; 31 W. R. 474; 3 Morrell 57.

(6) 62 Ind. Cas. 924.

(7) 36 Ind. Cas. 771.

(8) 52 Ind. Cas. 761.

(9) 52 Ind. Cas. 1898; 151 P. R. 1919.

(10) 66 Ind. Cas. 271; 45 M. 189; 14 L. W. 639; 41 M. L. J. 606; (1921) M. W. N. 816; (1922) A. I. R. (M.) 246.

the Official Receiver refuses to act. But it is urged that a creditor is not a person aggrieved by the order of the lower Court even though it be held that he could move the lower Court for an order under either of the sections. If he could move the lower Court to set aside a transfer or to avoid a preference under section 53 or 54, he cannot be said to be a person aggrieved by the order of the lower Court passed against him. In *Kumarappa Chettiar* v. *Murugappa Chettiar* (7), a Bench of this Court held that "any appeal against an order passed under sections 36 and 37 of the Provincial Insolvency Act need not necessarily be presented by the Official Receiver, but may be presented by a creditor of the insolvent." This was again decided in *Jagannatha Ayyangar* v. *Narayana Ayyangar* (8). We do not rest our decision that an appeal lies in this case upon the slender ground that there is an order for costs against the appellant though that is sufficient to dispose of the respondent's objection. If the Official Receiver refuses to move the Court under section 53 or 54 even though a creditor offers to indemnify him against costs in the event of an adverse order against him, such creditor can apply to the Court to permit him to use the Official Receiver's name or make him a party to the proceeding and may move for an order under sections 53 and 54, and if the order is against him, if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal. In this case, the learned Judge declined to hear the case on the merits and the appellant suffered a legal grievance and, therefore, has right of appeal. In the well known case of *Sidebotham* (11), James, L. J., in the course of his judgment referred to the case of in *Ex parte Walter* (12), in which it was held that a creditor who had not been heard before the Registrar on the question of the registration of liquidation resolutions was entitled to appeal from the Registrar's order, because the question of registration or non-registration of such resolution was one which affects the interests of all the creditors.

(11) (1880) 14 Ch. P. 458 ; 49 L. J. B. K. 41 ; 42 L. T. 783 ; 28 W. R. 715

(12) (1876), 2 Ch. B. 326 ; 45 L. J. B. K. 105 ; 74 L. T. 701 ; 24 W. R. 834.

We hold the respondent's contention that no appeal lies in this case to be untenable.

In his deposition in the District Court the appellant alleged that he asked the Official Receiver to take proceedings under sections 53 and 54 of the Act and that the Official Receiver promised to do so but failed to take any action. The Official Receiver did not go into the witness-box and deny the first petitioner's statement that he informed the Official Receiver about the suit transaction. He contented himself with denying it in his memo. of October 11th, 1921. The District Judge has not found the first petitioner's statement to be untrue but he remarks in paragraph 8 of his judgment : "It is worthy of note that the condition of sale that the property was to be sold free of encumbrance and subject to discharge of the amount due to the first respondent out of the sale-proceeds was only announced to the bidders on the day of the sale and before the sale commenced and was not mentioned either in the sale notice, [Ex. IV (*a*)] posted on the notice board of the Official Receiver's Office, nor in the brief notice of sale sent by post and to creditors (Exs. II, IV, etc)." The mortgage is one of four alienations made at or about the same time and within three months of the presentation of the petition for adjudication of the third respondent as an insolvent, one of which was set aside by the Court, one was given up by the mortgagee and one was not registered and, therefore, invalid. Any expression of opinion on the evidence might prejudice the trial of the case by the lower Court, but it is sufficient to say that there is a case for enquiry on the merits. It is urged for the respondent that a notice was sent to the appellant as well as to other creditors and that he did not take steps in time to have the hypothecation in question set aside. It would not be proper to express any opinion on the conduct of the Official Receiver, as he is not before us, but the memorandum put in on his behalf shows that he has not correctly understood what is his duty in matters of this kind. When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation. In this case the allegation that the hypothecation in question was a

fraudulent one was made in the petition presented for adjudication of the third respondent as an insolvent. A general notice, which is sent as soon as a person is adjudicated insolvent, asking the creditors to prove their claims, is not such a notice, as should be given to a creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should fix a date for enquiring into the *bona fides* of particular transactions of the insolvent and should give notice to such creditors as have already informed him of the nature of the transaction and should also give notice to others to appear before him and state their objections, if any, to the alienations or alleged fraudulent preferences by the insolvent. He should examine the insolvent as regards the transactions which have come to his knowledge and the substance of his examination should be reduced to writing and the statements of the creditors and witnesses whom they produce in support of their allegations should also be reduced to writing. If he finds that a certain alienation or other transaction is in fraud of creditors, he should himself move to have it set aside by a Court. But if he is not satisfied that such is the case and, if a creditor is willing to indemnify him against costs in the event of failure, it is his duty to move the Court for setting aside the alienation or other transaction as being in fraud of creditors. He should not in such cases express his own opinion as to the nature of the transaction, but should place before the Court such evidence as the creditor is prepared to produce, for the finding of the Court may differ from that of the Official Receiver, and a trial before the Court will bring out many facts which perhaps the Official Receiver may not be able to get at; and, in the event of an adverse decision of the District Court, if a creditor is willing to indemnify him for the costs of an appeal against the order of the Court, the Official Receiver should prefer an appeal after taking security for costs. The Official Receiver should not consider it the duty of creditors alone to bring to his knowledge the nature of any doubtful transaction, but it is his duty to enquire into the nature of every transaction which *prima facie* does not appear to be proper and *bona fide* and valid. In cases where the transaction is within three months, he should enquire fully into the matter before satisfying himself that it is above board; and, in such cases, it is his duty to call upon the creditors to appear before him on a date fixed for the purpose to prove their allegations against the *bona fides* of the transaction. The Official Receiver should give every facility to the creditors to impugn the transactions of the insolvent which are ostensibly within three months of the insolvency.

The order of the District Judge is set aside and he is directed to restore the petition to file and dispose of it according to law.

The appellant's costs of this appeal will be borne by the second respondent.

V. N. V. *Appeal accepted.*

K. S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 188 OF 1923.

April 15, 1924.

Present :—Mr. Hallifax, A. J. C.

KHEDU SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHAGWAN SINGH—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), *s.* 109, *scope of—Protected status—Effect of—Exclusive possession by recorded* Thekadar—*Hindu Law—Joint family—Manager, rights of—Exclusive possession.*

Section 109 of the C. P. Land Revenue Act makes the tenure of a protected *Thekedar* impartible but that does not take away the ownership of any person who has a share in it nor his right to joint possession.

The grant of a protected status does not make any change in the rights of the joint holders of a lease *inter se* except making the tenure impartible when the lease might have been partible before.

A person who is recorded as a protected *Thekedar* is not entitled to keep out the other co-sharer from the joint possession of ownership of the *Thekedar* rights.

KHEDU SINGH *v.* BHAGWAN SINGH

The manager of a joint Hindu family cannot claim exclusive possession of the joint family estate as against the other members of the joint family unless they are his sons.

Appeal against the decree of the District Judge, Raipur, dated the 27th February 1923, in Civil Appeal No. 70 of 1923.

Mr. *M. Gupta*, for the Appellants.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—We are concerned in this case with the tenure of a Protected *Thekedar* of which the incidents are laid down in section 109 of the Land Revenue Act, 1917. The learned District Judge in his appellate judgment says: "One of the incidents of protected status is that only one person can be in possession of the village at a time and that person must be the holder of the Certificate." I can find no authority for this *dictum*, which is the basis of the decree for exclusive possession of a village granted to the manager of a joint Hindu family who is the recorded Protected *Thekedar* of the village against other members of that family who are co-sharers in the *theka*.

Fagwa v. *Budhram* (1), deals with the law as it stood before 1917, but the reasoning and the principles enunciated hold good still. Section 109 of the Land Revenue Act, 1917, certainly makes the tenure impartible, but that does not take away the ownership of any person who has a share in it nor his right to joint possession; a single elephant beloning to a joint Hindu family is equally or even more impartible, but it is no less a unit in all the partible property of the family, and all the members of it are entitled to joint possession of it till a partition is made, when it must be allotted whole to one share or another or made common property. Any other state of things in regard to a village held under the protected status would be entirely inconsistent with the first *proviso* to clause (*a*) of sub-section (1) of section 109. It is also clearly contemplated by the whole of clause (*b*) of sub-section (1) and by sub-section (3).

Neither under the Land Revenue Act, 1917, nor under earlier legislation does the grant of the protected status make any change in the rights of the joint holders of a lease *inter se*, except to make the tenure impartible where the lease might have been partible before. If the manager of a joint Hindu family acquires a lease out of family funds but takes it in his own name, he is the sole lessee and the sole recorded lessee, as far as the proprietor is concerned, and also the tenure is impartible. But the other members of the family are joint owners of the lease with him and entitled to joint possession of the village.

The position then is this. The joint Hindu family of which the plaintiff is the manager and the defendants are members own property which includes a proprietary right in each of four villages which are partible and a lease-hold right in four more each of which is impartible. The defendants have forcibly taken exclusive possession of one of the lease-hold villages and the plaintiff has sued to eject them. That is the whole case. It has been slightly complicated by a discussion of whether a house in the village of which the defendants have taken possession is a part of the village, and so also impartible, or not. The house is in all probability practically impartible, as, in the present state of feeling in the family, it would certainly have to be allotted whole to one share or another in a partition. But that makes no difference here. Still less does it matter whether it is a part of the village or not; if it is, the part of the joint family property of which the defendants have taken exclusive possession consists of one item of the whole property, and if it is not, it consists of two.

Now, it seems to me fairly obvious that the manager of a joint Hindu family is no more entitled to exclusive possession of any part of the joint family property than any other member is. If another member takes exclusive possession of a part or of the whole of the property and thereby ousts the manager from joint possession, the latter can be restored to that joint possession, but he cannot be put in exclusive possession as admittedly he has no right to it. The question in *Raghoba v. Ziboo* (2), was not whether the manager in similar circumstances was entitled to a decree for joint possession or to one for exclusive possession at all or not. Batten, A. J. C., held that he was not entitled to eject

(1) 24 Ind. Cas. 855; 10 N. L. R. 64.

(2) 11 Ind. Cas. 687; 7 N. L. R. 82.

the member of the family who had taken exclusive possession, and incidentally confirmed the decree for joint possession that had been given to him.

In 1875 the Allahabad High Court held in *Baldeo Das* v. *Sham Lal* (3) that where the manager of a joint Hindu family is the father of the other members he is entitled to eject one of them who usurps exclusive possession of a part of the family property. There again the possibility of the manager being entitled to joint possession only was not examined. The question decided was whether he was or was not entitled to eject the other member of the family, and it was decided with reference to the special rights of a father against his sons. Here the members of the family who have excluded the manager from joint possession of a part of the property are his nephews.

For all these reasons the decree of the lower Appellate Court granting the plaintiff Thakur Bhagwan Singh exclusive possession of the village of Bodtara and the house in it will be modified into a decree for joint possession of that property. I understand that the parties have at last decided to have a partition of the whole property, which they ought to have done in the beginning instead of wasting their time and money and effort over this practically infructuous litigation. In all the circumstances, I consider it proper that each party shall pay its own costs throughout.

G. R. D. *Appeal allowed.*

K. S. D. *Decree modified.*

(3) 1 A. 77; 11 Mad. Jur. 222; 1 Ind. Dec. (N. S.) 52.

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 300 OF 1921.

January 2, 1923.

Present:—Mr. Justice Gokul Prasad.

Musammat AKBARI BEGAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHAIKH ZAMIN ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5.—Appeal filed in wrong Court—Mistake, bona fide—Extension of time, whether should be allowed.

A suit for ejectment was filed in the Revenue Court. The defendants' plea of proprietary title was negatived by the Court which, however, dismissed the suit on other grounds. The plaintiffs appealed to the Commissioner and, naturally, did not raise the question of proprietary title against the defendants who tried to support the decree on the ground that they were proprietors. The appeal was allowed and the suit decreed. On appeal by the defendants, the Board of Revenue held that, as soon as the question of proprietary title was raised before the Commissioner, he ceased to have jurisdiction and directed that the appeal be returned for presentation to the District Judge. Accordingly, the Commissioner returned the memorandum of appeal to the plaintiffs on the 31st August 1920 and they filed it before the District Judge on the 4th September. The District Judge dismissed the appeal as time-barred. Plaintiffs appealed to the High Court :

Held, that the plaintiffs had in good faith filed the appeal in the Commissioner's Court and as they had filed it before the Judge within five days of the return of the memorandum of appeal by the Commissioner, the District Judge ought to have granted an extension of time under section 5 of the Limitation Act.

Second appeal against the decree of the District Judge, Bareilly, dated the 9th of December 1920.

Mr. *Iqbal Ahmad*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit for ejectment filed in the Revenue Court. The defendants pleaded *inter alia* their own proprietary rights. This plea was decided in the negative by the first Court but it dismissed the plaintiffs' suit on other grounds. The plaintiffs went up in appeal to the Commis-

sioner and naturally did not raise the question of proprietary title as they could not do so, inasmuch as the point had been decided in their favour by the Court of first instance. The defendants, however, tried to support the decree of the first Court on the ground that they were proprietors and the finding of the first Court on that point was wrong. The Commissioner allowed the appeal and decreed the plaintiffs' claim. The defendants went up in appeal to the Board of Revenue and the Board decided that, as soon as the question of proprietary title was raised before the Commissioner, he ceased to have jurisdiction and remanded the case with a direction that he should return the memorandum of appeal for presentation before the Judge. This order was passed in July and in compliance therewith the Commissioner returned the memorandum of appeal to the plaintiffs on the 31st of August 1920 and the plaintiffs filed their appeal before the Judge on the 4th of September following. The appeal was by that time much beyond time and the plaintiffs asked the District Judge to give them an extension of time under section 5 of the Limitation Act. The District Judge refused to do so and has dismissed the appeal as being barred by time. The plaintiffs come here in second appeal and their learned Advocate has put forward two contentions before me : (1) that inasmuch as the question of proprietary title was not a matter in issue in appeal, the Commissioner had jurisdiction to hear the appeal and the appeal was rightly filed in his Court, and (2) that even if the appeal was not rightly filed in his Court the District Judge has failed to exercise his discretion rightly inasmuch as he ought to have granted the extension of time prayed for. In my opinion an appeal lies under section 177 (*e*) to the District Judge from a decree of the Revenue Court in cases in which a question of proprietary title had been in issue in the Court of first instance and is a matter in issue in appeal. In the present case the question of proprietary title had been decided in favour of the plaintiffs although the suit was ultimately dismissed on other grounds. The plaintiffs naturally could not raise the question of proprietary title in their memorandum of appeal as that point had been decided in their favour and could not know that the defendants would like to support the decree of the Court of first instance on the ground of their own proprietary title. The appeal was, therefore, rightly filed in the Commissioner's Court. However, the Board of Revenue, the final Appellate Court, has held the contrary and I cannot compel the Commissioner to hear the appeal again. The point of law raised was a doubtful one and the plaintiffs had in good faith filed the appeal in the Commissioner's Court. Within five days of the return of the memorandum of appeal by the Commissioner it was filed before the District Judge and in my opinion the District Judge ought to have granted an extension of time under section 5 of the Limitation Act. I, therefore, allow the appeal, extend the time for filing the appeal up to the date when it was filed in the lower Appellate Court, set aside the decree of that Court and send the case back to it for restoration to its original number and disposal according to law. Costs here and hitherto will abide the event.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 986 OF 1923.

March 3, 1924.

Present : —Mr. Justice Suhrawardy and Mr. Justice Chotzner.

NABA KUMAR CHOUDHURY—
DEFENDANT—PETITIONER
versus
S S. HIGHEAZANY—PLAINTIFF
—OPPOSITE-PARTY.

Pleadings—Plaintiff suing in personal capacity—Subsequent amendment of plaint beyond limitation—Plaintiff, status of, alteration in—Amendment, effect of—Suit, whether time-barred.

Where, in a suit for money which was instituted by the plaintiff in his personal capacity within the period of limitation, the plaintiff, after the expiration of that period, prayed to be permitted to sue not only in his personal capacity but also as the administrator to the estate of the deceased proprietor and the plaint was amended accordingly:

NABA KUMAR CHOUDHURY *v.* HIGHEAZANY

Held, that the suit was not barred by limitation as there had been no change in the person to whom the money was payable and the alteration in the capacity of the plaintiff did not affect the defendant's liability to pay.

Peary Mohan Mukherji v. *Narendra Nath Mukerji*, 5 Ind. Cas. 404 ; 37 C. 229 ; 14 C. W. N. 261 ; 7 A. L. J. 125 ; 7 M. L. T. 63 ; 11 C. L. J. 220 ; 12 Bom. L. R. 257 ; 20 M. L. J. 171 ; 37 I. A. 27 (P. C.), distingushed.

Civil Rule in the matter of S. C. C. Suit No. 399 of 1922 of the Court of the Sub-Judge, Dacca, exercising the powers of a Court of Small Causes.

Babu *Rajendra Chandra Guha*, for the Petitioner.

Babu *Iswar Chandra Chakraburty*, for the Opposite-Party.

JUDGMENT.—This case raises an important question of limitation. The plaintiff brought this suit against the defendant for a certain sum of money which he alleged that the defendant had realised from plaintiff's tenants but had retained in his own possession. The right under which he sued the defendant was not specified in the plaint and we take it that it was in his personal capacity. The suit was brought within the period of limitation but after the expiration of that period, the plaintiff prayed to be permitted to sue not only in his personal capacity but also as administrator to the estate of the deceased proprietor and the plaint was amended accordingly. The Small Cause Court Judge found that the money belonged to the estate which was inherited by plaintiff and his two sisters and of which the plaintiff was the administrator and decreed the suit. The defendant contends that at the time of amendment of the plaint the claim was barred by limitation and the suit ought to have been dismissed.

The question is not free from difficulty and there seems to be little or no judicial authority in point. The lower Court has cited two Madras cases, *Rajam Aiyangar* v. *Muthu Krishna Pillai* (1) and *Muthu Krishna Pillai* v. *Rajam Aiyangar* (2), the latter decision having been passed on appeal from the former case. In the first case Hannay, J., sitting singly has expressed the view that in a case like the present, the suit is not barred. There the plaintiff had brought the suit in his personal right but on the objection of the defendant he was permitted to sue, after the expiry of the period of limitation, for himself and as Manager of a certain Mill. The appellate judgment in the second case is not altogether convincing as the learned Judge in confirming the order relied upon the decision of the Judicial Committee of the Privy Council in the case of *Peary Mohan Mukerji* v *Narendra Nath Mukerji* (3) where the facts were different. There the suit was brought in time by a person on behalf of a debutter. Subsequently, as the result of litigation, the right to represent the debutter devolved upon another person who got himself substituted in place of the original plaintiff after the period of limitation. Their Lordships held that there was no change of plaintiff in the suit which was not barred by limitation. That case, therefore, has no bearing on the question before us.

The real question is, whether it is a case of misdescription which will ordinarily include non-description as in the absence of any description the plaintiff should be held to have brought the suit in his personal capacity. The case may be looked at from different points of view. According to the defendant the debt due by him to the estate of the deceased was extinguished as barred by limitation on the date on which the amendment was made. According to the plaintiff there has been no change in the person to whom the money is payable and the alteration in the capacity in which he sues does not affect the defendant's liability to pay. It ought not to make any difference whether the plaintiff takes the money with the right hand or the left. In short, there has been no change of "persona," no change of the person to whom the money is *payable* though there may perhaps have been some change in the basis on which the debt is *due*. In our opinion this view is correct. If the plaintiff, instead of applying for the amendment of the name of the cause of his own description, had applied merely to amend the

(1) 25 Ind. Cas. 945 ; 16 M. L. T. 251.
(2) 33 Ind. Cas. 357 ; 30 M. L. J. 57.

(3) 5 Ind. Cas. 404 ; 37 C. 229 ; 14 C. W. N. 261 ; 7 A. L. J. 125 ; 7 M. L. T. 63 ; 11 C. L. J. 220 ; 12 Bom. L. R. 257 ; 20 M. L. J. 171 ; 37 I. A. 27 (P. C.).

statement of his claim in the body of the plaint by adding that the money was due to him as administrator of an estate, it can hardly be said that that would be equivalent to the introduction of a new plaintiff in the suit. If the debt is payable to the plaintiff alone *and to no one else*, the change in the capacity of the plaintiff to maintain the suit will not have the effect of introducing a new plaintiff. Some light is thrown on this point by the decision of the Judicial Committee of the Privy Council in the case of *Soona Mayna Kena Roona Meyappa Chetty* v. *Soona Navena Suppremanian Chetty*(4) where their Lordships were considering a provision of law similar to section 22 of the Limitation Act. Lord Parker of Weddington there observes :—"Their Lordships are of opinion that section 23 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court.....If *A* is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the limitation ordinance, to take advantage of a suit improperly instituted by *B*." The change is one of form only and not of substance. The same view has been adopted in cases where the defendant is orginally sued in his personal capacity but upon a subsequent amendment of the plaint is described as executor of a deceased person : *Prosunna Kumar Sen* v. *Mohabarat Saha*. (5)

We are accordingly of opinion that the suit is not barred by limitation and this Rule must be discharged with costs 2 gold mohurs.

M. B.

K. S. D. *Rule discharged.*

(4) 35 Ind. Cas. 823 ; 20 C. W. N. 838; (1916) 1 M. W. N. 455; 18 Bom. L. R. 642; 85 L. J. P. C. 179; 43 I. A. 113; (1916) 1 A. 603; 114 L. J. 1002 (P. C.).
(5) 7 C. W. N. 575.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1455 OF 1922.

February 13, 1924.

Present :—Mr. Justice Mukerji.

RAMACHARI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SADHO SARAN TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Mortgage-deed more than 30 years old—Proper custody—Execution, presumption as to—Deed, value of.

Plaintiffs sued for recovery of possession by way of redemption. The alleged mortgage was executed in 1872 and the deed of mortgage was registered. It was produced by one of the alleged mortgagees:

Held, that the document being an old one and having been produced from proper custody, the presumption of law in favour of its proper execution applied and the document was, therefore, sufficient evidence of the mortgage.

Sheonandan Ahir v. *Ram Logan Singh* (1) distinguished.)

Second appeal against the decree of the District Judge, Ghazipur, dated the 6th October 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs. They instituted the suit out of which this appeal has arisen for recovery of property, being a fixed-rate tenancy by way of redemption. They succeeded in the Court of first instance; but the learned District Judge in appeal held that the mortgage had not been proved.

It appears that there were ten defendants in the case and out of them only five are in possession. The defendants are admitted by the only contesting defendant (No. 3) to be the descendants of the persons in whose favour the alleged mortgage was executed. The evidence was that the lands were the fixed-rate tenancies of defendants Nos. 1 to 5 and that, although the plaintiffs were the descendants of the alleged mortgagor, there being no mortgage, the suit must fail.

(1) 30 Ind. Cas. 908 ; 13 A. L. J 921.

RAMACHARI *v.* SADHO SARAN TEWARI

The Court of first instance pointed out that in the Settlement of 1840, the name of the grandfather of the plaintiffs was recorded as the fixed-rate tenant. The alleged mortgage was executed in 1872. The original deed has been produced by one Badri Tewari, who is admittedly one of the alleged mortgagees. The deed, therefore, comes from proper custody. The plaintiffs examined an old man to prove the execution of the deed, but his evidence has been disbelieved by tne learned District Judge. It has been urged for the contesting respondent that the finding of the lower Court is really a finding of fact and this Court cannot go behind that finding. I accept the argument in so far as the learned Judge says that the old witness is not reliable. But then the question remains whether the presumption mentioned in section 90 of the Evidence Act should not be applied to the mortgage-deed in question. As I have said, the deed is a registered one. We have found that the ancestor of the plaintiffs was the original tenant of the property. We have found that the deed comes from proper custody. Under the circumstances, it would be very unfair with respect to any transaction so old as 1872 not to apply the presumption of law in favour of the proper execution of the deed. It appears that the executant was illiterate and the *Patwari* of the village, one Sheoraj Das, signed the name of the executant, not only on the deed but also before the Sub-Registrar. The practice of taking thumb impressions was not in vogue in 1872. Sheoraj Das is one of the witnesses who identified the executant before the Registering Officer. The learned Judge remarked that there was a ruling of this Court under which he was prohibited from presuming that Sheoraj Das had signed the document under authority from the mortgagor Ram Autar. He does not quote the case and it has not been quoted on either side before me. But I presume the learned Judge had in his mind the case of *Sheonandan Ahir* v. *Ram Lagan Singh* (1), decided by Tadball, J. There is, no doubt, some observation of the learned Judge to the effect that there is no presumption as to the authority of the person signing for the executant. But the observations were made having regard to the peculiar facts of that case. The deed in the case before the learned Judge was unregistered. It was written throughout in the pen of one man. The signature of the executant and those of the witnsses were all in the pen of the same man. There was nothing to show that the lands mortgaged ever belonged to or were ever held by the alleged mortgagor. The facts in this case are all in favour of the appellants. Tne deed is a registered one. It has been found that in 1840 the plaintiffs ancestor was the recorded tenant. The transfer of possession to the defendants has not been accounted for and can be accounted for only by the mortgage-deed. The person who signed the deed for the illiterate executant is the person who singed before the Sub-Registrar for him. So for as the signature before the Sub-Registrar goes, we can surely presume that the Sub Registrar accepted the *Patwari's* signature simply because the executant authorised him to sign the endorsement before the Sub-Registrar. The law in 1872 did not require that the mortgagee should put his mark on the deed. The case of *Sheo Nandan Ahir* (1) has, therefore, no application the facts of this case. The document, in my opinion, should have been accepted as sufficient evidence of the mortgage.

I allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. Costs in this Court and in the lower Appellate Court will be paid by the answering respondent.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 236 OF 1922.

April 5, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

BINDU GOVIND NAIK KURBET AND ANOTHER—ORIGINAL DECREE-HOLDERS—APPELLANTS

versus

HANMANT GOVIND BHAT AND ANOTHER —ORIGINAL JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 182—*Mortgage-decree—Application to make decree final—Step-in-aid of execution—Limitation, operation of.*

A decree was passed upon a mortgage on 18th April 1913 for a certain sum payable by yearly instalments, the first of which was payable on 31st March 1914. On failure to pay any one instalment in time, the decree provided for sale of the mortgaged property or a sufficient portion thereof to recover the amount of the instalment overdue. The creditor sought to make the decree final on default instead of applying for sale. The Court, instead of pointing out the error, made orders from time to time as instalments became due, for making the decree final with regard to those instalments. On 30th October 1919 the creditor applied to make the decree final as regards the instalment due on 31st March 1917, but the application was rejected. The decree-holder then applied for execution on 26th July 1920 with regard to the four instalments then overdue. This *Darkhast* was dismissed for default on 15th February 1921. On 8th July 1921, the decree-holder having again applied in execution for those four instalments and the fifth which fell due in 1921:

Held, (1) that the application of 30th October 1919 was a step-in-aid which started a new period of limitation running.

(2) that the application of 26th July 1920 was in time with regard to the instalment due in 1917 and, consequently, the *Darkhast* of 1921 was also in time and the execution should proceed for the full amount of the five instalments.

An application to make a decree final may in one case be considered as a step-in-aid although it may in other cases, be not so.

Gulappa Rudrappa v. *Asava*, 63 Ind. Cas. 844; 230 Bom. L. R. 1013; 46 B. 269; (1922) A. I. R. (B.) 118, referred to.

Appeal against the decision of the First Class Subordinate Judge, Belgaum, in *Darkhast* dated the 8th July 1921.

Mr. *G. P. Murdeshwar*, for the Appellants.

Mr. *R. A. Jahagirdar*, for the Respondents.

JUDGMENT :—This case belongs to that numerous class of cases in which difficulties arise in execution of an instalment decree. The decree passed on the 18th April 1913 for Rs. 12,359-1-0 was payable by yearly instalments of a thousand rupees, the first of which was payable on the 31st March 1914. On failure to pay any one instalment in time the decree allowed sale of the mortgage property or a sufficient portion thereof to recover the amount 'of the instalment overdue. The creditors sought to make the decree final on default instead of applying for sale. Apparently, the Court, instead of pointing out the error, made orders from time to time as instalments became due for making the decree final with regard to a particular instalment. On the 30th October 1919 the creditors applied to make the decree final as regards the instalment due on 31st March 1917. That application coming before a different Judge was rejected. The plaintiffs applied for execution on the 26th July 1920 with regard to the four instalments then overdue; but that *darkhast* was dismissed for default on 15th February 1921. On the 8th July 1921 another *darkhast* was filed for those four instalments and the fifth which fell due in 1921. Execution was granted for the instalments due in 1918, 1919 and 1920 and 1921 and the final order made in April 1922. But execution with regard to the instalment for 1917 was disallowed. We think that there is no rigid rule to be laid down in these cases. We have already held in *Gulappa Rudrappa* v. *Arava* (1) that an application to make a decree final may in one case be considered as a step-in-aid although it may in other cases be not so. But here, considering all the facts of the case, we think that the application of 30th October 1919 was a step-in-aid which started a new period of limitation running. Therefore, the application of 26th July 1920 was in time with

(1) 63 Ind. Cas. 844; 23 Bom. L. R. 1013; 46 B. 269; (1922) A. I. R. (B.) 118.

regard to the instalment due in 1917 and consequently the present *darkhast* is also in time. The appeal, therefore, is allowed and the *darkhast* should proceed for the full amount of Rs. 5,000 with costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1121 OF 1921.

December 14, 1922.

Present :—Mr. Justice Gokul Prasad.

KABUL—DEFENDANT—APPELLANT
versus
KABOOL SINGH AND OTHERS—
PLAINTIFFS AND DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence, admission of—Court, duty of, to record reasons—Omission to record reasons, effect of.

A Court of Appeal is bound to record its reasons for the admission of additional evidence and when it omits to do so, its finding cannot be accepted as binding on the High Court, being a finding partly based on inadmissible evidence.

Second appeal from the decree of the Subordinate Judge, Meerut, dated the 14th June 1921.

Mr. *N. C. Vaish*, for the Appellant.

Mr. *S. N. Gupta*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for possession and removal of certain constructions alleged to have been made by the defendants who are *ryots* in the *abadi* on a plot of land which the *zemindar* alleges is his. The pleas taken in defence were that the plaintiff was not the owner of the plot and that the shop of the defendants was an old one and not liable to removal. The first Court found in favour of the defendants on both the points and dismissed the plaintiff's suit. The plaintiff went up in appeal and the lower Appellate Court issued a commission for the measurement of the plot in dispute and to make an enquiry whether it belonged to the plaintiff or not and also whether the building put up by the defendants was old or new. The learned Judge of the lower Appellate Court, after having considered the report of the Commissioner along with the other evidence on the record, came to the conclusion that the plot in dispute came to the plaintiff's share in a partition of the village in the year 1917 and that the building in dispute was new. On these findings of fact he has allowed the appeal and decreed the plaintiff's claim. The defendant Kabul comes here in second appeal and his first ground is that the issue of the commission which amounted to receiving additional evidence was bad as being contrary to the provisions of O. XLI, r. 27 of the Code of Civil Procedure. The learned Judge has omitted to record his reasons for the admission of such evidence. He was bound to do it (*vide* O. XLI, r. 27, cl. (2)). In the absence of any reasons recorded by the lower Appellate Court for the admission of additional evidence, I must hold that its action cannot be defended and its finding cannot be accepted as binding on this Court as it is partly based on inadmissible evidence and partly on admissible evidence I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and send the case back to that Court under the provisions of O. XLI, r. 23, Civil Procedure Code, with a direction to restore the case to its original number and to decide it according to law after omitting from consideration the report of the Commissioner and the sketch made by the Commissioner. Costs here and hitherto will abide the event.

K. S. D.

Appeal allowed.

Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 839 OF 1922.

September 6, 1923.

Present :—Mr. Justice Kumaraswamy Sastri.

RANGIAH CHETTIAR—PETITIONER
—APPELLANT
versus
ANNASWAMY ALWAR AYYANGAR—
COUNTER-PETITIONER—RESPONDENT.

Provincial Insolvency Act (V of 1920), whether retrospective.

ALLAHDINO *v.* THE SHIKARPUR MUNICIPALITY

The provisions of the Provincial Insolvency Act, 1920, are applicable to all proceeding, on petitions filed under the old Act and pending at the time of its coming into operation.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge, Tinnevelly, in E. P. No. 962 of 1922 in S. C. S. No. 1551 of 1919, dated the 9th October 1922.

Mr. *K. R. Rangasami Iyengar*, for the Petitioner.

JUDGMENT.—The petition was presented when the old Insolvency Act, III of 1907, was in force. Nothing was done except transfering the application to the Official Receiver. After the new Insolvency Act, V of 1920, came into force the adjudication order was passed. It is contended that the provisions of the old Act applied and that all cases filed when Act III of 1907 was in ferce should be dealt with on the footing that that Act continues to be in force. I do not think that contention is sound. No doubt any order passed under the Act or rights obtained thereunder will be unaffected by the new Act. I can find no authority for holding that, in spite of passing of Act V of 1920, all proceedings, on petitions filed under Act III of 1907, should continue to be dealt with under the provisions of the old Act.

The petition is dismissed.

N.H. C. *Petition dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 15 OF 1923.

February 28, 1924.

Present :—Mr. Kennedy, A. J. C. and Mr. Rupchand Bilaram, A. J. C.

ALLAHDINO AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE SHIKARPUR MUNICIPALITY—PLAINTIFFS—RESPONDENTS.

Bombay District Municipal Act (III of 1901), s. 120, scope of—Private well—Municipality, powers of.

Section 120 of the Bombay District Municipal Act gives no right to a Municipality to annex a private well and turn it into a public well and does not give the Municipality any right to require a person who has a well which is filled up to excavate it. It does no more than provide that if a person has a well and has given consent to its water being used by the public, he shall not allow it to become dangerous to the public either by reason of the danger of the people falling into the well or owing to the insanitary condition of the water or the surroundings of the well. It gives the Municipality no power to require a private individual to keep up or not to keep a well.

Appeal against the judgment and decree of the Joint Judge, Sukkur, in Civil Appeal No. 55 of 1921.

Mr. *Dipchand Chandumal*, for the Appellants.

Mr. *Bhojsing Gurdinomal*, for the Respondents.

JUDGMENT.—In this case the Shikarpur Municipality brought a suit against the defendants asking for a mandatory injunction directing the defendants to clear out a certain well and to re-build the well so as to put it into working order and to keep the well and the land adjoining it in a condition suitable for the use of the public and for further injunction that the Municipality should not be obstructed in the exercise of its usual powers under section 120 and other provisions of the Municipal Act. The suit was originally dismissed by the learned Subordinate Judge of Shikarpur but in appeal to the District Court of Sukkur that decision was reversed and the appeal was allowed with costs and the injunctions asked for issued. The defendant Allahdino comes here in second appeal to this Court.

The facts are somewhat peculiar but it appears that both the parties accept the position laid down in the judgment in Civil Appeal No. 108 of 1916 which we find in the paper Ex. 75. From that judgment it clearly appears that this well was at one time attached to a Mosque, the manager of which was of the family of the defendant, the present appellants, and the family, that is to say, the appellant and his ancestors, have been in possession of that well and the land thereto attached for over a century, but whether as owners or as *Mutavalis* of *Wakf* property does not appear and the learned Judge who passed that order in Civil Appeal No. 108 of 1916 declared that the well was not a public well

which vested in the Municipality but one the water of which was to be used by the public as a matter of right and he gave to the defendant's family a declaration of their right to possess this well subject to the right of the public to use it and the Municipality to act in respect of it under section 120 and other provisions of the Municipal Act and an injunction to the Municipality restraining them from interfering with such possession of the defendants' family.

There seems to have been a certain amount of obstinacy on the part of the appellant and what at first sight might appear a certain amount of encroachment by the Municipality but the public also seems to have objected to paying some honorific duty which was claimed by the Manager of the well under the title Hakabo and Kingri with the result that the present appellant, apparently in a fit of temper, filled up this well, so as to render it inaccessible to the public. The Municipality thereon asked him to clear it out and on his failure to do so, the Inspector of Nuisances prosecuted him before the "A" Bench of Magistrates of Shikarpur where the accused was acquitted. The Municipality thereupon brought this action.

We are not in this action concerned with the question as to how far the owner of property over which other people have a right of usufruct is bound to keep up such property when he no longer desires to do so solely for the benefit of the persons who are entitled to exercise the right of usufruct. That would be a matter which would arise if any person of the Shikarpur people who is in the habit, of using this well brought an action against Allahdino, the present appellant, in order to compel him to allow such plaintiff to draw water from this well. What we are at present concerned with is the right of the Shikarpur Municipality. We cannot see that they have any rights in the matter at all. This well was not a public well. It is a well to which the people have an access and the only special rights the Municipality have are under section 120 of the Municipal Act.

Now, section 120 only gives the Municipality power to regulate an actually existing well with the view to prevent the supply of water from being dangerous, stagnant or insanitary. As the marginal note says all the powers given to Municipality by section 120 are intended to prevent any well which is being used by the public from becoming dangerous to the public. Section 120 gives no right to the Municipality to annex a private well and turn it into a public well and does not give the Municipality any right to require the person who at one time had a well which was filled up to excavate it. It would be an extraordinary thing if the Legislature had given such powers to the Municipality because, if so, any body who owned a well to which the public had access might in the case of a land-slip or the unexpected fall of neighbouring buildings be compelled under proviso 2 to meet the entire cost of removing any shifted soil or ruinous structures which obstruct the public in access to the well. Section 120 does no more than provide that if a person has a well and has given consent to its water being used by the public he shall not allow it to become dangerous to the public either by reason of the danger of the people falling into the well or owing to the insanitary condition of the water or the surroundings of the well. It gives to the Municipality no power whatsoever to require a private individual to keep up or not to keep up a well. The other powers of the Municipality under the other sections of the Act, so far as they are indicated to us, are general powers and entitle them to regulate the use of private wells or to regulate the access of the public to existing wells or themselves to buy or dig or preserve their own wells and maintain them out of the public funds. All that gives no right to the Municipality to invade private property and it is not necessary to say, that any such invasions by the Municipality of private rights should be watched with great strictness by the Courts and should in no way be encouraged.

We think, therefore, that the whole cause of action of the Municipality is bad and that this suit should be dismissed with costs all through.

We say nothing which may prejudice the rights of any private person who imagines that his right to draw water from his well has been improperly interferred with by the appellant to seek his legal remedies, and our judgment solely is confined to the consideration of statutory powers given to the Municipalities.

P. B. A. *Appeal dismissed.*

ABDUL QUDDUS *v.* SAYED AHMAD HUSAIN

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1176 OF 1921.

December 19, 1922.

Present:—Mr. Justice Gokul Prasad.

ABDUL QUDDUS—DEFENDANT—APPELLANT

versus

SAYED AHMAD HUSAIN—PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 182 (5)—*Attachment in execution—Objections by owner—Decree-holder's application for summoning witnesses to contest objection—Step-in-aid of execution.*

A decree for money having been passed on the 10th January 1916 the decree-holder applied for execution on the 14th August 1917 and attached certain property. On the 28th January 1918, one *A* put in an objection claiming the property to be her own. On the 16th February 1918, the decree-holder put in his application to summon witnesses in reply to the objection. The property was released from attachment and the application for execution was dismissed in default. On the 14th November 1920 the decree-holder again applied for execution :

Held, (1) that the application by the decree-holder on the 16th February 1918 to summon witnesses to contest the objection was a step-in-aid of execution and a fresh period of limitation started from that time ;

(2) that the application for execution was, therefore, within time.

Second appeal against the decree of the District Judge, Shahjahanpur, dated the 28th of April 1921.

Hon. Mr. *N. P. Asthana*, for the Appellant

Messrs. *S. A. Haidar* and *Ibni Ahmad*, for the Respondent.

JUDGMENT.—This is an appeal arising out of execution proceedings. The decree-holder is the appellant. He obtained a simple decree for money under section 90 of the Transfer of Property Act on the 10th of January 1916. The first application for execution was made on the 14th of August 1917 and certain property was attached and later on all costs for sale were deposited. On the 28th of January 1918 one Musammat Amir Bibi put in an objection claiming that the property was hers. On the 16th of February 1918 the decree-holder put in his application to summon witnesses in reply to the objection filed by *Musammat* Amir Bibi in which the 23rd of February 1918 had been fixed for disposal. The property was released from attachment and the application for execution was dismissed in default. On the 14th of November 1920 the present application for execution was made and the judgment-debtor promptly pleaded limitation. The first Court dismissed the judgment-debtor's objection and directed execution to proceed. On appeal, however, the learned District Judge had referred to a large number of rulings and dismissed the present application as being barred by time. In this the learned Judge was obviously in error. The application by the decree-holder on the 16th of February 1918 to summon witnesses to contest the objection put in by *Musammat* Amir Bibi was a step-in-aid of execution and a fresh period of limitation started from that date (see the case of *Muhammad Siddiq Khan* v. *Misri Lal* (1). The application for execution was, therefore, within time. I allow the appeal set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale. The first Court will now proceed to execute the decree according to law.

K. S. D. *Appeal allowed.*

(1) 64 Ind. Cas. 524 ; 19 A. L. J. 843 ; (1922) A. I. R. (A.) 432.

CHANDRA MOHAN MAITI *v.* KINARAM MAITI

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2164 OF 1921.

February 5, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

CHANDRA MOHAN MAITI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KINARAM MAITI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 32—Cess Act (IX of 1880, B.C.), s. 95—Road Cess Return, when can be used—Statement re possession made in return, value of—Appellate judgment, what should contain—Finding of fact, when can be challenged in second appeal.

A Road Cess Return cannot be used under any circumstances in favour of the perrson making it but it can be used by others for a purpose not directly connected with the statements made in the return.

Ram Prasad Roy v. *Sham Narain*, 6 C. L. J. 22; *Lachmi Prasad Chaudhury* v. *Jag Mohan Lal Chaubey*, 22 Ind. Cas. 594 ; 18 C. L. J. 633, discussed.

A statement that a certain land is in the *Khas* possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a Return by invoking the aid of section 32 of the Evidence Act or some other adjective law.

In a judgment of reversal, it is not enough to say that, in the opinion of the Appellate Court, the evidence is meagre and could not be relied on without giving any reason in support of that view.

Where the Appellate Court simply says that the evidence is meagre and cannot be relied on and does not give any reasons in support of its view, its finding on a question of fact can be challenged in second appeal.

Appeal against the decree of the Officiating Subordinate Judge, 3rd Court, Midnapore, dated the 17th of June 1921, modifying the decree of the Munsif, 1st Court, at Contai, dated 11th March 1920.

Babu *Sashi Sekhar Bose*, for the Appellants.

Babu *Santimoy Mazumdar*, for the Respondents.

JUDGMENT.—The defendants are the appellants. The plaintiffs brought a suit for *Khas* possession of two plots of land '*Ka*' and '*Kha*' on the allegation that they were the *debuttar* property of Thakur Chandaneswar Mahadeva. With regard to their claim in respect of the land marked '*Kha*' both the Courts below have agreed in dismissing the plaintiffs' suit. With regard to plot '*Ka*' the defendants' case was that they were holding this land as tenants for a long time under an idol named Banabir Thankurani and under Thakur Chandaneswar Mahadev.

The first Court found that the land belonged to Thakur Mahadev but refused to give the plaintiffs *Khas* possession of the land, holding that the defendants were tenants in respect of it and could not be ejected therefrom. The plaintiffs appealed and the lower Appellate Court found with respect to this plot that the plaintiffs were entitled to *Khas* possession on the ground that the defendants failed to prove that they were the tenants on the land. Against this decree of the lower Appellate Court with respect of plot '*Ka*' that the defendants have preferred this appeal.

The findings of the first Court with regard to this plot are that the defendants have been holding it for the last 37 years and that they are in possession of this land as mentioned in a document executed by defendant No. 5 who is a recorded *shebait* of the idol Mahadev. There are other considerations also which led that Court to find for the defendants. The lower Appelate Court has upset that finding with the remark that the evidence on this point, namely, the possession of the defendants as tenants, is very meagre and cannot be relied upon. Then the learned Judge goes on to rely upon certain items of evidence adduced by the plaintiffs in respect of their case. One of these pieces of evidence is certain Road Cess Returns filed by the *shebaits* of the idols in 1890 and 1906. It is argued by the appellants that these Returns are not admissible in evidence under section 95 of the Bengal Cess Act. The facts are somewhat peculiar. The plaintiffs are the *shebaits* of both the idols Chandaneswar Thakur and Banbir Thakurani and they have been holding possession of the land belonging to these two idols as *shebaits* of both of them. The Road Cess Returns were filed on behalf of both the idols together. The plaintiffs attempted to use these Returns in order to show that the land in dispute did not belong to one idol but to the

other. Both Courts have apparently admitted these documents ; and the Court of Appeal below is of opinion that Road Cess Returns could be used in evidence in spite of section 95 of the Cess Act, but he does not give his reasons for this view. He, however, relies upon two reported cases. The first case the learned Judge refers to is the case of *Ram Prasad Roy* v. *Sham Narain* (1). That case does not support the respondents' contention. In that case the plaintiff, alleging himself to be an occupancy *raiyat*, sued the defendants for possession of the land on the ground that they were in occupation without any right and in proof of his title he produced the Road Cess Return filed by the *Zemindar*. It was held in that case that section 95 of the Cess Act has no application to a case where the parties were not persons who filed them in pursuance of the provisions of the Act. If anything, this case is an authority for a view opposite to that taken by the learned Judge. The next case referred to is the case of *Lachmi Prosad Chaudhury* v. *Jag Mogan Lal Chaubey* (2) There the suit was brought by a reversioner who in support of his case filed Road Cess Returns submitted by the widow who was in possession of the estate. It was held in that case that the Road Cess Return is admissible in evidence in favour of not only the person who filed it but also any person who claims through him or may be deemed to be his representative-in-interest, a reversioner is not a person who claims through a widow or may be deemed to be her representative-in-interest. This case also does not support the view taken by the learned Judge. These cases lay down the principle which has been enunciated by the Judicial Committee of the Privy Council in *Hem Chandra Chaudhury* v. *Kali Prosanna Bhaduri* (3) and followed in the case of *Chalho Singh* v. *Jharo Singh* (4) and *Mohendra Narayan Singh* v. *Ajodhya Prosad Singh.* (5) The result of these decisions is that section 95 of the Cess Act restricts the provisions of section 21 of the Evidence Act and makes the exceptions to that section inapplicable to the case of these Returns. The conclusion which is derivable from those cases is that a Return cannot be used under any circumstances in favour of the person making it but it can be used by others for a purpose not directly connected with the statements made in the Return. In the present case the Returns were filed by the *shebaits* of the idols. They show that the disputed plot is in the *Khas* possession of the idol Mahadev. The genesis of section 95 of the Cess Act is traceable to a tendency on the part of landlords to describe lands, though in the occupation of tenants, as in their *Khas* possession for some possible ulterior purpose. A statement, therefore, that certain land is in the *Khas* possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a Return by invoking the aid of section 32 of the Evidence Act or some other adjective law.

It has been very ingeniously argued by the learned Vakil for the respondents that the Returns were filed on behalf of the two idols any entry in the returns in favour of one idol must necessarily be against the interest of the other idol, they are, therefore, admissible under section 95. We regret that that we cannot accede to this proposition. If they are used against one of the idols they are also used in favour of the other idol which has submitted the Return, thus contravening the provisions of section 95 of the Cess Act. Moreover, if this view be adopted it would be easy to defeat the provisions of section 95 by making joint Returns by co-sharer landlords. We are, therefore, of opinion that the learned Judge is wrong in admitting in evidence those Road Cess Returns.

The next piece of evidence to which the learned Judge has adverted is the Record of Rights. The entry in the Record of Rights is to the effect that the defendants are occupancy *raiyats* in respect of the disputed land under the idol Mahadev. The learned Judge seems to think that if the defendants fail to prove that they are holding their tenancy under the idol Banabir they cannot avail themselves of that entry in the Record of Rights. Though he does not say so, probably he means that when both parties impugn the correctness of an entry in the Record of Rights the legal presumption ought not to be raised in favour of the defendants. But the learned Judge has not taken into consideration the peculiar facts of

(1) 6 C. L. J. 22.
(2) 22 Ind. Cas. 594; 18 C. L. J. 633.
(3) 30 C. 1033 (P. C.) ; 8 C. W. N. 1 ; 30 I. A. 177.
(4) 18 Ind. Cas. 61 ; 39 C. 995.
(5) 15 Ind. Cas. 284 ; 39 C. 1005.

this case. The record shows that the land has been held by the tenants as occupancy *raiyats* under the same man Naba Kumar Samanta, defendant No. 5, who happens to be the *shebait* of both the idols. The entry, namely, the defendants are holding this land in occupancy right under Naba Kumar, so far as it goes, certainly raises a presumption in favour of the defendants' tenancy. With regard to the idol being Mahadev or Banabir it must be borne in mind that it is the same person who represents both the idols and it is not unlikely to make a mistake as regards the name of the idol which is the real owner. The learned Judge, in our opinion, is not correct in rejecting the Record of Rights merely on the ground that the name of Mahadev appears in the entry instead of the name of the other idol.

It has been strenuously urged before us that, as the finding of the learned Judge is a finding of fact, we are not entitled to interfere with it in Second Appeal. The learned Judge says, as we have observed, that the evidence of the defendants' tenancy is very meagre and cannot be relied upon. He has not discussed the evidence and he does not say why it is meagre. It must be remembered it is a judgment of reversal, that the learned Judge was upsetting the findings arrived at after detailed consideration of the whole evidence on the record by another Court. We do not think that it is enough to say that, in the opinion of the Appellate Court, the evidence is meagre and could not be relied on without giving any reason in support of that view.

In the result we are of opinion that the learned Judge has not approached this case from the correct point of view and has not given that attention to it which it requires. Under the circumstances, we think that it would be proper that the appeal should be re-heard by the Court of Appeal below.

There is a cross-objection preferred by the respondents in respect of plot '*Kha*.' Both the Courts below have found that the plaintiffs have failed to prove their title or the title of the deity Mahadev to this plot. The learned Judge says "There is absolutely no evidence to show that plot '*Kha*' belongs to Chadaneswar. The public road separates this plot from Mahadev's temple compound. I also agree with the lower Court that plaintiffs have failed to establish that plot '*Kha*' is *Debuttar* property of the idol Mahadev. We do not see how, on this finding, it is possible for us to interfere in Second Appeal.

The order, therefore, which we propose to pass in this case is that the decree of the lower Appellate Court, so far as it relates to plot '*Kha*', would be set aside and the case remitted to that Court for a re-hearing of the appeal as regards that plot in accordance with the observations contained in the judgment. Costs of the appeal will abide the result.

The cross-objections are dismissed with costs.

M. B. *Appeal accepted.*

K. S. D. *Cross-objection dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1439 OF 1922.

June 22 and 27, 1923.

Present :—Mr. Justice Das and
Mr. Justice Macpherson.

Mahanth RAMPERKASH DAS
—APPELLANT

versus

KINJ LAL AND OTHERS—
RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XXII, r.* 9 (2)—*Death of respondent—Abatement of appeal—Application to set aside abatement—Ignorance of factum of death—Substitution of names, when can be made—Patna High Court Rules, Chap. VI, r.* 6.

The right to file the affidavit required by r. 6 of the Patna High Court Rules is conditional on proof of reasonable diligence. But when that condition is fulfilled and the application is filed, substitution is only admissible subject to other provisions of the law regarding appeals such as O. XXII of the Code of Civil Procedure and the Limitation Act. [p. 416, col. 1.]

Where an appeal has abated on account of the death of a party and the failure of the opposite party to bring the deceased's legal representatives on the record within the statutory period, no substitution of names can be made until the abatement has been set aside on application under O. XXII, r. 9 (2) of the Civil Procedure Code. [p. 416, col. 2]

RAMPERKASH DAS *v.* KINJ LAL

A person prosecuting a suit or an appeal is bound to keep himself informed of the existence of his adversary. A mere plea of ignorance of the death of an opposite party which took place many months or even years before is not a sufficient ground for setting aside abatement. [p. 416, col. 2]

Mirza Muhammad Askari v. *Lalu*, 45 Ind. Cas. 594; 21 O. C. 68, followed.

ORDER.—These applications to set aside abatement are made in second appeals arising out of suits tried together in which the decree bears date the 5th February 1920. The suits were dismissed and the plaintiff's appeal to the District Judge was also dismissed on the 4th September 1920. The plaintiff then preferred a second appeal to the High Court on the 12th January 1921 and the High Court, on the 13th June 1922, remanded the appeals to the lower Appellate Court. The District Judge decided the remanded appeals on the 11th September 1922, though his decree bears date the 31st October 1922. The present second appeals were preferred by the plaintiff on the 12th December 1922. When notices issued from the High Court they were returned with the report that certain respondents were dead, and on the 14th March 1923, the appellant, alleging that neither he nor his *karpardaz* had any knowledge of the death of the respondents at the time of the presentation of the memorandum of appeal and that the *karpardaz* only learnt of the death about a week before the date of the petition, applied to set aside the abatement and to substitute the legal representative for the deceased respondent in each case. The respondents are stated to have died on the dates shown against their names in list below,—

Appeal.	Respondent.	Date of death.
1439.	No. 5.	5th September 1922.
1442.	No. 5.	20th August 1921.
1447.	No. 5.	7th September 1922.
1454.	No. 5.	17th January 1922.
1452.	No. 8.	26th October 1920.
1459.	No. 8.	21st October 1920.
	No. 9.	5th January 1921.
1466.	No. 6.	18th July 1919.
1473.	No. 5.	17th November 1921.
1476.	No. 6.	18th December 1921.
1481.	No. 5.	24th December 1921.

It will thus appear that of the deceased respondents one in appeal No. 1456 died prior to the decision of the suit, one in No. 1452 and two in No. 1459 died before the first appeal from appellate decree was presented to the High Court, one each in appeals Nos. 1442, 1444, 1473, 1476 and 1481 died while those appeals were pending in the High Court, and one each in appeals Nos. 1439 and 1447 died while the remanded appeals were still on the file of the District Judge. Accordingly, the suit or the first appeal or the second appeal, as the case may be, abated as against the deceased respondents enumerated as substitution was not made in their place within the statutory period.

Reliance is, however, placed upon r. 6 of Chapter VI of the Patna High Court Rules the only provision of those rules which is applicable. Under that rule whenever, after a memorandum of appeal has been presented to the High Court, any appellant ascertains that any party mentioned in the memorandum of appeal had died before the appeal was presented, he may apply for an order that the memorandum of appeal be amended by substituting for the person who is dead his legal representatives, if along with his application he files an affidavit showing that the application is made with all reasonable diligence after the fact of the death of such person first came to his knowledge or to the knowledge of his agent, if any, acting on his behalf in that litigation.

Rule 6 has been the subject of consideration by this Court in several cases.

In Second Appeal No. 1379 of 1917 it was held that it was not necessary to bring on record the heirs of certain deceased respondents who were dead when the decree was made against them in the lower Appellate Court. That, however, was a peculiar case. The suit was one for partition. It was dismissed by the Trial Court but decreed in the lower Appellate Court. Some of the defendants appealed to the High Court and made respondents certain of their co-defendants who had died before the first appeal was decided in the lower Appellate Court. It was in respect of these deceased defendants-respondents that it was held that it was not necessary to bring them or their legal representatives on the record in that case, as the legal representatives were not bound by the decree obtained in the lower

Appellate Court. Indeed, it was the case of the petitioners for substitution that the decree under appeal being a nullity against some of the defendants, was, for that reason also, bad (in a partition suit) against all the defendants including the petitioners themselves. In the present case, which is also a second appeal, the circumstances are different. The appellant in this instance was plaintiff in the suit and appellant in the lower Appellate Court. Both suit and appeal having been dismissed, he must, in order to get a decree, have all the original defendants or their representatives on the record.

In *Kamakhya Narayan* v. *Baijnath Sahay* (F. A. 182 of 1922) the facts were that a defendant, Mahadeo Pandey, had died several months berore the decree under appeal was passed in his favour but his name was included in the list of respondents named in the memorandum of appeal. An application having been made to set aside the abatement and to substitute the legal representative of Mahadeo Pandey in his place, it was held that the case came under r. 6 of Chapter VI of the Patna High Court Rules in view of the contents of the affidavit filed, and the legal representative of Mahadeo Pandey was substituted for him as prayed. That case is not distinguishable from the case of the respondents in Second Appeals Nos. 1439 and 1447, in which the death of the deceased respondents took place when the litigation was before the Court from whose decree the appeal before the Court has been preferred, but is distinguishable from the case of the respondents in the other appeals.

Now, the affidavit required by r. 6 merely deals with the question of reasonable diligence on the part of the applicant *after* the fact of death of respondent came to his notice. That is to say, the right to file the affidavit is conditional on proof of reasonable diligence. But when that condition is fulfilled and the application is filed, substitution is only admissible subject to the other provisions of the law regarding appeals—such as O. XXII of the Code of Civil Procedure and the Limitation Act. Indeed, the Allahabad rule upon which the rule of this Court is based, mentions that the provision is "subject to the law of limitation." If no question of abatement or limitation arises, the application is sufficient. But if such a question arises measures must be taken (as the case may be) to have the abatement set aside or to bring the case within section 5 of the Limitation Act. As to abatement, it has been held in numerous cases in this Court that no substitution can be made until the abatement has been set aside on application under O. XXII, r. 9 (2). In order that abatement may be set aside it has to be proved that the petitioner was prevented by sufficient cause from continuing the suit. On the facts set out above, it is manifest that in no case except perhaps in Second Appeals Nos. 1439 and 1447 which will be discussed later was the appellant "prevented by sufficient cause from continuing the suit." A person prosecuting a suit or an appeal is bound to keep bimself informed of the existence of his adversary. A mere plea of ignorance of the death of an opposite party which took place many months or even years before is not a sufficient ground for setting aside abatement—*Mirza Muhammad Askari* v. *Lalu* (1). Apart from the question whether this Court can set aside an abatement which took place in the Trial Court or in the first Appellate Court before remand, the appellant must have known that, in the ordinary course of human affairs, there must have been many deaths during the course of more than four years among the oppposite party in 56 cases and appeals, but he took no steps to acquaint himself with the facts. He has, therefore, made out no case for setting aside any abatement which occurred prior to the order remanding the appeal to the lower Appellate Court on the 13th June 1922.

As regards second appeal No. 1439 the respondent No. 5 died on the 5th September and the respondent No. 5 in second appeal No 1447 on the 7th September while the District Judge's judgment was passed on the 11th September 1922. Notice in these two cases will issue to show cause why the abatement should not be set aside and the proposed substitution be made.

The preparation of the remaining cases of the batch need not await the interlocutory proceedings in these two appeals.

On the 27th June 1923, the following order was, however, passed.

(1) 45 Ind. Cas. 594; 21 O. C. 68.

NAGESHAR PRASAD *v.* RAM HARAKA PANDE

As the record of the leading case of this batch S. A. No. 1427 of 1922 was not put up with the record of these cases, it escaped notice that the question was before us for final disposal. The matter is only of importance in respect of S. A. No. 1439 and No. 1447. The application for setting aside the abatement was only filed on the 14th March more than six months after the date of death in each case, and the only ground for setting aside the abatement is that the petitioner's *karpardaz* came to know of the death about a week before. There is no definite statement as to the source of the information, nor is any reason given why the petitioner or his *karpardaz* did not take sufficient interest in the cases to learn of the deaths of respondents. There has been hopeless negligence on the part of the petitioner throughout, both before the filing of the second appeal in this Court and after the filing of that appeal. In these circumstances, sufficient reason has not been advanced for setting aside the abatement. The application in S. A. No. 1439 and S. A. 1447 is also rejected.

K. S. D. *Petition rejected.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1388 AND 1389 OF 1921.

February 8, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

NAGESHAR PRASAD— DEFENDANT—APPELLANT

versus

RAM HARAKA PANDE AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Pre-emption—Custom — Wajib-ul-arz *ambiguous—Burden of Proof.*

When the language of a *Wajib-ul-arz* is ambiguous the onus lies upon the plaintiff to establish his right of pre-emption—evidence which would satisfy the Court that the custom is certain.

Sadho Charan Niser v. *Birj Raj Miser*, 11 Ind. Cas 274; *Ataullah* v. *Shamsuddin*, 11 Ind. Cas. 278, followed.

Second appeal from the decree of the Subordinate Judge, Basti, dated the 30th July 1921.

Dr. *K. N. Katju*, for the Appellant.

Dr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.

Lindsay, J.,—These are two connected appeals which have arisen out of a suit for pre-emption. The sale-deed which was executed and which gave rise to the suits comprised two items of property, namely, a share in *Mauza* Dhaurahra and another share in *Mauza* Kamhariya.

The Court of first instance gave the plaintiff a decree in respect of the share in Dhaurahra but dismissed the claim with respect to the share in Kamhariya.

Both parties appealed and the result in the lower Court was that the plaintiffs' claim to Kamhariya was allowed and the defendant's appeal relating to the share in Dhauraha was dismissed.

We have, therefore, these two appeals, Nos. 1388 and 1389; in the former the vendee-appellant raises the question of the plaintiffs' right of pre-emption with respect to *Mauza* Dhaurahra. As regards this case Dr. Katju has informed us that, as the record stands, he does not think that he is in a position to press his appeal and, therefore, we direct that appeal No. 1388 of 1921 be dismissed with costs to the respondents including in this Court fees on the higher scale.

There remains the other appeal, No. 1389 of 1921.

The question we have to deal with here is one of interpretation The Judge of the Court below was of opinion that the plaintiff had a better right to pre-empt than the vendee-appellant, Nageshar Prasad Pande.

It seems that both the pre-emptors and the vendee belong to the same family as the vendor whose name was Brij Lal. On the pedigree which is set out in the record it seems to us to be clear enough that, whatever relationship does exist between the pre-emptors and the vendee on the one hand and the

SIVA SUBRAMANIA PILLAI *v.* RAKKUMUTHU MOOPPAN

vendor on the other, it is a remote relationship.

Coming to the *Wajib-ul-arz* we find that there are four categories of pre-emptors. The first is described as "*hissedar Aziz karib*," that is, co-sharers who are near relations. The second category consists of "*hissedar aziz baeed*," that is to say, co-sharers who are distant relations. The third class consists of "*hissedaran patti*," and the fourth class of "*hissedaran deha*."

The controversy centres round the second category. The Court of first instance was of opinion that here the pre-emptor and the vendee being both distant relatives one had no preference over the other. The Munsif was of opinion that on the language of the *Wajib-ul arz* there was no preference *inter se* with respect to individuals who are included in each of the classes we have just mentioned. He was of opinion, therefore, that as both the parties were distant relations the purchaser, Nagashar Prasad, had just as good a right to take the property as the pre-emptor Ram Harak.

The Judge of the lower Appellate Court differed from the Munsif regarding this. He found that Ram Harak, the plaintiff, is one degree nearer in relationship to the vendor than the purchaser, Nageshar Prasad, and he thought that by reason of this circumstance Ram Harak had the better title.

The question we have to decide is no doubt one of some difficulty and it is almost impossible to ascertain with any approach to accuracy what the meaning of the words "*karib*" and "*baeed*" are as used in the *Wajib-ul-arz*.

Apart from that, however, we think that, as there is no special declaration in the *Wajib-ul-arz* to the effect that individuals in any particular class are to have preference, we ought not to find in favour of the plaintiff. After all, the plaintiff has come into Court asserting a better right to take this property then the vendee and the duty lay upon him to satisfy the Court by clear and unambiguous evidence that he had such a right. Whatever may be said about the language of this *Wajib-ul-arz* it certainly cannot be described as free from ambiguity.

We find that this principle has been laid down in various cases decided by the Pre-emption Bench. Two of these have been quoted before us to-day by Dr. Katju, namely, *Sadho Charan Misir* v. *Brij Raj Misir* (1), and *Ataullah* v. *Shamsuddin* (2). In both those cases where the language of the *Wajib-ul-arz* was ambiguous the Court decided upon the principle that the onus lay upon the plaintiff to establish his right of pre-emption by evidence which would satisfy the Court that the custom was certain. Applying the same principle here, we think that the judgment of the lower Appellate Court as regards the share in Kamhariya is wrong and ought to be reversed.

The result, therefore, is that we allow Second Appeal No. 1389 of 1921 and restore the decree of the Court of first instance *in toto*. The appellant in this case is entitled to his costs in the lower Appellate Court and in this Court including, here, fees on the higher scale.

K. S. D. *Appeal No.* 1389 *allowed.*
Appeal No. 1388 *dismissed.*

(1) 11 Ind. Cas. 274.
(2) 11 Ind. Cas. 278.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 44 OF 1922.

September 27, 1923.

Present :—Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Waller.

SIVA SUBRAMANIA PILLAI—SECOND COUNTER-PETITIONER—APPELLANT
versus
RAKKUMUTHU MOOPPAN AND ANOTHER—PETITIONER AND FIRST COUNTER-PETITIONER—RESPONDENTS.

Mortgage-suit—Decree by consent—Provision for payment by instalments and execution of decree in default—Decree, whether merely preliminary—Decree, execution of.

A suit on a mortgage executed by defendant No. 1 for himself and as guardian of defendant No. 2 was

SIVA SUBRAMANIA PILLAI *v.* RAKKUMUTHU MOOPPAN

compromised with the permission of the Court and the compromise decree provided that the money due was to be paid in two instalments on stated dates, and that in default the plaintiff was to recover the whole amount by executing the decree (1) personally against the adult defendant No. 1; (2) by selling the mortgaged property, and (3) out of the other property of defendants. The defendants defaulting, the plaintiff applied for execution of the decree and the minor defendant contended that it was a merely preliminary decree and was not executable:

Held, (1) that the decree was a compromise decree and could not be treated merely as a preliminary decree, the intention of the parties being that in default the decree-holder should be entitled at once to realise the amount due to him by the sale of the properties covered by the decree.

Raja Hemondralal Singh Das v. *Fakir Chand Dutt*, 74 Ind. Cas. 929; 27 C. W. N. 621; 5 O. C. 650; (1923) A. I. R. (C.) 626 and *Arumbati* v. *Ram Narain*, 58 I. C. 299; 2 P. L. T. 38, followed.

(2) that the minor having been properly represented and the Court having granted permission for the compromise, the decree was binding upon the minor and he could not question it.

Appeal against the appellate order, dated the 13th October 1921 of the Court of the Additional Subordinate Judge, Ramnad, Madura, in A. S. No. 84 of 1921 (A. S. No. 1918 of 1920 on the file of the District Court, Ramnad, Madura) preferred against the order of the Court of the Principal District Munsif, Srivilliputtur, in E. P. No. 94 of 1920, in O. S. No. 910 of 1909.

Mr. *K. S. Champakesa Ayengar*, for the Appellant.

Mr. *K. V. Sesha Ayengar*, for the Respondent.

JUDGMENT.—The facts are these. Plaintiff brought a suit on a mortgage executed to him by defendant No. 1 for himself and as guardian of defendant No. 2; the suit was compromised and a decree was passed which provided,—

A. that the amount due to plaintiff was Rs. 200 out of which he was to give Rs. 30;

B. that Rs. 170 was to be paid by defendant by a certain date;

C. that in default plaintiff was to recover Rs 200 and interest by executing the decree. (1) personally against defendant No. 1, (2) by selling the mortgaged property, (3) out of the other property of defendants.

Defendants defaulted, after which four attempts were made to execute the decree. Defendants had notice of the applications and on one occasion they actually appeared.

On that occasion they did not contend that the decree was unexecutable but merely asked for the adjournment of the sale. This is fifth attempt at execution. Before he Munsif, both of the defendants appeared. Defendant No .1 pleaded that he had made certain payments to plaintiff. These the Court refused to recognise. Defendant No. 2 contended,—

A. That he was not bound by the decree; B. that the decree was unexecutable as it was merely a preliminary decree.

The Munsif found against him on both points and he appealed. His appeal was unsuccessful before the Sub-Judge against whose order he has again appealed.

On the first question—that is to say—whether the decree is binding on defendant No. 2, it is clear that he was properly represented in the suit and that the Court granted permission for the compromise as far as he was concerned. The decree against him is valid and binding and he cannot now question it. On the 2nd, we think that the Courts below were right. What was passed was not a preliminary mortgage-decree but a decree by consent. In a case not unlike this, *Raja Hemendra Lal Singh* v. *Fakir Chandra Datta* (1), it was decided that a compromise decree could not be treated as a preliminary decree, the intention of the parties being that in default, the decree-holder should be entitled at once to realise the amount due to him by the sale of the properties covered by the decree. In another case of a consent decree passed in a mortgage suit, *Arunabati* v. *Ram Niranjan* (2), a similar conclusion was arrived at. We find in this case that the decree that was passed by consent was not a preliminary decree and was executable.

A third question was raised and found against defendant No. 2. Defendants had had notice of the four previous attempts to execute the decree and never appeared to contend that the decree was unexecutable. The lower Courts found that it was not now open to them to

(1) 74 Ind. Cas. 929; 27 C. W. N. 621; 50 C. 650; (1923) A. I. R. (C.) 626.
(2) 58 Ind. Cas. 299; 2 P. L

raise such a contention. It is not necessary for us to decide the appeal on this ground. Defendant No. 2 argues that he cannot be bound by his guardian's negligence in not appearing to oppose execution. It is not apparent how the failure to take a wholly untenable objection can be described as negligence.

Appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1083 OF 1921.

June 22, 1923.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Ross.

SARJU SAHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUKHI LAL—PLAINTIFF—BHAGWAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS

Negotiable Instruments Act (*V of* 1881), *ss.* 4, 80—*Document containing request to plaintiff to pay money to defendant—Undertaking to re-pay with interest—Ambiguity about rate of interest—Oral evidence, whether admissible — Evidence Act* (*I of* 1872), *s* 92 (*b*) *Rate of interest permissible—Interest Act* (*XXXII of* 1839) *s.* 1.

Plaintiff sued to recover Rs. 600 with interest at Rs. 1-8 percent.per mensem on the foot of a document which was in the shape of a request to the plaintiff to pay the defendant Rs. 500 which the defendant undertook to re-pay with interest at the rate of Rs. 1-8 per cent:

Held, (1) that the document as executed was not an unconditional contract and was not, therefore, a promissory-note under section 4 of the Negotiable Instruments Act;

(2) that consequently the plaintiff was not entitled to interest at the rate of Rs. 6 per cent. per annum under section 80 of the Act;

(3) that as it was not mentioned whether the rate of interest was to be per mensem or per annum, the document was ambiguous and under clause (6) of section 92 of the Evidence Act, no evidence could be given to clear up the ambiguity;

Protap Chandra Soha v. *Muhammad Ali Sarcar*, 20 Ind. Cas. 443; 18 C. W. N. 592; 19 C. L. J. 66; 41 C. 842.

(4) that as no time was fixed for the payment of the loan in the document the plaintiff was, under the Interest Act, entitled to interest at a rate not exceeding the corrent rate from the date of demand.

Appeal from a decision of the Subordinate Judge, Patna, dated the 14th March 1921, modifying a decision of the Munsif, Second Court, Patna dated the 8th June 1920.

Messrs. *S. M. Mullick*, for Mr. *Probhat Ch. Ghosh*, and *A. N. Das*, *for Mr. B. C. Mitter*, for the Appellants.

Messers. *S. C. Mitra* and Rai *T. N. Sahai*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.,—This appeal is directed against the decree passed by the Subordinate Judge of Patna, dated the 14th March 1921, in a suit brought by the plaintiff to recover Rs. 500 with interest at Rs. 1-8 per cent. per mensem from 11th April 1916 on the foot of a document, Exhibit 1, dated the 14th April 1916. The defendants are appellants. The only point urged by the learned Vakil on their behalf is that the claim of the plaintiff with respect to Rs. 207-5-6 was barred by limitation. That sum represents the amount which was found due from the defendants to the plaintiff upon an adjustment of account of the dealings between the parties. The adjustment took place on the 8th *Chait Sudi* 1973 (*Sambat*) corresponding to 11th April 1916. (8th *Chait* corresponds to two days 10th and 11th April). The suit was instituted on the 8th April 1919, that is, within three years from the adjustment of accounts. The learned Vakil on behalf of the appellants contends that the time should be computed from 6th *Chait* 1973, corresponding to 8th April 1916, when the last item on the credit side is shown in the account-books. In that case the suit will be barred by one day inasmuch as it ought to have been filed on the 7th. The learned Subordinate Judge overruled this contention on the ground stated by him that the said sum of Rs. 207-5-6 found due from the defendants merged itself into the sum of Rs 500 with respect to which the aforesaid

document (Exhibit 1) was executed by the defendants on the 11th April 1916 and, therefore, there was a new agreement by the defendants to pay Rs. 500 taken by the defendants —a part of it Rs. 207 odd in satisfaction of the prior dues and the balance of Rs. 292-10-6 taken in cash. The evidence in this case was that only Rs. 292-10-6 was paid in cash when the document in question was executed and the balance represented the plaintiff's dues under the *Bahi Khata* account. There is no mention of the dues inthe *Bahi khata* account in the document in question and consequently that transaction was wiped off and converted into a new transaction in respect to which the document (Exh bit 1) was executed Therefore, we agree with the view taken by the learned Subordinate Judge that the document (Exhibit 1) created new obligation upon the part of the defendants to pay the said sum as mentioned therein and the entire sum is, therefore, recoverable on the basis of the said document. The previous transaction between the parties and sum due thereunder was only used in the case as evidence of how the consideration of Rs. 500 was paid to the defendants. Admittedly, the suit as based on the document is not barred and, therefore, the appellants' contention must fail. The appeal must, therefore, be dismissed with costs.

The respondents, however, have filed a cross-objection. It relates to the interest which the learned Subordinate Judge has disallowed to them in his partial decree It is contended on their behalf that the document in question was a negotiable instrument and consequently under section 80 of the Negotiable Instruments, Act the Court below should have at least given interest at the rate of 6 per cent. per annum. The document in question, however, is not a negotiable instrument It is not a promissory-note under section 4 of the Negotiable Instruments Act inasmuch as there is no unconditional term to pay a fixed sum of money. The document is in the shape of a request to the plaintiff to pay the defendants Rs. 500 which the defendants would pay with interest. This was, therefore, a conditional contract. The liability was upon the defendants after an advance of Rs. 500 was made by the plaintiff. No doubt the payment has been proved and the liability under the document is clear ; but the document as executed is not an unconditional contract and is, therefore, not a promissory-note under the Negotiable Instruments Act. Therefore, the contention put forward on behalf of the plaintiff-respondent must be overruled

It is then said that they should have been allowed interest at the rate of 1½ per cent. per mensem. The document says:—"I shall pay the principal with interest at the rate of 1½ per cent." It is not mentioned there as to whether the rate of interest aforesaid will be per mensem or per annum. The document is, therefore, ambiguous and under clause (6) of section 92 of the Evidence Act no evidence could be given to clear up that ambiguity, as held in *Protap Chandra Saha* v. *Muhammad Ali Sarkar* (1). Therefore, the appellants are not entitled to interest at the rate of 1½ per cent. as claimed by them. That case was with respect to agricultural holding and the claim was based upon a lease in which the rate of interest was mentioned one anna per rupee, but the other specification of whether monthly or annual was not mentioned and, therefore, Sir Lawrence Jenkins, C.J., held that there was a blank left as to whether the interest was per annum or per mensem and under clause (6) of section 92 of the Evidence Act no evidence could be given to clear up what that blank meant. The Court in that case held that of arrears of rent of agricultural holdings no rent was allowable but damages, and, therefore, the Subordinate Judge in that case allowed damages at the rate of 25 per cent. and that was upheld by Sir Lawrence Jenkins, C.J. We are not dealing with the case for arrears of rent due from agricultural holdings but with a contract to re-pay the money taken as loan and, in the absence of any contract to the contrary, the Interest Act of 1839 would apply. Under section 1 of that Act the plaintiffs are entitled to interest at a rate not exceeding the current rate of interest. In this case no time was fixed for the payment of the loan in the document (Exhibit 1) and, therefore, under the Interest Act the plaintiffs are entitled to interest at the rate not exceeding the current rate of interest from the date of demand. The money was demanded on the 8th March 1919 by a registered notice and the plaintiffs are, therefore, entitled to interest

(1) 20 Ind. Cas. 443 ; 18 C. W. N. 592 ; 19 C. L. J 66 ; 41 C. 312.

from that date at the rate of 6 per cent. per annum.

The cross-appeal is, therefore, allowed to that extent without costs. The result is that the decree of the Court below is modified by allowing interest at the rate of six per cent. per annum from the 8th March 1919 up to the date of realisation.

Ross, J.—I agree.

K. S. D. *Decree modified.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 7 OF 1921.

March 5, 1923.

Present :—Messrs. Batten, J. C. and Hallifax, A. J. C.

KUSHI BAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANRAKHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Gift by widow—Consent of nearest reversioners, effect of.

A gift by a Hindu widow with the consent of the next reversioner is valid.

Appeal from the decree of the Additional District Judge, Raipur, dated the 30th September 1920, in Civil Suit No. 3 of 1920.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Appellants.

Messrs. *M. Gupta* and *A. C. Roy*, for the Respondents.

JUDGMENT.—The only result of the death of Bahi Bai since the date of the decree in this suit is that her rights in the property in dispute, whatever they may be, have passed by survivorship to her sister Kushi Bai. It has been held that Kushi Bai, as well as Bahi Bai, consented to the gift to Durga Prasad by Sahelia Bai, but only on the ground that it was so decided against her in the previous suit. It appears, however, that Kushi Bai was not a party to the appeal in the judgment of which this matter has been assumed to have been decided against her. At the same time, there is conclusive evidence of her consent on the record of the present case in the copy of her deposition in that suit which is filed as Exhibit 1, D. 7.

The record of Kushi Bai's examination-in-chief is as follows. "I know about gift to Durga Prasad. Before the deed of gift in his favour was executed Sahelia Bai said she would gift the property and I along (with) the parents of Durga Prasad said 'you may execute the deed of gift. I consented to the gift in favour of Durga Prasad. Bahi Bai said that she would execute the deed. (*Bahi Baikahis ham likhawo*) When Bahi Bai myself and Bahi Bai's husband consented to the gift being executed in favour of Durga Prasad we were at Sursabandha. After the deed of gift was executed Durga Prasad came to Kumhari and told me that the deed of gift was executed in his favour. I said that 'you are our son, go and enjoy."

The answers in cross-examination in the same deposition have been recorded as follows:—" I have hard the deposition of Sahilia Bai when she was being examined. Nobody informed me that I was heir to the property after the death of my mother. I have a son. I do not know anything about giving up my rights in the property. The talk of gifting the property to Durga Prasad was going' on four months six months before execution of the deed of gift in favour of Durga Prasad and in fact this talk was going on from his birth. I was informed that the deed of gift was going to be executed in favour of Durga Prasad and this was at Kumhari about two or four months before. I do not know the exact period. I do not know what was written in the deed of gift. When I came to Sursabhandha after two months after the execution of the deed of gift Durga Prasad read over the deed of gift to me in the presence of Durga Prasad's mother and father."

In re-examination she said: "When the deed of gift was read over, Bahi Bai and all present said it was well done."

KUSHI BAI *v.* MANRAKHAN

It has been faintly suggested that the second and fourth sentences in the cross-examination show that she did not really consent, but two casual and somewhat ambiguous phrases of that sort cannot destroy the very clear effect of the whole deposition. It is true that in all the evidence on the matter that is available now Bahi Bai's husband only is mentioned specifically as having been consulted in the matter and Kushi Bai's is not. Banmali Prasad, however, is mentioned not as the husband of Bahi Bai but as the father and guardian of the minor donee, and it is beyond doubt from her own statement that Kushi Bai had the advice of her husband and all the other members of the family in the matter and that her consent was based on an intelligent understanding of the nature of the transaction to which it was given.

It is admitted that Kushi Bai's consent cannot of itself affect the independent rights of others in the property, and that any effect that consent may have will cease on her death; she could extinguish or otherwise affect at the most only the life ownership that was eventually to come to her. The direct legal effect of her consent is, however, a different matter from its evidential effect. It is contended on her behalf that the consent of the whole body of next reversioners to a gift by a Hindu female owner for life could not be regarded as presumptive evidence of that gift having been made for purposes or in circumstances which would validate it after the donor's death, in the way in which such consent was held by their Lordships of the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan* (1), to be presumptive evidence of the legal necessity for an alienation for consideration. The argument rests mainly on the assertion that legal necessity for a gift is inconceivable. Justifying cause for such a gift, even of the whole estate, is, however, quite conceivable and can be proved by evidence, just as such cause for a transfer for consideration whether of the kind that is called "legal necessity" or some other kind, can be proved and the consent of the people interested in quarrelling with an alienation would be equally strong proof of its being justifiable whether it was a gift or sale or a mortgage.

In the case of *Rangasami Goundan* (1) it was held under what their Lordships called the second head of the subject that the consent of the next reversioner must be looked on, in their Lordships' own words in the earlier case of *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (2), "as affording presumptive evidence that the alienation was under circumstances which rendered it lawful and valid," without any specification of those circumstances. The consent of reversioners who would not be more than life owners if they ever did inherit could not be treated in the same way as presumptive evidence of an unspecified cause which would justify and validate an alienation beyond their own lives. But it is presumptive evidence of circumstances not requiring to be specified which would render it lawful and valid during their lives and there is no reason why it should not be treated as evidence, for what it may be worth, of specific causes justifying an alienation which created an absolute title. The validity of the gift till at least the death of Kushi Bai can, however, be establised in a different manner.

It is to be remembered that the gift to Durga Prasad was of the whole estate that Sahilia Bai had inherited from her deceased husband Daryaodhari, so that if she had relinquished it the estate would immediately have vested in her husband's next heirs, that is to say, her two daughterts Bahi Bai and Kushi Bai. In *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (3) it was held by a Full Bench of the Calcutta High Court that a sale by a widow with the consent of the only presumptive reversioner was valid after the death of the widow, for the reason that it could be regarded as a relinquishment of the estate in favaur of the next reversioner and as a sale by him after the estate had vested in him. This was approved by their Lordships of the Privy Council in the case of *Rangasami Goundan* (1) already mentioned. In

(1) 50 Ind. Cas. 498; 42 M. 523; 36 M. L J. 493; 17 A. L. J. 536; 29 C L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

(2) 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 12 A. L J. 711; 19 C. L. J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533; (1914) M. W. N. 480 (P. C.)

(3) 10 C. 1102; 5 Ind. Dec. (N. S.) 737.

that case, after pointing out that in case of alienations by a Hindu female there is a distinction between the power of surrender or renunciation which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second, their Lordships mentioned the Calcutta Full Bench case in the course of their discussion of the subject under the first head, and then said : " The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Noboki-shore* (3) already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth."

Here also the gift to Durga Prasad was of the whole of the property inherited by Sahilia Bai from her husband Daryaodhar, so that if she had merely relinquished it the estate would have vested immediately in her husband's next heirs, that is to say, his two daughters Bahi Bai and Kushi Bai. At the time of the gift, however, there were two other reversioners ranking equally with Durga Prasad after the two daughters of Daryaodhar. These daughters could not, therefore, relinquish the entire estate in his favour, so that it should vest in him immediately, but there was nothing to prevent them from agreeing that he should remain in possession of it in their stead for as long as they were entitled to do so. What happened, then, when the deed of gift was executed by Sahilia Bai with the consent of Bahi Bai and Kushi Bai was that the former relinquished the estate and the two latter inherited it and immediately transferred their own rights in it, that is, their ownership of it for life, to Durga Prasad.

The third and fourth plaintiffs, who would have ranked at the time of the gift as equal reversionary heirs with Durga Prasad to the property of their maternal grand-father Daryaodhar, and at present constitute the whole of the first line of reversion have asked in this Court for a declaration that the gift will in any case not hold good after the death of Kushi Bai. In the lower Court their claim was to immediate possession as the next heirs on the death of Sahilia Bai in case it were held that Bahi Bai and Kushi Bai had disentitled themselves from claiming possession by consenting to the gift to Durga Prasad. This clearly impossible position has now been abandoned and a new prayer has been put forward for a declaration that, on Kushi Bai's death, the property will pass to the heirs of Daryaodhar just as if there had been no gift.

There was no prayer for any such declaration in the lower Court, and on the plaint as it stood the rights of the parties after the death of the survivor of the two sisters were not really in issue, as a determination of their rights during the lives of Bahi Bai and Kushi Bai was quite sufficient for a decision of the questions whether some or all of the plaintiffs were or were not entitled to immediate possession and whether the third defendant's mortgage was entirely void or not. The prayer for a declaration now made is really a prayer for an amendment of the plaint which makes a considerable change in the character of the suit. It appears, however, that this change was tacitly made in the lower Court, though without any actual amendment of the plaint. Both defendant parties pleaded that Durga Prasad acquired an absolute estate in the property because the gift to him was made in compliance with the expressed wishes of Daryaodhar, which amounted practically to a nuncupative Will. The fourth of the issues stated for trial was " whether Durga Prasad got an absolute title to the estates by reason of the fact that the gift was consented to by the daughters or by reason of the decision of the former suit No. 5 of 1907." The finding of the learned Additional District Judge on this issue was as follows: " As the plaintiff Nos. 1 and 2 who consented to the gift themselves take a limited estate I hold that Durga Prasad does not obtain an absolute estate." In this Court also no objection has been taken on behalf of any of the respondents to the question of the rights of the parties after the death of

KUSHI BAI *v.* MANRAKHAN

Kushi Bai being treated as directly and substantially in issue betweem them in the suit; on the contrary, the question has been argued by them all. It will, therefore, be considered and decided just as if the necessary amendment in the plaint had been actually made.

The third defendant is Sheogulam Krishnapakshi, who holds a mortgage of the property which was executed in favour of his deceased father Narayan Rao by Durga Prasad, and he was joined as a defendant on the allegation that the plaintiffs are entitled to obtain possession of the properties claimed free from any encumbrances created by Durga Prasad. It is to be noted that in the heading of the written statement filed on his behalf this defendant is called Sheomangal twice over, though the verification clause of the same document, apparently written by his pleader, reverts to the name of Sheogulam. In that written statement the defendant pleaded "that deceased Durga Prasad, father of the defendants Nos. 1 and 2, acquired absolute right to the properties in suit by virtue of the aforesaid gift, and could deal with the same as he liked. This defendant did not expressly call in aid section 41 of the Transfer of Property Act or section 115 of the Evidence Act in that written statement, but they would come in only in answer to the plea that the mortgage was valid only up to the death of the survivor of the two sisters, which was not expressly taken. He is clearly entitled to rely on those sections in reply to a plea based on an admission that his title is good while Kushi Bai is alive, and he does so in this Court. For the rest, his position is the same as that of the other defendants.

It will be convenient to examine first the case common to all three defendants and to see whether there are any circumstances to justify the gift so that it would invest Durga Prasad with the absolute estate in the property. In the appellate judgment in the previous suit, in which Bahi Bai sued Durga Prasad and Sahilia Bai and Kushi Bai for a declaration that the gift was void, Skinner, A. J. C., set out the facts as follows: "Daryodhar had left no son but two daughters, Bahi Bai and Kushi Bai, both of whom have children. Durga Prasad, however, was the only grandson in existence in the grandfather's lifetime, though a younger son has since been born to Bahi Bai, and a son to Kushi Bai. On the 14th December 1890 Sahilia Bai, in accordance with what she believed to have been her husband's wishes, gave M. Sursabandha to Durga Prasad by a registered deed. He was already living with her, and has since been in possession as owner and has mortgaged the village to the defendant Narain Rao. The plaintiff sued in May 1907 as reversioner for a declaration that the gift is invalid as against the reversionary heirs of Daryodhar, and has joined as defendants Sahilia Bai, Durga Prasad, Kushi Bai and Narain Rao. Before the District Judge, Durga Pershad set up a title by adverse possession, which was rightly disallowed, and has not been set up in appeal; and a title under a nuncupative Will by Daryodhar was put in issue and found not proved, but seems to me from the pleadings to have been invented by the plaintiff's pleader for the pleasure of demolishing it, and never set up by Durga Prasad. All that he alleged was that Daryodhar had expressed a wish that he should be his heir and succeed to his property, and I see no reason to doubt the evidence that Daryodhar had expressed a wish to that effect and had thought of adopting the boy. He had not actually adopted him or made a Will in his favour but the fact that he had wished to do so affords a very reasonable motive for Sahilia's desire to give the village to the boy her husband had designated as his heir, and who was her eldest grandson."

The following passage occurring later in the judgment is also of importance: "There remains the question to what the plaintiff consented, and the answer in my opinion is an out and out gift and not to a mere transfer of Sahilia's life interest. In the first place, the plaintiff has never alleged that she consented to the transfer of a mere life interest but has denied that she consented at all. Secondly, if Sahilia's interest only was to be transferred there was no need to ask the plaintiff's and her sister's consent. Thirdly, the deed clearly purports to transfer all the rights of Sahilia and her heirs to Durga Prasad and his heirs, and Kushi Bai (after being put on her guard with regard to her and her son's rights and saying 'I do not know anything about giving up my rights in the property,' and 'I do not know what was written in the gift,') admitted that two months after its execution Durga Prasad read it over

to her in the presence of his mother and father, and that when it was read over Bahi Bai and all present said it was well done. I find that the plaintiff consented to the gift as made, and that, whatever. rights and her sister's sons may still have, her suit is, therefore, unsustainable."

As evidence of the circumstances of the gift and the reasons that led to it we have copies of the statements made by Sahilia Bai (Exhibit 1. D. 6) and Kushi Bai (Exhibit 1, D. 7) in the previous suit to which reference is made in full at the beginning of this judgment. It will be convenient to have the full statement of Sahilia Bai also re-produced. She appeared to be about 80 years of age when she was examined on the 7th of January 1908 and the record of her deposition is as follows: "I have gifted the village Sursabaudha to Durga Prasad. Durga Prasad is now the owner of the village.

Q.—Since when is Durga Prasad in possession?

A.—He has been in possession of the village all his life. He was brought up by Daryaodhar and has been living there.

Q.—Why was the village gifted to him?

A.—He was brought up as his son by Daryaodhar who before his death had directed me to gift the said village to Durga Prasad and as I had none else to look after the village I gifted it to Durga Prasad. The gift was made about 10 or 12 years ago. I gifted the village with the consent of Banmali and both the daughters Bahi Bai and Kushi Bai and my son-in-law accompanied me to Raipur to keep me company and get the document of gift executed. I put up at his house at Raipur. Here at Raipur Gaibinath pointed out that Banmali may have four sons and they may claim a share but I said I will gift the village to Durga Prasad alone and to none else and Banmali consented. I had gone from Sursabandha to Paota on my way to Raipur and at Paota I had put up with my daughter Bahi Bai. Bahi Bai pressed me to gift the property to Durga Prasad and said that if I did not do so Lutudhar might claim it. There was a dispute between Lutudhar and myself about this village as he disputed my right to this village and after I got the village I gifted it to Durga Prasad. After I executed the document of gift at Raipur I went to village Paota and remained there in the house of Bahi Bai for four days and informed her that I had executed the deed of gift of the village in favour of Durga Prasad and she approved. Durga Prasad had accompanied me to Pota and from there he went to Rajim. Kushi Bai is my younger daughter. I did not inform Kushi Bai that she had share in the property. Kushi Bai also pressed me to gift the property to Durga Prasad. I cannot say why she has changed now.

Cross-Examination.—The consultation about gifting the village was first taken at Sursabandha one year before the execution of the deed and it was going one year before and my daughters and my sons-in-law were pressing me to gift the village to Durga Prasad from the time of his birth. Durga Prasad was about 25 years old when the document was executed in his favour and a son was born to him at that time. For the whole of this period of 25 years consultation was going on about the gifting of the village to Durga Prasad. My husband died when Durgaprasad was three years old and then Lutudhar raised a dispute and when this dispute was settled, I gifted the village to Durga Prasad. The dispute with Lutudhar went on for four years. I then went to pilgrimage and when Durga Prasad came of age I gifted the property to him (witness volunteers and says) Durga Prasad was in possession all along. I did not gift the property to Durga Prasad for fear of Lutudhar. His dispute had already been settled. As far as I remember Durga Prasad had only one younger brother at the date of the gift whose name is Ganpat. Kushi Bai's son Bodhan was then aged four years only. When I went to Paota while coming to Raipur from Sursabandha for the purpose of executing the deed Kushi Bai was not at Paota. I came to Raipur with Banmali and my nephew Tejnath. The deed of gift was written at Ratiram Tewari's house and was read over to me. I do not remember if I told the scribe that my husband had directed me to give over the village to Durga Prasad. I was asked by the scribe only three questions. The first was that whether I would reserve anything for myself and my reply was that I would not reserve anything for myself. The second question was, if Durga Prasad turns you out what would you do and my answer was that he would never turn me out. The third question was, do you give the whole property to Durga Prasad and my reply was in

the affirmative. No one suggested to take signatures of my daughters on the deed of gift. I informed the scribe that I had two daughters. If I had not executed the deed of gift in favour of Durga Prasad, Lutudhar would have enjoyed the whole property and none else would have got any property. None of my daughters were present at Raipur when I executed the deed of gift in favour of Durga Prasad."

Of the oral evidence given in the suit the only depositions that have any bearing on the matter in issue are those of Bahi Bai (P. W. 1), and Kushi Bai (P. W. 2) both of whom were examined on commission. The depositions of all the rest and also the greater part of those of the two sisters appear to be directed to proving that Sahilia Bai died more or less than twelve years before the institution of the suit. It is only against Bahi Bai and Kushi Bai that time would run from the death of Sahilia Bai, and the title against them is established by their consent to the gift; during their lives possession of the property by Durga Prasad or his sons cannot be adverse to the next reversioners. The two sisters make contradictory and confused depositions in the endeavour to make out that they did not consent to the gift to Durga Prasad, and overreach themselves entirely by going to the length of saying that they never heard of the gift at all till months after it had been made. These depositions have to be ignored entirely, being completely contradicted by those in the previous case. We are left then practically with no oral evidence but those two earlier depositions, and we agree entirely with the appreciation of them by Skinner, A. J. C., in the passage quoted from his judgment. It may be added that the statement by both Kushi Bai and Sahilia Bai that the gift to Durga Prasad had been in contemplation "from his birth" is proof that Daryaodhar's expression of his wishes was not a mere casual statement of a passing idea, but a repeated and consistent declaration of a fixed intention to make him his heir.

There are two other matters for consideration in this respect, which were put forward by the learned Advocate for the appellants as indicating that the gift was not made in consequence of any expressed wish of Daryaodhar. One was the fact that there is no mention of any such thing in the deed of gift itself. Such a mention would perhaps have made the evidence on the point even stronger than it is, but its absence cannot make it less strong than it is. The other matter is the fact that the period between Daryaodhar's death and the execution of the deed of gift was about sixteen years. It is by no means improbable that Sahilia Bai would postpone the transfer as long as possible, in spite of knowing what her husband wished her to do with it, and would retain it in her own hands until old age rendered her less able to manage it and also rendered further postponement risky.

The facts proved by this evidence seem to be as follows. Daryaodhar did wish Durga Prasad to inherit all his property and had frequently said so. He even intended to adopt the boy but never actually did so, probably for the reason that up till his death Durga Prasad was the only son of his father, but Durga Prasad lived mainly with him and after his death with his widow after the manner of an adopted son. It was in fulfilment of that desire and that intention that Daryaodhar's widow and his two daughters joined in handing over all his property to Durga Prasad after his death, and they intended that Durga Prasad should become the absolute owner and not that he should hold it only till the death of the last survivor of them. They believed, and were probably not wrong in believing, that Daryaodhar's wishes would not have been changed on the birth of another son to Bahi Bai and one to Kushi Bai. Indeed, it is by no means improbable that if he had been alive when Bahi Bai's second son was born he would himself have ensured the fulfilment of his wishes by adopting Durga Prasad. The expression of the wishes and intentions of Daryaodhar amounted practically to a nuncupative Will that was never quite formulated. This appears sufficient justifying cause for the alienation of the property by the owners for life.

But there is further and perhaps stronger evidence of the transfer of the property having been made to Durga Prasad for reasons which among Hindus would be considered proper. It is indeed the evidence of the subsequent consent of one of the next two reversioners after Bahi Bai and Kushi Bai, Ganpat Prasad the younger son of the former, and is to be found in Exhibits D-2, D-3, D-4

and D-5. From these documents it appears that when Banmali Prasad died Ganpat Prasad successfully resisted Durga Prasad's claim to be entered in the Mutation Register as owner of half his property on the ground that he already had his grandmother's property. The statements recorded in the mutation proceedings in March 1913 are as follows. Durga Prasad said : "My father Banmali died three moths ago. He owned 2-anna share in Paota and 2-anna share in Tandul. I am not in possession of any of these shares but I pray that mutation be made in the name of Ganpat Prasad and mine equally. Ganpat Prasad is in exclusive possession of the two shares." Ganpat Prasad's statement was : "My father Ban mali held 2-anna share in Powta and Tandul. He died leaving two sons myself and Durga Prasad. Durga Prasad has gone away to Sursabandha in Mahasamund Tahsil. He does not inherit this property. I am in full possession of the village share. Pray mutation be sanctioned in my name. Durga Prasad gets my grand-mother's village." It would seem then that the whole family had actually put Durga Prasad in the position he would have occupied if Daryaodhar had actually adopted him, as he undoubtedly wished and intended to do.

Our findings then are that none of the plaintiffs can in any case claim possession of the property till the death of Kushi Bai, as she was entitled to alienate it in favour of Durga Prasad after it had vested in her by the relinquishment of her prior interest by Sahilia Bai ; the transfer by Bahi Bai and Kushi Bai after relinquishment by Sahilia Bai, which is the effect of the transfer by Sahilia Bai with their consent, was a fulfilment of the intentions of Daryaodhar, which have been carried out even to the extent of Durga Prasad being regarded as the adopted son of Daryaodhar so that he lost all rights in his own father's property ; this is justifying cause for the alienation in favour of Durga Prasad so as to confer on him the absolute estate that the donors intended to confer. For all these reasons the dismissal of the suit appears correct. The appeal is accordingly dismissed and the appellants are ordered to to pay all the costs.

K. S. D. *Appeal dismissed.*

N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 203 OF 1924.

April 30, 1924.

Present :—Mr. Justice Martineau.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

CHARANJIT LAL—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890) ss. 72, 77, 140—Loss of goods—Damages, suit for—Risk Note B—"Running train," what is—Notice to Railway—Notice sent to Secretary Railway Department forwarded to Agent, whether sufficient.

A "running train" within the meaning of Risk-Note, form B, means a train in motion between stations and does not include a train standing at a stations during the course of its journey.

A notice purporting to be under section 77 of the Railways Act, instead of being addressed to the Agent of the defendant Railway, was addressed to the Secretary to the Government of India, Railway Department, but in the acknowledgment which the latter sent to the plaintiff it was stated that the plaintiff's letter had been sent to the Agent of the defendant Railway for disposal ;

Held, that it could reasonably be presumed that the Agent of the defendant Railway had received notice of the claim.

East Indian Railway Co. v. *Jethmull Ramanand*, 26 B. 669 ; 4 Bom. L. R. 495, distinguished.

Appeal against the decision of the District Judge, Amritsar, dated the 19th October 1923.

Lala *Jai Lal*, R. B., for the Appellant.

Messrs. *Shamier Chand* and *Sagar Chand*, for the Respondent.

JUDGMENT.—The plaintiff has been given a decree against the Secretary of State for the value of 24 tins of Ghi lost out of a consignment of 150 tins which had been booked by the North Western Railway from Gharinda to Sialkot and re-booked from Sialkot to Amritsar. The waggon containing the Ghi was sealed, but not locked, and the seals were intact up to Gujranwala. The train reached Muridke at 12-58, A. M. and remained there for several hours. It does not appear

from the evidence that the seals were examined at the time when the train reached Muridke, but the Guard saw them at 8 A. M. and found that they had been broken, and it was then discovered that 24 tins of Ghi were missing. The Courts below have found that as the waggon had not been locked, and there were no *Chaukidars* keeping watch on the train during the halt at Muridke, the loss was due to the wilful neglect of the Railway Administration, which is therefore liable under the terms of the Risk Note.

The Secretary of State has preferred a second appeal, and the learned Government Advocate has cited *East Indian Railway Company* v. *Gopiram Gourishankar* (1) in support of his contention that there was no wilful neglect on the part of the Railway. But in the first place the loss of the consignment in that case was discovered as soon as the train arrived at the station where it first stopped, so that the case is not similar to the present one in which there was a halt of several hours at Muridke before the loss was discovered. In the second place, the lower Appellate Court's finding that there was wilful neglect on the part of the Railway is a finding of fact, which cannot be contested in second appeal.

There is nothing to support the theory that the goods were stolen from the running train, and the probability seems to me that they were stolen during the long halt at Muridke. The learned Government Advocate contends that the train was a "running" train all the time until it reached its destination, even while it was not in motion, but he can cite no authority in support of this contention, and I agree with the view of the lower Appellate Court that a "running train" means a train in motion between stations.

The only other contention on behalf of the appellant is that the notice required by section 77 of the Indian Railways Act was not given.

It is true that the notice instead of being addressed to the Agent of the Railway, was addressed to the Secretary to the Government of India, Railway Department, but in the acknowledgment which the latter sent to the plaintiff it was stated that the plaintiff's letter had been sent to the Agent of the North Western Railway for disposal.

From this it may reasonably be presumed that the Agent of the Railway received the notice of the claim. The learned Government Advocate relies on *East Indian Railway Co.* v. *Jethmull Ramanand* (2), but the notice given by the plaintiff in that case was a notice of aclaim against a Railway different from the Railway which was really liable for the loss, so that the ruling is not in point.

I agree with the Courts below that the notice required by law was given by the plaintiff in the present case.

The appeal fails and I dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 73 Ind. Cas. 642.

(2) 26 B. 669; 4 Bom. L. R. 495.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1358 OF 1922.

February 12, 1924.

Present:—Mr. Justice Mukerji.

RAM SARUP—PLAINTIFF—APPELLANT

versus

HARDEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (*IV of* 1882), *s.* 54—*Contract for sale—Consideration, passing of—Sale-deed not executed or registered—Title, whether created—Registration Act* (*XVI of* 1908), *ss.* 17, 49—*Evidence Act* (*I of* 1872), *s.* 92.

Where there is no sale-deed the mere fact that a consideration has passed between the parties does not operate to create a title.

A mere contract does not create any equitable interest in immoveable property.

Maung Shew Goh v. *Maung Irn*, 38 Ind. Cas. 938; 44 C. 512; 15 A. L. J. 82; 21 M. L. T. 18; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 60; 44 I. A. 15 (P. C.) followed.

Plaintiffs sued to recover possession of certain rooms in a house. It appeared that previous to this a

RAM SARUP *v.* HARDEO

compromise had been arrived at in a Criminal case between the parties which was embodied in a paper bearing an 8-annas stamp but which was not registered. It stated that room No. 126 of the house in dispute was given up by defendants in lieu of room No. 129 and that they should continue in possession of room No. 128 'as before':

Held, (1) that the document being unregistered it conveyed no title to the defendants and the plaintiffs were not estopped from claiming back their own property, but they must put the defendants in the same position in which they had been if there had been no compromise.

(2) that defendants could not be permitted to prove the agreement of relinquishment of title by oral evidence.

Salamat-ul-Zamani v. *Masha Allah Khan*, 43 Ind. Cas. 649; 16 A. L. J. 98; 40 A. 187 distinguishd.

Second appeal against the decree of the District Judge, Bulandshahr, dated the 7th September 1922.

Mr. *Nehal Chand*, for the Appellant.

Mr. *Benoy Kumar Mukerji*, for the Respondents.

JUDGMENT :—The facts which have given rise to this second appeal are briefly these :—

There is an enclosure No. 43, in which there are, it seems, several rooms or houses. The appellant who was the plaintiff in the Court below, has been found to be the owner of the entire enclosure. Two of the rooms or buildings in this enclosure are the subject-matter of the suit. In a portion of this enclosure, the defendants and their predecessors were living. It has been found by the Court below that their possession was permissive. The parties, it appears, quarrelled and fought over the possession of the defendants and one of the parties on the side of the defendants sustained grievous hurt. There was a criminal case and a compromise was arrived at on the 5th of June 1918. It was embodied on a paper bearing stamp-duty of eight-annas and was not registered. It was stated in the compromise-deed that room No. 126 was given up by the defendants and that they were given room No. 129 in lieu of the same. It was further stated and agreed that the defendants would continue in possession of room No. 128 'as before.' The finding is that on this compromise being entered into, the prosecution was dropped and evidently the permission of the Court was obtained to the compounding of the offence. For the compromise was filed in the Criminal Court. Just on the last day of the expiry of three years, the plaintiff filed this suit for recovery of possession of the rooms Nos. 128 and 129. He pleaded that the compromise had been obtained by the exercise of undue influence. But that point has been given up in appeal in this Court. The only point that has been argued is this. The compromise was really a document by which the plaintiff transferred his title to the property in favour of the defendants. The value of the property has been found roughly, by Court below, to be about Rs. 500. Such a transfer could only be effected by means of a registered document under the provision of the Registration Act, section 17 and section 54 of the Transfer of Property Act. The document being unregistered it really conveyed no title to the defendants and, therefore, the plaintiff is entitled to get back what was really his own property.

The Courts below dismissed the suit holding that the plaintiff was estopped from claiming the property back, although the title still remains with him.

I have to see whether this proposition of law is correct. It having been found that the property originally belonged absolutely to the plaintiff and it having been found that the possession of the defendants was only permissive there can be no doubt that the defendants are bound to leave the property when the plaintiff asks them to do sc. If any document is pleaded in bar of such a suit that document must be registered under the law already quoted, even if we take the transaction as one by which the plaintiff relinquished his title in favour of the defendants, the document would come under clause (b) of section 17 of the Registration Act and his title to it can be extinguished only by a registered document.

The document being unregistered is inadmissible in evidence under section 49 of the Registration Act. Indeed, the defendants are precluded from saying that there is a document in their favour by which the title of the plaintiff has been extinguished. Further, they are not permitted to prove the agreement by oral evidence because the agreement, such as it was, had been reduced into writing (section 92 of the Evidence Act). Such being the case

there really remains nothing to prevent the plaintiff from recovering.

For the respondents reliance as been placed on the case of *Salamat-ul-Zamani* v. *Masha Allah Khan* (1), a decision by two learned Judges of this Court. In that case it appears that there was an exchange of property between two parties and that exchange had been acted upon. After some time one of the parties to the exchange wanted to go back over the transaction and sought the recovery of the property which he had given away. There was no registered document to record the transaction. It was held by Walsh, J., that the rules of equity would prevent the plaintiff from succeeding. Piggott, J., was of opinion that the title of the plaintiff was not lost but on equitable principles the Court would not give its aid in favour of the plaintiff. In my opinion that ruling has no bearing on the facts of this case. In the case before me, the defendants gave nothing to the plaintiff in the shape of any tangible property according to the finding of the Court below. The property which they purported to exchange was the property of the plaintiff himself. The entire enclosure has been found to be the property of the plaintiff. All the consideration that the plaintiff got for purporting to give away his two rooms Nos. 128 and 129 was the dropping of the prosecution that was going on against him. This was no doubt a good consideration and would have created a valid consideration for a sale. But the question is, where there is no sale-deed, can the mere fact that a consideration passed operate to create a title? To put it in simple terms, suppose a man agrees to sell for a sum of Rs. 500 his house. He receives the consideration and hands over the property. Can he not, in the absence of a registered sale-deed, go back over the contract and say here is the sum of Rs. 500 which you gave to me, take it and give me back my property. If he could not be allowed to say so, the result would be an extension of the law, as embodied in section 54 of the Transfer of Property Act. It lays down that in the case of property of the value of Rs. 100 or more, a sale could be effected only by a registered instrument. In the case of property of lesser value a sale could be effected by delivery of possession. If we say that the mere fact that possession had been delivered and the sale price had been paid, was sufficient for the creation of a title or for preventing the plaintiff from getting back his own property, shall we not really be legislating? The Calcutta High Court in a case directly on the point, *Jagadbandhu Saha* v. *Radha Krishna Pal* (2), held that the rules of equity would not apply where there were clear provisions of law to the contrary. In the case of *Umrao Singh* v. *Lachhman Singh* (3) there was a compromise in the nature of a family settlement. It had been partially acted upon as the son of one of the parties to the contract obtained arrears of maintenance on foot of it, but their Lordships of the Privy Council had no hesitation in holding that the compromise failed so far as immoveable property was concerned simply because the document had not been registered under Act of 1877, section 17. That in India a mere contract does not create any equitable interest in immoveable property was held in the Privy Council case of *Maung Shwe Goh* v. *Maung Inn* (4).

The title being with the plaintiff, as I have said, he must succeed. But he must also put the defendants in the same position in which they would have been in, if there had been no compromise. The compromise was to the effect that they would have a certain consideration for dropping the prosecution. If the consideration had been a certain sum of money there would have been no difficulty in puting the plaintiff to terms. He could have got his decree for possession on payment of the sum of money which was the consideration. In this case the prosecution was dropped in consideration of the two houses which have been found to have been the absolute property of the plaintiff. There was no clear issue before the lower Court as to the actual value of the houses. This point, therefore, should now be decided. It is my opinion that the plaintiff would be entitled to recover the houses

(1) 42 Ind. Case 645; 16 A. L. J. 98; 40 A. 187.

(2) 4 Ind. Cas. 414; 36 C. 920.

(3) 10 Ind. Cas. 285; 8 A. L. J. 465 ; 15 C.W.N. 497; 13 P. C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637 ; 33 A. 344 ; 14 Q C. 38,133; I. A. 104; (1911) 2 M. W. N. 242 (P C.).

(4) 38 Ind. Cas 938 ; 44 C. 542 ; 15 A. L. J. 82 ; 21 M. I. T. 718 ; (1917) M. W. N. 117 ; 32 M. L. J. 6 ; 25 C. L. J. 103;19 Bom. L. R. 176; 21 C. W. N. 500 ; 5 L. W. 532; 10 Bur. L. T. 69 ; 44 I. A. 15 P. C.

only on payment of an equivalent in money of the same.

I remand the following issues for trial to the Court below:—

What is the value of the two houses Nos. 128 and 129 in enclosure No. 43?

Fresh evidence would be allowed on behalf of the parties. The finding would be returned in two months. Ten days time is allowed for filing objections.

K. S. D. *Appeal allowed.*
Case remanded.

RANGOON HIGH COURT.

FULL BENCH.

CIVIL REFERENCE NO. 7 OF 1923.

August 14, 1923.

Present :—Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Myoung, and Mr. Justice Po Han.

THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON—
APPELLANTS

versus

THE SURATI BARA BAZAAR COMPANY, LIMITED—
RESPONDENTS.

City of Rangoon Municipal Act (VI of 1922), s. 80 (2)—Assessment to taxation, basis of—Standard rent—Rent actually obtained by tenant from sub-tenants—Rateable value, determination of.

In assessing buildings and lands to taxation in Rangoon under the City of Rangoon Municipality Act 1922 the Corporation must, in the absence of special circumstances, take as its basis the standard rent in those cases on which the standard rent has been fixed by the Rent Controller. In other cases it must fix the rateable value on a consideration of all the surrounding facts any circumstances including the effect that the Rangoon Rent Act has, or may have, on the matter.

It cannot be said in every instance that the amount that a tenant is able to obtain from his sub-tenants is always to be taken as the rateable value; but that amount may be taken into consideration with all the other facts governing the question. In other words, in arriving at a decision as to the amount for which the premises may reasonably be expected to let, the Assessor will consider the rent a tenant can extract from his sub-tenants; but this will not be the only matter to be considered in arriving at a decision.

Reference arising out of Civil Miscellaneous Appeal No. 299 of 1922 of this Court.

ORDER OF REFERENCE TO FULL BENCH.

Following is the order of references made by Mr. Justice Duckworth to Full Bench.

The matter agitated in this Civil Miscellaneous Appeal is of great importance to the Rangoon Corporation not only with reference to houses and hereditaments owned by the respondents — the Surati Bara Bazaar—but with regard to a considerable portion of their assessment powers. The respondents are the owners of the house in question, which they lease to one M. A. Mamsa for Rs. 150 per mensem. Mamsa, in his turn, sublets premises in the house to his sub-tenants, and is stated to collect rents amounting to the sum of Rs. 375 per mensem. The Rangoon Corporation claim to assess the premises for taxation purposes, under the City of Rangoon Municipal Act, VI of 1922, on the basis of the latter value. The respondents set up that the basis should be the rent which they receive from their tenant, Mamsa, which, under the Rent Act, they cannot enhance. It is now agreed that the Rent Controller has fixed no Standard Rent, but that on the 1st April 1918 the actual rent was not more than Rs. 150 per mensem.

The question really resolves itself into this general question :—

Whether, in assessing building or lands to taxation in Rangoon, the Corporation should take as its basis the standard rent, as defined by section 2, clause (*c*) of the Rangoon Rent Act, 1920, as amended by Burma Act I of 1922, or should take as its basis an hypothetical value derived from standards other than those afforded by the Rangoon Rent Act?

In support of the Corporation's contentions, Mr. McDonnell quotes the case of *Roberts* v. *The Assessment Committee of the Metropolitan Borough of Popular* (1), which was before

(1) (1922) 1 K. B. 25.

three Courts, and some eleven Judges, in England, and dealt with a similar question of assessment to rates under the English Act. The Court of Appeal, by a majority, took, a view which was contrary to Mr. McDonnell's thesis,—a view, I may say, which was similar to the view taken by a Bench of the Chief Court of Lower Burma in the case of *William Carr* v. *The Municipal Corporation of Rangoon* (2), in which judgment was delivered on January 23, 1922. The House of Lords, however, by a majority (3), came to a decision in a judgment, dated March 20, 1922 (or after *William Carr's case* was decided), which tends to support the view that the assessment should be made on the value of the actual occupant's beneficial occupation and three of their Lordships held that the English Act of 1920 was not to be taken into account in determining valuation for rating, which in fact is largely what the Rangoon Corporation now contends. Sir Robert Giles for the respondents argues that I am bound by the findings in the case of Wiliam Carr, and that the decision of the House of Lords in the *Poplar case* (3) is not a true guide, inasmuch as, whereas, under the English Act, rates and taxes on property are assessed upon the value of the property to the tenant or the hypothetical tenant, in Rangoon, the principle is to assess taxes on the value of the property to the landlord. On the one side the criterion is what is the occupier's beneficial interest in the property, and, on the other, what the landlord may be expected to get out of the tenant, which Sir Robert Giles argues is not the same thing at all.

After comparing section 80 (2) of the City of Rangoon Municipal Act 1922, where 'annual value' for assessment purposes is defined, with the definitions of 'gross value' and 'rateable value' in section 4 of the Valuation of Property (Metropolis) Act, of August 9, 1869, and reading section 86, clauses (1), (2) and (3) of the City of Rangoon Municipal Act, I am not at all sure that there is as much difference between the two bases of assessment, in Rangoon and London respectively, as Sir Robert Giles would have this Court to believe. I am, therefore, of opinion that, had the decision of the House of Lords been available, when the Chief Court Bench adjudicated upon William Carr's case, their decision might have been different.

I personally have much doubt whether the sum of the rents obtained by a tenant from sub-tenants for lands and buildings can be taken as a proper basis, for assessing the 'annual value' under the Act, as this would, in many instances, be but a fluctuating amount and would not, in every case, represent what an owner would be likely to obtain as rent. The true basis seems to me to be not so much the amount for which the property would be likely to sub-let, as the 'hypothetical' amount of the letting value to the owner, or conversely the sum which a 'hypothetical' tenant might reasonably be expected to pay him.

In any case, the point is one of such extreme importance that I do not consider that it ought to be decided finally by a single Judge. It is to be noted that the admitting Judge, on 22nd December 1922, did not certify that this appeal should, under clauses (*i*) (*c*) of High Court Notification No. 10 (General) of 18th December 1922, come before a Bench of at least two Judges. Inasmuch as I was not the admitting Judge, and had actually almost completed the hearing of the appeal before the matter was suggested, I take it, that I have not now get the power to certify this appeal, as fit for such a Bench, I have, therefore, only two courses open to me :—

(1) to decide the appeal and, if required, certify an appeal from my decision under (*i*) (*b*) of that Notification, a course which as I am informed an appeal would be required, would involve the parties concerned in what I consider would be needless expense ;

(2) to refer the question to the Hon'ble the Chief Justice in order that it shall be decided by a Bench, or Full Bench according as he may direct.

I am in favour of this latter course if only to save expense and time to the parties. As matters stand, I consider that I am bound by the ruling in *William Carr's case* (2), but, in view of the decision of the House of Lords in the *Poplar case* (3), I now refer the following questions to a Bench or Full Bench of this

(2) Civil Reference 10 of 1921.
(3) (1922) A. C. 93.

Court, as the Hon'ble the Chief Justice may direct :—

(1) Whether in assessing buildings and lands to taxation in Rangoon under the City of Rangoon Municipal Act, 1922, the Corporation must take as its basis the standard rent, as defined in section 2, clause (*e*) of the Rangoon Rent Act, 1920, as amended by Burma Act, I of 1922, or can take as its basis and hypotheti cal value derived from standards other than those afforded by the Rangoon Rent Act.

(2) Whether the amount of the rent or rents obtained by a tenant from his sub-tenant or sub-tenants, with the usual deduction of 18 per centum, is a fair and proper basis for arriving at the gross annual rent for which the whole building or property might reasonably be expected to let, as laid down in section 80 (2) of the City of Rangoon Municipal Act 1922?

OPINION OF THE FULL BENCH.

Mr. *McDonnell*, for the Applicants.

Sir *Robert Giles*, with *N. M. Cowasji*, for the Respondent.

Robinson, C. J.—The questions referred to us are as follows :—

(1) Whether,in assessing buildings and lands to taxation in Rangoon under the City of Rangoon Municipal Act, 1922, the Corporation must take as its basis the standard rent as defined in section 2, clause (*e*) of the Rangoon Rent Act, 1920, as amended by Burma Act I of 1922, or can take as its basis an hypothetical value derived from standards other than those afforded by the Rangoon Rent Act.

(2) Whether the amount of rent or rents obtained by a tenant from his sub-tenant or sub-tenants with the usual deduction of 18 per cent. is a fair and proper basis for arriving at the gross annual rent for which the whole building or property might reasonably be expected to let, as laid down in section 80 (2) of the City of Rangoon Municipal Act, 1922.

The first of these two questions came before a Bench of this Court, to which I was a party, last year in the case of *William Carr* v. *The Munuicipal Committee of Rangoon* (2). What was then held was that the principle to be adopted is that laid down in the Municipal Act, but that that the principle may be, and, where a standard rent has been fixed must be qualified by the provisions of the Rangoon Rent Act. We had not before us at that time the cases that have now been cited; but our decision might have been supported by the case of *Scuicoates Union* v. *Dock Co. at Kingston-upon-Hull* (4), and also by the majority of the Court of Appeal in the case of *Roberts* v. *The Poplar Assessment Committee* (5), upholding the judgment of the King's Bench Division. Subsequently, however, that case was taken to the House of Lords, and, by a majority, their Lordships reversed the decision of the Courts below.

In the first case cited the House of Lords held with reference to a Dock Company which, in addition to its docks and wharves, had railway and tramway lines but had been prohibited by an Act of Parliament from charging a certain Railway Company any tolls for the use of those railway lines, that since no rent could be earned by the Dock Company because of the statutory prohibition, the rent which could have been earned but for that prohibition ought not to be taken into consideration in determining the rateable value of the Dock Company's property. Lord Herschell, L.C., said : "But then it is said, 'but they could earn more profits than they are earning, and therefore you ought to suppose that a hypothetical tenant would give more.' But if the Legislature have said that they shall not earn these suggested further profits because they shall not charge tolls, how can it be established as a matter of fact that they could earn more? It appears to me that if you are to disregard such statutory restrictions as these, you might just as well say that a Railway Company ought not to be rated only according to the tolls which it receives—ought not to be rated even according to the tolls which it could by law receive within its maximum, but that you ought to disregard its statutory maximum and ask what a tenant from year to year would give for the Railway if he could charge any tolls which he pleased." And later he said—"But the question is whether

(4) (1895) A. C. 136 ; 64 L. J. M. C. 49; 11 R. 74; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612.

(5) (1922) 1 K. B. 25; 91 L. J. K. B. 44 Reversing on Appeal (1922) 2 A. C. 93; 91 L. J. K. B. 449 ; 127 L. J. 99; 86 J. P. 137; 20 L. G. R. 317 ; 66 S. J. 386 ; 38 T. L. R. 499.

you are to consider the profits which it might earn if a state of things existed which does not exist, or whether you are to consider the profits which it can earn under the only conditions under which it is allowed to earn profit at all."

In the case of *Roberts* v. *The Assessment Committee of Poplar* (2) the question of the Rent (Restrictions) Act, 1920, was considered, and in the House of Lords two points were decided. The first was that, in arriving at the valuation for the purposes of the Valuation (Metropolis) Act, 1869, of a hereditament to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, the maximum gross value to be assigned to that hereditament is not limited to the standard rent of the hereditament together with additions thereto permitted by the latter Act; and three of their Lordships held that the Rent (Restrictions) Act, 1920, is not to be taken into account in determining the valuation for rating purposes on the hereditaments to which it applies. In the King's Bench Division, Avory, J., referred to the well-established principle in rating-law that the valuation is to be made *rebus sic stantibus*; *Port of London Authority* v. *Orsett Union* and he quoted Lord Buckmaster in the case of *Assessment Committee* (6). When referring in that case to the *Sculcoates Union* case, he said—"In other words that decision emphasized and made clear a principle that must always be applicable to such cases. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."

In *Roberts* v. *The Poplar Assessment Committee* (2), Lord Buckmaster referred to this case (the *Port of London Authority case*), and he stated: "I do not think that the language which I there used needs to be modified or explained; but those words related entirely to determining the value of the occupation to the occupier excluding, of course, any element due to his skill, industry, or other strictly personal qualifications. In the present case the respondent seeks to introduce into these words the conditions which regulate the value of the hereditament to the landlord. So far as the occupier is concerned, the provisions of the Rent Restriction Act have not in any way made his occupation less beneficial. It is the landlord who is affected, and he, as landlord, is not the subject of assessment, nor can his interest in the property be considered for the purpose of determining what that assessment should be. If, however, the rent which has to be ascertained under the section is the real rent, then the fact, that that cannot be increased will have a material effect upon the valuation." Referring to the case of *Rex* v. *Munday* (7) his Lordship said: "Again, it was the actual beneficial occupation that was the subject of the rating, and the question as to what rent the actual landlord was capable of exacting did not enter into the calculation." Lord Atkinson in his judgment, referring to the case of *Rex* v. *Green* (8), said: "Rateability did not depend on tenancy, or on the possession of any estate or interest in the property under consideration, or on the receipt of any rent from it, but solely on the beneficial occupation of it." Lord Summer said: "Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers." And he calls attention to the definition of "gross value" in the Assessment Act with which they were dealing saying: "It may be observed that the phrase is 'might be expected to pay'; it does not go on to say 'and the landlord might be able to exact'." Lord Parmoor said: "The occupation value of property may be, and often is, distinct from its value to the owner." And, again, "In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the value of beneficial occupation of the property or its profit-earning capacity." And again, "The question, however, remains whether a restriction on rent under the Rent (Restrictions) Act,

(6) (1920) A. C. 273; 89 L. J. K. B. 481; 122 L. T. 722; 84 J. P. 69; 18 L. G. R. 153; 36 T. L. R. 233.

(7) (1801) 1 East 584; 102 E. R. 226.

(8) (1829) 9 B. and C. 203; 4 M. and Ry. 164; 7 J. (O. S.) M. C. 94; 32 R. R. 64 639; 1099 R. 76.

1920, can be regarded as a statutory restriction on the value to an occupier of the profit-earning or rent-earning capacity of the 'Cobden's Head'."

What their Lordships were, therefore, considering was the question of the Rent (Restrictions) Act, with special reference to the value of the premises to the occupier quite apart from their value to the owner or landlord; and they did so because of the wording of the definition of "gross value" in the Assessment Act with which they were concerned. It may be that the *Sculcoates Union case* (1) should be distinguished on the ground that it deals with the case where there was a statutory provision prohibiting the property in question earning any profits whatsoever. As matters stood, when that case came before the Courts, there was only one Company from whom tolls could be exacted, and the Act of Parliament forbade the taking of any tolls from them.

Another point which arises with reference to the case of *Roberts* v. *The Poplar Assessment Committee* (2), is the difference between the English Rent (Restrictions) Act, 1920, and the Rangoon Rent Act. By the former it was not an offence *ipso facto* to take more rent than a certain fixed standard, but, only if the margin of profit taken above that allowed as normal profit was extortionate. In our Rangoon Rent Act, where a standard rent has been fixed by the Controller, it is an offence for a landlord knowingly to accept more than that rent, however slightly it may exceed the standard rent fixed. On this point I would refer to the judgment of Bankes, L. J., in the Court of Appeal. He said: "The answer to the question depends, in my opinion, upon whether the true effect of the Rent (Restrictions) Act, 1920, is to fix and not merely to affect the value of these premises for rating purposes. The answer to this question must depend upon what is the true construction of the Act read as a whole. If its effect is to render it illegal, and consequently impossible, for any higher rent than the standard rent to be paid or received for premises to which the Act applies, then the principles of the *Sculcoates* case (1) and *Lincoln Corporation* v. *Holmes Common* (9) would, in my opinion, apply; and the rateable value could not be fixed higher than the standard rent." He sums up his judgment by saying: "The conclusion at which I have arrived upon the whole case is that, though the Rent (Restrictions) Act, 1920, may affect the rateable value of these premises, it does not fix the rateable value and that any voluntary payment for the occupation of the premises in excess of the standard rent which a tenant might be expected to make can be taken into consideration in arriving at what the gross and rateable value of the premises should be."

The conclusion at which I have arrived, after a very full and careful study of these judgments, is that the case of *Roberts* v. *The Poplar Assessment Committee* (3), must be distinguished, both because the wording of the Act of 1869 differs from that of the City of Rangoon Municipal Act, and their Lordships were dealing only with the beneficial occupation to the occupier, and also because the Rent (Restrictions) Act that they had before them did not make it an offence, as the Rangoon Rent Act does, to take more than the standard rent when that standard rent has been fixed by the Controller. In certain circumstances, the *Sulcoates Union case* (1) is an authority which should be followed.

The definition of "annual value" for purposes of taxation given in section 80 (2) of the City of Rangoon Municipal Act, runs as follows: "'Annual value' means the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, from year to year." In this definition the landlord is not excluded. It does not say what a tenant may reasonably be expected to pay, and it is, in my opinion, clear that it must be considered with reference to both what a landlord may reasonably expect to get, as well as what a tenant may reasonably be expected to pay. It is, no doubt, the case that the Rangoon Rent Act was not intended to affect assessments. It was not passed for that purpose, but with an entirely distinct and settled object. But it is the law of the land at present, and it cannot be treated as non-existent if it does affect the question that has to be decided in these cases. In all ordinary cases it will be necessary to consider what rent the landlord could reasonably exect to get from the premises. The landlord, the standard

(9) (1867) 8 B. & S. 314; 36 L. J. M. C. 73; 2 Q. B. 482; 16 L. T. 730; 15 W. R. 786.

rent having been fixed by the Controller, could not reasonably expect to get any higher rent for the premises. Did he attempt to do so, he would be guilty of an offence for which he would be liable to a heavy fine. It is open to question, at least, whether a would-be tenant who approached a landlord and induced him to let the premises to him at a rent which was higher than the standard rent in order to get possession would not also be guilty of an offence, though it was possibly not intended that he should be liable. It seems unlikely, except possibly in very special cases, that any tenant would be willing to pay more than he knows he need pay to obtain occupation of the premises. Still, speaking of general cases, I would hold that a tenant could not, therefore, be reasonably expected to pay more than the rent fixed by the Rent Controller, and that a landlord could not reasonably expect to get more. It would be an offence for a landlord to accept any rent higher than the rent fixed by the Rent Controller, and in these cases I would hold that the principle of the *Sculcoate's case* (1) applies, and that, in the absence of special circumstances, the rateable value cannot be fixed higher than the standard rent. But, where no standard rent has been fixed by the Rent Controller, it is no offence for a landlord to accept a higher rent than the rent for which the premises had been let on the 1st April 1918, that is to say, the automatic standard rent laid down in the Act. It is possible that a landlord could get a tenant willing to pay more than that rent. At the same time, the fact that a tenant might agree to pay a higher rent in order to get into occupation and could, as soon as he was in occupation, move the Rent Controller and deny his agreement or claim to be relieved from paying more than the automatic standard rent cannot be overlooked. That would be an instance in which the Rangoon Rent Act would not fix the rateable value, but would possibly affect it. There may be cases in which a landlord has for years been accepting a low and inadequate rent for the premises from poor relations or friends, or for any other reason. The automatic standard rent would be that low rent; but the Assessor would not be limited to that rent even if it had been a rent fixed by the Rent Controller. The Rent Controller is not bound to fix the standard rent at the rent that was payable on the 1st April 1918 if he is of opinion that that rent was unduly low. Circumstances may have altered after the Controller has fixed the standard rent, and they may be such as would justify the Controller in amending his previous order and increasing the standard rent. If such can be shown to exist, then, even if the landlord has not moved the Controller to enhance the standard rent, the Assessor may and can take them into consideration and his assessment need not be limited to the amount of the standard rent.

In my opinion, therefore, the answer to the first question should be that the Corporation must, in the absence of special circumstances, take as its basis the standard rent in those cases on which the standard rent has been fixed by the Rent Controller. In other cases it must fix the rateable value on a consideration of all the surrounding facts and circumstances including the effect that the Rangoon Rent Act has, or may have, on the matter.

As regards the second question referred, it is partly answered by the answer to the first question. In my opinion it cannot be said in every instance that the amount that a tenant is able to obtain from his sub-tenants is always to be taken as the rateable value; but that amount may be taken into consideration with all the other facts governing the question. In other words, in arriving at a decision as to the amount for which the premises may reasonably be expected to let, the Assessor will consider the rent a tenant can extract from his sub-tenants; but this will not be the only matter to be considered in arriving at a decision.

May Oung, J.—I concur.

Po Han, J.—I concur.

K. S. D.

GAYAN SINGH *v.* BABU LAL

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 148 OF 1921.

July 13, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

THAKUR GAYAN SINGH—PLAINTIFF—APPELLANT

versus

BABU LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Village Custom— Wajib-ul-arz— Inhabitants generally given right of pre-emption—Custom whether reasonable.

A custom recorded in the *wajib-ul-arz* of a village giving a right of pre-emption to the inhabitants generally in the case of the co-sharers of the village refusing to exercise the right, is not necessarily unreasonable and can be enforced.

An entry in a *wajib-ul-arz* is *prima facie* evidence of the existence of the custom recorded unless there is anything in the *wajib-ul-arz* itself which negatives the existence of the custom or there is other evidence to the contrary.

First appeal against the decree of the First Additional Subordinate Judge, Aligarh, dated the 3rd January 1921.

Dr. *S. N. Sen* and Mr. *P. Banerji*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption in respect of a sale-deed dated the 27th February 1919 executed by the delendant No. 2 in favour of Babu Lal, defendant No. 1. The plaintiff frankly confessed that he was neither a co-sharer in the village nor a relation of the vendor. His claim was based entirely on the ground that he was a resident (*bashinda*) of the village Mahwat in which the property sold was situated. It was alleged that there was a custom prevailing in this village under which, in case co-sharers refused to pre-empt, the right of pre-emption was given to residents of the village.

In the written statement the defendant-vendee admitted paragraph 1 of the plaint which had stated that the plaintiff was a resident of the village in question. It was, however, disputed that there was any such custom in existence. The plaintiff's allegation as to the incorrect recital of the sale consideration was also challenged.

The learned Subordinate Judge framed several issues, issues Nos. 2 and 3 of which were directed to the question whether a custom of pre-emption in favour of a mere resident, who was not a co-sharer, was proved or could be enforced in law. He came to the conclusion that no such custom had been established by the evidence produced in this case and that, in any case, such a custom would be uncertain and unreasonable and, therefore, incapable of being enforced by a Court of Law. He accordingly dismissed the suit without going into the question of the correct price of the disputed property.

The plaintiff has come up in appeal to this Court and on his behalf the findings are challenged.

The evidence produced in support of the custom consisted of a *wajib-ul-arz* of the year 1871, paragraph 15 of which contains the following recital :—

"If a share-holder wants to sell his property he should sell it first to his near co-sharer and in case he does not take it, then he should sell it to other co-sharer and if he also does not take it then he should sell it to the inhabitants of the village. In case no co-sharer and no inhabitant of the village takes it, the vendor has power to sell it to any one he may like. The rate of value will be according to the quality of the share. If any co-sharer, in order to deprive the nearer co-sharer, fraudulently declares an excessive amount of price, then the matter relating to the proper amount of consideration would be settled by private partition or under an order of the officer and the amount would be caused to be given."

This *wajib-ul-arz* was veriefied on the 8th September 1871 when the Board's Circular No. 24 of 1868 was in force. In paragraph 9 of this Circular there was a direction that the *wajib-ul-arz* should be a record of custom and usages prevalent in the district. It is apparent that an entry relating to a right of pre-emption in the inhabitants of the village could not in all probability have been a record of

contract. Inhabitants who were not co-sharers in the village were no parties to the *wajib-ul-arz*; and it is not likely that co-sharers would enter into a contract with them. Either, therefore, this entry was an entry of a custom prevailing in this village or it was a useless entry made at the desire of attesting co-sharers. It has been laid down by their Lordships of the Privy Council in the case of *Digambar Singh* v. *Ahmad Sayeed Khan* (1) that an entry in a *wajib-ul-arz* is *prima facie* evidence of the existence of a custom. Unless, therefore, there is anything in the *wajib-ul-arz* itself which negatives the idea of such an existence or there is other evidence to the contrary or such custom is unreasonabe and unenforcible, the presumption would be that such a custom exists.

Another piece of evidence relied upon in the Court below was a judgment of the District Judge of Aligarh dated the 9th of May 1917. That was a suit arising out of a sale of a share in another village, Pans, which, however, is situated in the same *parganah* Etah Sakit, Tahsil and district Etah, where the property in the present suit is situated. There the plaintiff was not a co-sharer at all, but was a blacksmith. The learned District Judge in allowing the appeal remarked that it was contended by the Counsel for the respondent that the custom was unreasonable inasmuch as Bale, the plaintiff pre-emptor, was an artisan. He could not see anything unreasonable in the custom and saw no reason why a neighbour residing in the same village should not be given preference to an outsider; nor did he consider the fact that no recent exercise of the right of pre-emption had taken place to have any bearing on the case. In this wiew he allowed the appeal and decreeed the suit.

The defendant-vendee filed an appeal to this Court, which was numbered as S. A. 1111 of 1917 and was disposed of by the Pre-emption Bench on the 15th January 1918, the judgment and decree of the District Judge being confirmed. It is apparent that on that occasion at least both the District Judge and this Court did not consider that such a custom was so unreasonable as not to be enforcible in a Court of Law. This litigation, as it related to another village, is of value for this purpose only.

So far as we can find, there has been only one recent sale in this village, on which, according to the oral evidence, Ram Sarup a co-sharer did bring a suit and got a decree. That circumstance neither helps the present plaintiff, nor does it in any way negative the existence of the custom relied upon by him.

It has been strongly contended that the custom set up is unreasonable and should not be enforced. A custom of pre-emption may either prevail in a certain locality or may govern a particular community. In the present case the plaintiff's case is that this custom governs the community which consists of the residents of a village and it prevails in the area which is defined by that village. Such a custom has once at least been enforced in the neighbourhood. We do not think that such a custom is unnecessarily unreasonable or unenforcible. For the enforcement of a right of pre-emption under a custom it is not necessary that the pre-emptor should be a proprietor. In numerous cases the right of a mere relation to enforce a custom has been recognised by the Courts.

The last point urged in support of the decree was that it had not been established that the plaintiff was a resident in that very *mahal* in which the share sold was situated. This was a question of fact which ought to have been raised in the Court below. The plaintiff's residence in the village was admitted in the written statement and no plea was raised that he was not a person who came within the expresson *bashindgan* village as recited in the *wajib-ul-arz*. We think that this question of fact should not now be allowed to be raised.

As the learned Subordinate Judge has disposed of the suit on a preliminary ground only and we are not prepared to uphold his finding, we allow this appeal, set aside the decree of the Court below, and remand the case for disposal of the suit by decision of Issue No. 4. Issue No. 1 has already been disposed of by implication. Costs here and hitherto will be costs in the cause and will abide the result. Costs in this Court will include fees on the higher scale.

N. H.

Appeal allowed.
Case remanded.

(1) 28 Ind. Cas. 34; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L. J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 42 I. A. 10; 37 A. 129 (P. C.).

BASHESHAR NATH *v.* MEHR CHAND

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1863 OF 1918.

May 2, 1922.

Present:—Mr. Justice Broadway and
Mr. Justice Campbell.

BASHESHAR NATH AND OTHERS—
DEFENDANTS—APPELLANTS
versus
MEHR CHAND AND OTHERS—PLAINTIFFS,
AND JIYA NATH—DEFENDANT—
RESPONDENTS.

Appeal, second—Findings of fact based on evidence, whether can be challenged—Admissibility of evidence—Non-registration—Objection taken in written statement subsequently dropped—Remand, whether can be directed.

Where the lower Appellate Court has arrived at findings of fact after considering all the evidence on the record and there exists on the record evidence, which is legally admissible, in support of the findings, the High Court cannot, in second appeal, interfere with the findings of fact merely because it considers that they ought to have been different.

Where an objection to the admissibility in evidence of a document on the ground of non-registration based on the fact that the value of the property dealt with by the document was not correctly stated therein, was taken in the written statement, but was subsequently dropped and was neither put in issue in the Trial Court nor urged in the lower Appellate Court :

Held, that the suit could not be remanded in second appeal for ascertaining the correct value of the property for purposes of registration.

Appeal against the decree of the District Judge, Gurdaspur, dated the 13th March 1918.

Lala *Moti Sagar*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This is a second appeal from the decree of the District Judge, Gurdaspur, confirming that of the Senior Subordinate Judge granting the plaintiff, Ram Saran Das, a declaration that he is proprietor of 81 *kanals* 10 *marlas* of land on the basis of a deed of exchange executed on the 2nd of March 1903.

The defendants were two brothers, Basheshar Nath and Shankar Nath ; *Musammat* Gurdevi, widow of their cousin Shib Nath, and another cousin Jiya Nath. Their main plea was that the exchange had not been acted upon. They admitted that a deed was drawn upon the 2nd March 1903 by which they gave the plaintiff the land in suit in exchange for a similar area in the village of Shahzada Nangal.

Both Courts concurred in the finding that the exchange not only was made on the 2nd March 1903 but was acted upon from that date and that Mt. Gurdevi, who was no party to the deed, had acquiesced in the transfer.

We have heard Mr. Moti Sagar for the appellants, Basheshhar Nath, Shankar Nath and *Musammat* Gurdevi ; and Mr. Tek Chand has addressed us for the plaintiff-respondent.

The first point urged for the appellants is that the deed of exchange in question was inadmissible in evidence for want of registration. The value of the property in suit stated in the deed was Rs. 99 and admittedly the land was held by occupany tenants. The objection as to inadmissibility of the deed was taken in the first Court in the written statement but was afterwards dropped and was not put in issue. It was not taken in the grounds of appeal to the learned District Judge. In these circumstances, we see no reason for remanding the case for an inquiry into the actual value of the proprietary rights in 1903. There is nothing on the record to suggest that it was more than what is stated in the deed ; and, in our opinion, the appellants have no ground for pressing for the remand of the suit (which was instituted on the 12th August 1915) more especially as two of the three appellants were parties to the statement of value in 1903.

The remainder of Mr. Moti Sagar's argument has consisted of an attack on what are findings of fact by the learned District Judge that the exchange took place and was acted upon. He has contended that the evidence has not been properly appreciated, but he has been unable to show us that the learned District Judge has overlooked anything. Every piece of evidence which is referred to by Mr. Moti Sagar is mentioned in the District Judge's judgment in such terms as to show that it has been fully considered and there exists on

the record evidence, which is legally admissible, in support of the findings. This being so, we could not interfere with those findings merely because we considered that they ought to have been different.

The appeal must fail and is dismissed with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

MISCELLANEOUS APPLICATION NO. 64 OF 1922.

June 18, 1923.

Present :—Mr. Justice May Oung.

MAUNG HMAN AND OTHERS—APPELLANTS

versus

MA SHIN—RESPONDENT.

Letters Patent (Rangoon) cl. 13—Appeal—Application for certificate—Delay, effect of.

No period of limitation has been prescribed for an application under clause 13 of the Rangoon Letters Patent to obtain a declaration that a case is fit one for appeal, but long delay in making the application may disentitle the applicant from obtaining the declaration, especially where the declaration is sought on a technical ground in a case in which the order complained of has done substantial justice between the parties.

Mr. *Mya Bu*, for the Appellants.

ORDER.—Ma Sun Ma had two husbands, Pauk Kyi and Pyu Yaung. Petitioners, are her children by Pauk Kyi and respondent's husband Po Chit was her son by Pyu Yaung.

Petitioners sued respondent for possession of certain properties on the ground that they were Ma Sun Ma's sole heirs, Po Chit having already received his share.

I found that Ma Sun Ma had purported to transfer the lands in suit to Po Chit as his share of the inheritance, but that the transfer was ineffective for want of a registered deed. I held, however, that because petitioners were present at the transfer and signed the report for mutation of names in token of their knowledge of and consent to the transfer, they could not be allowed to impugn it.

My judgment was delivered on the 15th of February 1923 and on the 11th of June 1923, that is, nearly four months after the date of the judgment, petitioners apply for a declaration under clause 13 of the Letters Patent that the case is a fit one for appeal.

Their case is that I was mistaken in holding that there was any estoppel against them

It may be that I was mistaken in applying the law of estoppel but I am satisfied that my order did substantial justice between the parties. There can be no doubt that petitioners agreed to the transfer of the lands to Po Chit, and if respondent had sued them as heirs and legal representatives of Ma Sun Ma for a registered conveyance of the lands I do not see how they could have met his claim. Respondent's defence that Po Chit was put into possession by Ma Sun Ma, under whom petitioners claim, under an agreement to transfer the lands to him outright is a good defence to petitioner's suit so long as respondent has a right to specific performance of that agreement, and if she had no right to the lands as her share of the inheritance, then her claim as representing one of the heirs of Ma Sun Ma would revive, since she would have been deprived of what she received as her share and petitioners' remedy would be by way of a suit for partition of the estate and not for possession of the particular lands.

It is true that no period of limitation has been prescribed for appeals under the particular provisions of clause 13 of the Letters Patent which are invoked in this case, but in my opinion the petitioners' delay in making this application can fairly be considered against them. It seems to be perfectly clear that

they are attempting to take advantage of a technical defect in the transfer to which they themselves agreed and their case has no real merits.

I, therefore, see no reason to declare that the case is a fit one for the special appeal allowed by clause 13 of the Letters Patent and I dismiss the application.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1203 OF 1921.

April 17, 1924.

Present :—Mr. Justice Abdul Raoof and
Mr. Justice Moti Sagar.

GIRDHARI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MAM CHAND—PLAINTIFF, AND NIADAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation — Reversioner, remote, locus standi *of, to challenge alienation.*

An alienor had three minor sons living. His next immediate reversioner brought a suit to challenge the alienation on the ground of want of consideration and necessity ;

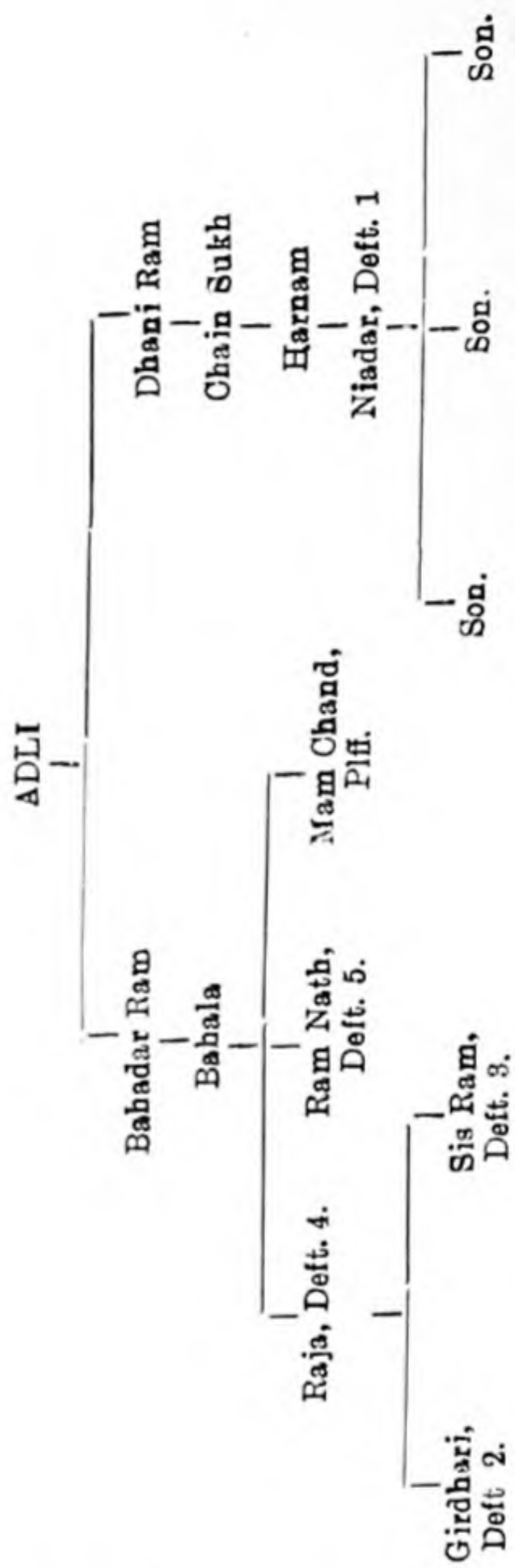
Held, that the plaintiff had only a bare possibility of succession to the alienor and had, therefore, no *locus standi* to maintain the suit, which must be dismissed as speculative.

Second appeal from the decree of the Additional District Judge, Karnal, dated the 3rd February 1921, affirming that of the Senior Sub-Judge, Rohtak, dated the 28th July 1920.

Mr. *Sagar Chand*, for the Appellants

Mr. *Shamair Chand* and Lala *Amar Nath Chona*, for the Respondents.

JUDGMENT.—The relationship of the parties will be illustrated by the following pedigree table :—



The appellants before us are the defendants Girdhari and his brother Sis Ram. The plaintiff Mam Chand is the main respondent in the case. On the 20th February 1919, Niadar, son of Harnam, sold the land in suit to Girdhari and Sis Ram for a sum of Rs. ,3000. The plaintiff Mam Chand, who is a collateral of Niadar, thereupon brought this suit for a declaration that the alienation was without consideration and legal necessity and that it would not

affect his reversionary interests after the death of the alienor. The Trial Court found necessity established to the extent of Rs. 886 only and decreed the suit subject to the plaintiffs paying that sum to the defendants-vendees when succession opened out. Both sides appealed to the District Judge against this decision with the result that both appeals were dismissed and the decree of the Court of first instance was affirmed. The defendants have now come up in second appeal to this Court and the main contention urged on their behalf is that the suit is of a speculative character and that the plaintiff has no *locus standi* to contest the alienation. This contention is in our opinion well founded and must prevail. It is admitted on behalf of the respondent that the alienor Niadar has three sons living who are nearer in order of succession than the plaintiffs, but it is urged that they are minors and that the plaintiff is entitled to sue as next in order of succession to them. A large number of authorities have been cited in support of this proposition and reliance is placed on paragraph 67 of Rattigan's Customary Law which lays down that, where a nearer reversioner is precluded from suing or colludes with the alienor, a more remote reversioner is entitled to maintain the action. This is, however, not the case here. This is a purely speculative claim, the respondent only having a bare possibility of succeeding and nothing more, and we have, therefore, no hesitation in holding that he has no *locus standi*.

The result is that the appeal succeeds and the plaintiff's suit is dismissed with costs throughout.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 50 AND 51 OF 1922.

March 19, 1923.

Present :—Mr. Justice Oldfield and Mr. Justice Devadoss.

PITTA RAMASWAMIAH—COUNTER-PETITIONER—APPELLANT

versus

SUBRAMANIA AIYAR—RECEIVER—RESPONDENT.

Provincial Insolvency Act (*III of* 1907), *s.* 36—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 187—*Application by Official Receiver to set aside alienation by insolvent* —*Limitation.*

An application under section 36 of the Provincial Insolvency Act by the Official Receiver to set aside an alienation made by the insolvent is not governed by Art. 181 of Schedule I to the Limitation Act.

Doraiya Solagyan v. *Venkatarama Naicker* 60 Ind. Cas. 123 ; 12 L. W. 535, followed.

Appeals against the order of the District Court, Salem, dated the 4th July 1921, in I. A. Nos. 15 of 1921 and 77 of 1919 in I. P. No. 5 of 1917.

Mr. *K. Sankera Sastry*, for the Appellant.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondent.

FACTS.—One Narasimha Iyah was adjudicated an insolvent in or about 1917 and a Receiver was appointed to his properties. He had executed a mortgage of his properties in favour of his nephew, the appellant herein, on 24th February 1916 and the latter filed a statement before the Receiver that a sum of Rs. 2,000 with interest was due to him on the mortgage. He was absent and unrepresented when the Court considered the Receiver's report. Hence the amount was not included in the schedule of debts framed by the Court. In August 1919, the appellant formally applied under section 24 of the Act for proof of debts. While the petition was still pending, the Receiver by I. A. No. 15 of 1921 dated January 1921 applied under section 53 of the

Provincial Insolvency Act, V of 1920, to set aside the mortgage as being in fraud of creditors. The learned District Judge disposed of both petitions by the same order and dismissed them holding that the mortgage was a mere sham transaction and that the appellant had failed to show that he was a transferee in good faith and for valuable cansideration.

Two appeals were filed to the High Court against the orders. One of the grounds of the C. M. A. was that the application of January 1921 under section 53 was barred by limitation since it was more than 3 years from 1917, the date when the debtor was adjudicated insolvent.

JUDGMENT.—These appeals are argued on the ground that the lower Court should either have set aside the mortgage Ex. I or should at least have allowed the proof of the present appellant, the alienee, in respect of the amount secured by that document, as a simple debt.

The first suggestion is that the Official Receiver's petition was out of time with reference to Article 181, Schedule I of the Limitation Act. A similar contention was rejected in *Duraiyya Solagyan* v. *Venkatarama Naiker* (1), a decision with which we entirely agree. Next, it is said that the burden of proof should have been placed on the Official Receiver. But, in the circumstances of the case and in view of the fact that the interval between the insolvency petition and Ex. I, was less than two years, it was for the alienee to prove his case.

The lower Court has dealt fully with the merits. We need add only that the alienee did not give evidence. The appeals fail and are dismissed with costs to include only one Vakil's fee.

V. N. V. *Appeal dismissed.*

(1) 60 Ind. Cas. 123 ; 12 L. W. 535.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2824 OF 1923.

April 14, 1924.

Present :—Mr. Justice LeRossignol.

PARS RAM—DEFENDANT—APPELLANT
versus
FIRM HARGOLAL AND SONS—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX. r. 1—Injunction, temporary, restraining alienation—Alienation after decree—Disobedience.

A temporary injunction was issued restraining appellant from alienating certain property till the disposal of the suit. He mortgaged the property after decree and whilst no proceedings in execution were pending :

Held, that the jurisdiction of the Court issuing the injunction had determined as soon as the suit was decided, and the appellant was not, therefore, guilty of disobedience.

Appeal against the decision of the Senior Sub-Judge, Ambala, dated the 6th December 1923.

Mr. *Shamair Chand*, for the Appellant.

JUDGMENT.—The question for decision is whether the appellant disobeyed a temporary injunction to refrain from alienating property '*tafaisala muqaddama*,' till the disposal of the suit.

He mortgaged the property after decree and whilst no proceedings in execution were pending. At the time of the alienation, even if execution proceedings be deemed to come within the meaning of suit, no suit was pending and the issuing Court's jurisdiction had determined. I accordingly accept the appeal and set aside the order of the Court below committing appellant to prison.

No order as to costs.

Z. K. *Order set aside.*

CENTRAL BANK OF INDIA LTD. *v.* NADIRSHAHA METHA

SIND JUDICIAL COMMISSIONER'S COURT.

SUIT No. 566 OF 1923.

November 16, 1923.

Present :—Mr. Rupchand Billaram, A. J. C.

CENTRAL BANK OF INDIA LTD.—PLAINTIFFS—APPELLANTS

versus

NADIRSHAHA METHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Promissory-note payable on demand—Oral evidence to prove one executant signed as surety, admissibility of—Agreement to proceed first against principal, whether can be proved.

In a suit on a promissory-note payable on demand executed by two persons it is open to one of them to lead parol evidence to prove that he executed the pronote as surety for the other, but parol evidence is not admissible to prove a contemporaneous oral agreement by the plaintiff to recover the amount of the loan in the first instance from the principal.

Case-law discussed.

Mr. *N. C. Navaty*, for the Appellants.

JUDGMENT.—The plaintiffs have filed this suit for recovery of Rs. 21,317-12-0 alleging that defendant No. 1 and one Framroze, since deceased, borrowed from them a sum of Rs. 17,000 on 29th April 1920 and executed a joint and several promissory-note payable on demand in their favour bearing interest at 12 per cent. per annum and that they renewed this note by another on 28th August 1920 which provided for interest at 9 per cent. per annum with six-monthly rests. The plaintiffs have based this suit on the second note but have claimed interest at the enhanced rate of 10½ per cent. per annum from 29th October 1920 with monthly rests on an alleged contemporaneous oral agreement on notices sent to defendant No. 1 claiming the enhanced rate, the debit advised sent to the defendant, and the alleged practice of the plaintiffs to charge the enhanced rate with monthly rests on overdue loans. It, however, appears from memo. of account filed with the plaint that the plaintiffs have calculated interest at 10½ per cent. per annum with six-monthly rests from 29th October 1920 to 1st January 1922 and thereafter at the same rate with monthly rests. Framroze died on 16th September 1920 and his widow and executrix of his estate has been joined as defendant No. 2.

Defendant No. 1 pleaded that he was a surety for Framroze to the knowledge of plaintiffs, that plaintiffs had agreed at the time of loan to recover the amount in the first instance from Framroze and that, therefore, a decree should be passed in their favour requiring them to recover the amount in the first instance from the esate of Framroze in the hands of defendant No. 2. He denied the right of the plaintiffs to claim interest at 10½ per cent. per annum with monthly rests.

Defendant No. 2 denied that defendant No. 1 was a surety or that the amount of the loan was recoverable in the first instance from the estate of Framroze and urged that the question of the liability of defendants *inter se* could not be gone into in this suit. She joined hands with defendant No. 1 in disputing the claim for interest.

At the close of the case defendant No. 1 has intimated to the Court that he does not dispute the right of the plaintiff to claim the interest at the enhanced rate of 10½ per cent. per annum.

The following issues arise out of the pleadings of the parties :—

1. Did defendant No. 1 join in the loan as a surety for Framroze ?

2. Did plaintiffs agree to recover the amount of the loan in the first instance from Framroze ?

3. Can defendant No. 1 give parol evidence in proof of issues Nos. 1 and 2, or either of them ?

4. Can questions *inter se* between defendants Nos. 1 and 2 be gone into in this suit ?

5. Are plaintiffs entitled to the interest claimed by them ?

6. General.

Issue No. 3. It is not seriously contested that evidence of a contemporaneous oral agreement is admissible on issue No. 1 in a proper case. Such evidence falls within proviso 1 of section 92, Evidence Act, and does not purport to add to or vary or contradict the written transaction. The demand note, Ex. 20, is silent

as to the rights of the executants *inter se* though each of the executants is primarily liable to the payee. Under section 128 of the Contract Act the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided in the contract. By proving the defendant No. 1 signed the note as a surety he does not limit his liability under Ex. 20.

Defendant No. 1's difficulty, however, arises in showing that parol evidence is admissible on the second issue. In *Pooley* v. *Harradane* (1), referred to by Mr. Isardas for defendant No. 1, where defendant was permitted to prove by parol evidence that he signed the promissory-notes payable on demand as a surety to the knowledge of the plaintiffs and to contend that he was discharged from his liability as such as the plaintiffs had without his knowledge and consent extended time for payment to the principal debtor to his prejudice, Coleridge, J., observed as under,—

" In the case of *Hollier* v. *Eyre* (2) Lord Cottenham in delivering his opinion in the House of Lords laid down the rule of law relied upon by the Counsel for the plaintiff in the argument before us that " the question whether the plaintiff as between himself and the grantees was a principal in the grant of the annuity, or only a surety for the payment of it by another must be ascertained by the terms of the instruments themselves; no extraneous evidence," said he, " is admissible for that purpose." In this doctrine we entirely concur, and we think that if the discharge of the surety could only be effected by establishing that there was a different contract as between the creditors and the alleged surety from that apparent on the written contract as, for instance, that the latter would be liable not primariiy but collaterally only, on the default of the principal debtor, we should be satisfied that the defence was not made out."

Here defendant No. 1 is attempting to prove by parol evidence that he is collaterally liable notwithstanding the express terms of Ex. 20 requiring him to repay the loan on demand and the provisions of section 128 of of the Contract Act which render him primarily liable to the plaintiffs. He is thereby attempting to vary the express terms of the contract. It is argued that this evidence is not intended to vary the terms of the contract but intended to attach a condition precedent to the contract and as such it is admissible under proviso 3 of section 92 the Evidence Act. Proviso, read with illustration (*J*), enunciates the well established rule of English Law that if the parties agree that the written contract shall not be of any force or validity until some condition has been performed, parol evidence of such oral agreement is admissable to show that the condition has not been performed and consequently the written contract has not become binding. Until this condition is performed, there is no written agreement at all. (Ameer Ali, pages 617-618, VII Edition). Distinction must be made between an agreement that no obligation shall be attached to a written transaction and an agreement that though such obligation does attach it shall be postponed to some future date. By admitting that he signed the note as a surety defendant No. 1 admits his liability as such from the date when he signed the note and cannot, therefore, contend that no legal obligation attached to the note when it was signed.

In *Ramjibun* v. *Oghar Nath* (3) a defendant who had executed a promissory-note in full discharge of his debts and all other claims against him up to the date of the note was not permitted to plead that the plaintiff agreed not to bring an action until the defendants' share in certain compensation-money had been recovered by him. Sale, J., in giving judgment said :—

"Under the promissory-note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement the effect of which is to qualify or restrict that engagement. The case of *Mosely* v. *Hanford* (4) is clear authority to the effect that in England the evidence of such an oral agreement would be inadmissible. There are numerous other English

(1) (1857) 7 E. & B. 431 ; 410 R. R. 666 ; 26 L. J. Q B. 156: 3 Jur. (N. S.) 488 ; 5 W. R. 405; 119 E. R. 1307.

(2) (1842) 57 R. R. 1; 9 Cl. & F. 1 ; 8 E. R 313.

(3) 25 C. 401; 2 C. W. N. 188; 13 Ind. Dec. (N S.) 266.

(4) (1830) 10 B & C. 729; 8 L. J. (O.S.) K. B 261; 109 E. R. 621.

authorities to the same effect to which I need not refer, inasmuch as the argument for the defendant is not so much that under the English Law the evidence is admissible but that, proviso 3 to section 92 of the Evidence Act has the effect of altering the English Law. Now, in the present instance the oral agreement sought to be proved does not provide that the promissory-note was to have no force or effect until the happening of the particular event mentioned, but it purports to provide that the promise to pay on demand absolute in its terms was not to be enforceable by suit until the happening of that event, or in other words, that the legal obligation to perform the promise was to be postponed."

The above remarks were quoted with approval by Macleod, C.J., in *Vishnu Ramachandra* v. *Ganesh Krishna* (5) where a defendant was not permitted to prove the existence of a contemporaneous oral agreement whereby the plaintiff had agreed that he would not present the note though it was payable on demand, until he had discharged certain incumbrances on the property he had sold to strangers. In *Sri Ram* v. *Sobha Ram* (6), the defendant was not allowed to plead that the amount specified in the note was payable after adjustment of some account between the parties. In *Ram Singh* v. *Ibrahim* (7) recently decided by the Appellate Bench of this Court, a plea that the amount of the demand note was to be set off against the value of certain work done or to be done did not prevail.

I hold that, though it is open to defendant No. 1 to give evidence in a proper case of a contemporaneous oral agreement on the first issue, it is not open to him to give such evidence on the second issue.

Issue No. 4.—Defendant No. 1 does not claim any equitable relief specified in sections 133 to 141 of the Indian Contract Act : he has not asserted that the plaintiffs have done anything to prejudice his rights as against the principal debtor nor has he paid the amount due to entitle him to the securities, if any, in the possession of the plaintiffs. Defendant No. 1 is not, therefore, entitled to any relief in this suit as against the plaintiffs. Defendant No. 1's remedy is against defendant No. 2 in a properly constituted suit. I hold on this issue in the negative. Evidence on issue No. 1 is, therefore, not pertinent to the present inquiry and as such should have been excluded. As, however, I have allowed evidence to be given on both the issues, I shall record my findings on both of them.

Issue No. 1.—Dady Nanavati, plaintiff's local agent, admits that Framroze approached him for the loan and that at his suggestions Framroze brought defendant No. 1 to join them in executing the note as the rules of the Bank required that advances on demand notes could only be made if there were two parties liable for its payment. He further admits that the amount advanced by the Bank was transmitted to Bai Gulbai at Bombay on the application of Framroze Ex. 4, and that the bearer cheque signed by both the executants for withdrawal of the money was signed at its back by Framroze in token of his having received the money. The letters Exs. 6, 18|1 and 18|3 sent by the plaintiffs to defendant No. 1 refer to his having guaranteed the payment of the loan on behalf of Framroze. The letters sent by defendant No. 1 to the Bank prior to the filing of this suit Exs. 10, 11 and 12 asking for extension of time for payment are to the same effect. Hiralal Ex. 12 who is even at present employed as the Mehta of defendant No. 2 admits having handed over to defendant No. 1 Rs. 1,205 for payment to plaintiffs as interest. Though he states that this amount represents the share of the interest payable by defendant No. 2 it has been paid into the Bank as interest for the whole sum of Rs. 17,000 due up to the 30th June 1921 under vouchers Exs. 7 and 8. It is clear from this evidence that defendant No. 1 executed the two demand notes as a surety to the knowledge of the plaintiffs. I may, however, note that, Mr. Dipchand Chandumal for defendant No. 2 has declined to cross-examine defendant No. 1 on this point contending that he considered that the questions *inter se* between the two defendants could not be gone into in this suit.

(5) 63 Ind. Cas. 673; 45 B. 1155; 23 Bom. L. R. 488.

(6) 67 Ind. Cas. 513; (1922) A. I. R. (A.) 213; 44 A. 521 ;20 A. L. J. 315; 4 U. P. L. R. (A.) 153.

(7) 78 Ind. Cas. 418.

I hold on this issue in the affirmative.

Issue No. 2.—Dady Nanavaty Ex. 5 states that he at no time agreed to recover the amount of the loan from Framroze of Framroze's estate. His evidence is amply corroborated by the admissions of defendant No. 1 contained in his letters Exs. 10, 11 and 12. Defendant No. 1 has not been able to put his case any higher than to assert that the plaintiffs' agent knew that Framroze had to pay the money. I hold on this issue in the negative.

Issue No. 5.—Mr. Nadirshah for the plaintiffs has given up the plea of a contemporaneous oral agreement to charge interest at 10½ per cent. and in view of the fact that the plaintiffs have charged interest at that rate with monthly rests from 1st January 1922 he has not pressed the claim for interest with monthly rests or given evidence to prove the alleged usage. The only question for the Court to decide is whether the plaintiffs are entitled to interest at the enhanced rate of 10½ per cent. per annum from 29th October 1920 up to date of suit with six-monthly rests. At the close of the case Counsel for defendant No. 1 intimated to the Court that he does not contest the claim for the enhanced interest. It appears from the memo of particulars filed with the plaint that the defendants have paid interest at the enhanced rate of 10½ per cent. per annum from 29th October 1920 up to 1st January 1922. It has not been alleged, as in *Daniell* v. *Sinclair* (8), that this enhanced rate of interest was charged and paid wrongly under the belief that the demand note provided for payment of interest at that rate. The letters and debit advices sent by the plaintiffs intimating to defendant No. 1 that interest at the rate of 10½ per cent. was being charged, the fact of the payment of interest at that rate up to 1st January 1922, and the request made by him for extension of time are evidence of a subsequent implied agreement that extension was applied for and granted by the plaintiffs on the defendant's agreeing to pay the enhanced rate of interest. It is in evidence that all the letters addressed to defendant No. 1 after the death of Framroze were forwarded by him to defendant No. 2 for her information. The extention of time was applied for on the ground that the failure to re-pay the loan was due to the unforeseen delay in obtaining probate of the Will of Framroze. It is not now open to either of the defendants to deny their liability to pay the enhanced rate of interest from 1st July 1922 up to the date of suit. I hold that the plaintiffs are entitled to interest at the rate of 10½ per cent. per annum with six-monthly rests from 29th October 1920 up to date of suit.

Issue No. 6.—There will be decree against both the defendants for Rs. 17,916-12-0 and interest due thereon calculated at the rate of 10½ per cent. per annum with half-yearly rests from 1st January 1922 up to 26th July 1923 with further interest at six per cent. per annum on the total sum so found due from 26th July 1923 up to payment and costs of the suit.

Z. K. *Suit decreed.*

(8) (1881) 6 A. C. 181; 50 L. J. P. C. 50; 44 L. T. 257; 29 W. R. 569.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1596 OF 1919.

June 4, 1923.

Present:—Mr. Justice Lumsden and Mr. Justice Abdul Raoof.

SANWAL DAS—DEFENDANT—APPELLANT
versus
JAIGO MAL AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (*I of* 1913), s. 22—*Withdrawal of deposit pending appeal by vendee, effect of.*

Plaintiff pre-emptor obtained a decree and deposited in Court the sum mentioned in the decree as payable to the vendee. The latter appealed and obtained a stay of execution. The pre-emptor thereupon obtained an order from the Appellate Court permitting him to withdraw the money deposited by him in pursuance of the decree. The money was accordingly withdrawn :

Held, that the withdrawal of the amount pending appeal did not entail the dismissal of the pre-emptor's claim under the provisions of section 22 (5) (a) of the

SANWAL DAS *v.* JAGIO MAL

Punjab Pre-emption Act. The object of an order under section 22 (1) of the Punjab Pre-emption Act is to guarantee vendees against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree, the need for a deposit no longer exists so far as the Trial Court is concerned. No doubt such deposits are available for the discharge of costs under clause (3) of the section, but such satisfaction is not the *raison detre* of the deposit and there is nothing to suggest that a vendee appellant is entitled to any advantage of the kind.

Appeal against the decree of the Senior Sub-Judge, Delhi, dated the 20th June 1920.

Messrs. Bakhshi *Tek Chand* and *Shamai Chand*, for the Appellant.

Pundit *Sheo Narain*, R. B., for the Respondents.

JUDMGENT.—The hearing of this appeal was delayed in order to await an authoritative decision on the question of the period allowable under Article 177 of the Limitation Act. It has now been held in *Gobind Das* v. *Rup Krishore* (1) that the amending Act has left that Article unaltered. We have no hesitation in following this authority, which is the result of an exhaustive enquiry into the question rather than the Bench decision publised in *Chuni Lal* v. *Kala Khan* (2)] where it appears to have been taken for granted that the effect of the amending Act was to reduce the period to 90 days. It follows that this appeal has not abated. The plaintiffs in this case, who are father and son, sued to pre-empt a house situated at Delhi on the ground of vicinage. They alleged that the price actually paid was only Rs. 6,000 and not Rs. 9,000 as entered in the deed of sale registered on the 19th May 1917. The vendor and vendee both opposed the claim asserting that the plaintiffs had waived their rights and that the full price of Rs. 9,000 plus Rs. 426-3-0 on account of costs and other expenses had been paid. The Trial Court found that the vendee had actually paid Rs. 9,221-13-0 but that no waiver on the part of the plantiffs had been established. A decree for possession by pre-emption on payment of the sum mentioned was accordingly granted, parties being left to bear their own costs.

(1) 77 Ind. Cas. 469 ; (1924) A. I. R. (L) 65 ; 4 L. 367; 6 L. L. J. 25.

(2) 67 Ind. Cas. 596; (1922) A. I. R. (L.) 61 ; 4 L L. J. 171 ; 34 P. W. R. 1922.

Against this order the vendee has preferred this appeal. It appears that, after the institution of this appeal, the appellant obtained an order for stay of execution. The plaintiffs pre-emptors thereupon applied for permission to withdraw the pre-emption money deposited in accordance with the decree and this application was accepted by a Judge in Chambers. The pre-emptors armed with this permission accordingly withdrew their deposit of Rs. 9,221-13-0. Counsel for the appellant now argues that the withdrawal of this sum entails the dismissal of the pre-emptors' claim under the provisions of clause (*a*) of sub-section (5) of section 22 of the Pre-emption Act, 1913. In the special circumstances, we have allowed this objection to be raised though no additional ground of appeal relating to it was put in. We are satisfied, however, that the objection must be repelled. In the first place, the pre-emptors are not the appellants in the case. In the second place, the word "so" in the clause cannot be ignored. That word refers to the preceding section and in the case of an appeal obviously relates to action taken by an Appellate Court under sub-section. (2). In the present case there is no order by this Court under that sub-section. In the third place it is clear that the object of an order under section 22 (1) is to guarantee vendees against frivouls proceedings on the part of bossible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree, the need for a deposit no longer exists so far as the Trial Court is concerned. No doubt such deposits are available for the discharge of costs, section 22 (3), but such satisfaction is not the *raison detre* of the deposit and there is nothing to suggest that a vendee-appellant is entitled to any advantage of the kind. We have no hesitation, therefore, in holding that section. 22 (5) (*a*) does not apply to the present appeal.

The only other question requiring determination is that of waiver. Great stress has been laid by the appellant on the statement of Chhanga Mal, plaintiff in the Trial Court. In that deposition Chhanga Mal admits that he asked the vendee to sell him a part of the property and that he had told a messenger sent by the vendee to offer a small sum as *solatium*, that he neither wanted the house nor the money. He explains that he would

not have brought the suit at all had it not been for the pressure brought on him by the ladies of his household. Counsel contends with some reason that this conduct amounts to waiver, *i.e.*, a surrender of the right to pre-empt, and though on behalf of the pre-emptors it is urged that these admissions should not be taken too seriously, we are of opinion that it was not open to Chhanga Mal to bring a suit for pre-emption on the top of this waiver. At the same time, we do not consider that there was any estoppel—a further argument urged on behalf of the appellant. Chhanga Mal asserts that he was not consulted about the sale before it took place and the vendor admits that he neither gave any notice to the pre-emptors nor made any enquiry from them. The evidence produced to prove estoppel does not appear to us to be at all convincing.

But while we are of opinion that Chhanga Mal was not entitled to sue by reason of his waiver, we can see no reason for supposing that his son was not competent to sue. We regard the proof that he, too, waived his rights as entirely inadequate and we are not prepared to accept the contention that he is not entitled, in view of his father's waiver, to maintain a suit. Reliance has been placed on *Sukha Ram* v. *Kotu Ram* (3), but that authority has no applicability to the present facts. On the other hand, *Ishri Prashad* v. *Basheshar Nath* (4) is clearly in point, and a similar opinion was expressed by the Allahabad Court in *Gandharp Singh* v. *Sahib Singh* (5). In this case it has nowhere been even suggested that the father was acting as the manager of the family at the time of waiver and the terms of the plaint itself are directly opposed to any such theory.

It follows that, so far as Jaiju Mal, plaintiff is concerned, the decree of the lower Court must be maintained; while Changa Mal's name must be removed from the decree. Ground 7 of this appeal regarding payment of stamp-duty and brokerage has not been seriously pressed and we see no reason to differ from the finding of the learned Sub-Judge on the point. The sum found due, *viz.*, Rs. 9,221-13-0, must be re-deposited within 30 days from the date of this order otherwise the appeal will be accepted and the suit dismissed with cost throughout. Should the sum be deposited by due date we direct that, in the circumstances of the case, parties bear their own costs in this Court.

Z. K. *Appeal dismissed.*

(3) 67 Ind. Cas. 76.
(4) 35 P. R. 1908; 179 P. L. R. 1908; 92 P. W. R. 1908.
(5) 7 A. 184; A. W. N. (1884) 326; 4 Ind. Dec. (N. S.) 394.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 289 OF 1922.

June 11, 1923.

Present:—Mr. Justice Kanhaiya Lal.

KAMLAPAT DUBEY AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAM RAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—License—Construction of cattle troughs—Long user.

Plaintiffs, who claimed to be owners of the plot in dispute, sued to recover possession of it on the allegation that defendants had without any right constructed cattle troughs and fixed certain pegs for tying cattle over a portion of the plot a few months before suit. It was found that the land belonged to the plaintiffs, but that the cattle troughs had been in existence for more than twelve years prior to the suit;

Held, (1) that the defendants having been allowed to use the land and to maintain the cattle troughs for more than twelve years without obstruction the plaintiffs were not entitled to have the troughs removed;

(2) that as the troughs did not occupy the whole of the plot in dispute, no question of adverse possession arose and the title of the plaintiffs to the land remained unaffected.

Messrs. *N. P. Asthana* and *K. Verma*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to plot No. 584|2 Khasra, measuring 3 *biswas* 18 *dhurs* and situated in the village Mahnlia. The plaintiffs claim to be the owners of that plot and complain that the defendants had without any right constructed certain cattle troughs and fixed certain pegs for tying cattle over a portion of the said land in the month of *Bhadon* preceding the suit. The defendants, on the other hand, assert that the cattle troughs and pegs in question stand on their own land and have been in existence for more than 12 years prior to the suit. The Courts below found that the land in question belonged to the plaintiffs but the cattle troughs had been in existence for more than 12 years prior to the suit. They dismissed the suit of the plaintiffs as barred by time.

The learned Counsel for the plaintiffs-appellants relies on the decision in *Framji Cursetji* v. *Goculdas Madhowji* (1) and contends that such temporary user, even if it is of a long standing, can give the defendants no right to continue to occupy the land; but the user here is not of a temporary character. A place for the tying of cattle is one of the necessary adjuncts of an agriculturist's occupation and residence in the village. The cattle troughs in question are situated close to the house of the defendants and as the defendants have been allowed to use the land and to maintain the cattle troughs for more than 12 years without obstruction, the plaintiffs are not entitled to have those troughs removed. The troughs do not, however, occupy the whole land and no question of adverse possession can, therefore, arise.

The appeal is dismissed except in so far that the proprietary title of the plaintiffs to the land in dispute will remain unaffected. The parties will, under the circumstances, bear their own costs of this Court.

Z. K. *Appeal dismissed.*

(1) 16 B. 338 ; 8 Ind. Dec. (N. S.) 703.

LAHORE HIGH COURT.

CIVIL REVISION NO. 860 OF 1923.

May 3, 1924.

Present :—Mr. Justice Martineau.

BULLU MAL—PETITIONER

versus

HARDWARI MALL—RESPONDENT.

Hindu Law—Marriage—Consent of guardian absence of—Guardians and Wards Act (VIII of (1890), *s.* 19 *(a)—Minor girl, married—Guardian, whether can be appointed.*

A Hindu marriage is not invalidated by want of the guardian's consent.

Gajja Nand v. *Emperor*, 64 Ind. Cas. 500; 2 L. 288; 23 Cr. L. J. 20 ; 8 P. L. R. 1922, followed.

Under section 19 (a) of the Guardians and Wards Act, the Court is prohibited from appointing a guardian of the person of a minor who is married and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person.

Civil revision against the decision of the District Judge, Karnal, dated the 24th October 1923,

Mr. *Shamair Chand*, for the Petitioner.

Lala *Jagan Nath* and Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—This is an application by one Ballu Mal for revision of an order passed by the District Judge of Karnal appointing the respondent Hardwari Mal to be the guardian of the person of his niece Pisto.

The petitioner was not made a party to the proceedings in the lower Court, but he is certainly a person to whom a notice should have been issued under section 11 of the Guardians and Wards Act, since he has, as found by the learned District Judge, been married to the minor, and being a person interested in the matter of the appointment of a guardian he is entitled to move this Court to interfere in revision, see *Jhandshur* v. *Baijnath* (1).

The minor was given in marriage to Ballu Mal by her sister's husband Telu Mal without the consent of Hardwari Mal without. But contention of Counsel for the respondent that the marriage was brought about by force or fraud, and is, therefore, invalid is not correct. There

(1) 27 Ind. Cas. 121; 1 O. L. J. 76; 18 O. C. 66.

is no allegation that the minor was defrauded or that the marriage was performed against her will. She has taken no objection to the marriage, and in fact it seems that she wishes to remain with her husband. It is Hardwari Mal who objects to the marriage and the fact is that Telu Mal hurried on the marriage in order to forestall him, but this fact would not render the marriage invalid, for it has been held in *Gajja Nand* v. *Emperor* (2) that a marriage is not invalidated by want of the guardian's consent.

The lower Court has overlooked section 19 (a) of the Gurdians and Wards Act, which prohibits the Court from appointing a guardian of the person of a minor girl who is married, and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person. The learned District Judge, while he is of opinion that Telu Mal is unfit to be the minor's guardian, has expressed no opinion as to the fitness or unfitness of Ballu Mal, and that is the point be decided.

I accept the application, set aside the order of the learned District Judge, and direct him to pass a fresh order after issuing notice to Ballu Mal and hearing him and determining whether Ballu Mal is unfit to be guardian of the person of the minor. The parties will bear their own costs in this Court.

Z. K. *Order set aside.*

(2) 64 Ind. Cas. 500; 2 L. 288 ; 23 Cr. L. J. 20; 8 P. L. R. 1922.

PRIVY COUNCIL.

APPEAL FROM BOMBAY HIGH COURT.

June 21, 1923.

Present :—Lord Sumner, Lord Carson, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

SETH KEVALDAS TRIBHOVANDAS—APPELLANT

versus

SAKERLAL BULAKHIDAS AND ANOTHER—RESPONDENTS

Civil Procdure Code (Act V of 1908), O. XXIII, r. 3—Arrangement not arrived at bona fide*—Adjustment.*

An arrangement between some of the parties to a suit which has not been arrived at *bona fide* and which was not put forward during the course of the proceedings then pending between the parties cannot be recognised as a lawful adjustment within the meaning of rule 3 of Order XXIII of the Civil Procedure Code.

Appeal from the decison of the Bombay High Court, dated the 22nd August 1916.

Messes. *De Gruyther K.C.*, and *Rai,kes*, for the Appellant.

Messrs. *Upjohn*, *K. C.*, and *Parikh*, for the Respondens.

JUDGMENT.—The plaintiff (respondent) is a share-holder in the Bharatkhand Cotton Mills Company, Limited, carrying on business in the City of Ahmedabad, Bombay Presidency. He brought this suit, the natuae of which will be explained presently, so long ago as the 5th January, 1909. The first five defendants are managing agent and directors of the Company ; the sixth is a retired director ; the seventh defendant is the Company itself, having been added as a party to the suit later in the course of the proceedings. The first defendant (the present appellant before the Board), Kevaldas Tribhovandas acted as Chairman of the Board of Directors and is the manager of the Company. The plaintiff seeks in the suit an account of the funds belonging to the Company used by the appellant for his own purposes, and for a declaration that a Weaving Factory erected and worked by him is the property of the Company. The Company appears to have been established sometime in the year 1896. The evidence shows that in 1905 the defendant Kevaldas Tribhovandas started the Weaving Factory which he claimed as his own property. The plaintiff charges that that Factory was built and erected by the defendant with money belonging to the Company, and that he has worked the same for his own benefit. He seeks an account of the profits made by the defendant therefrom and a declaration that such profits also belong to the Company.

Tha date for filing the defence was originally the 12th February 1909, but the appellant applied for time which was extended to the 14th April 1909, when the written statement was filed. It is unnecessary to refer in detail

to the contentions raised by him against the plaintiff's claim. It is enough to say that on the 23rd December of the same year the Subordinate Judge delivered a judgment in which he overruled the defendant's technical objections to the suit ; and that on the 26th January 1910, he made a preliminary decree directing accounts against the defendant and appointing a Commissioner to take the same. The defendant preferred an appeal from this preliminary judgment to the District Judge. Whilst this appeal was pending he convened a meeting of the shareholders which was held on the 29th April 1910. At this meeting a resolution was adopted which the plaintiff charges was at the instance of the defendant. This resolution was subsequently on the 15th May affirmed, it is charged, under similar circumstances. It runs as follows :—

"On reading the application received from some shareholders and the "scheme" which has been submitted thereupon by Pari. Kevaldas Tribhowandas (it appears that) Pari. Kevaldas Tribhowandas has asked for Rs. 4,00,000, in words four lacs as the price of the Weaving Factor yerected by himself (*sic*). But on a consideration of the said (matter, it appears that) as he has worked the same up to this day depreciation had been caused and profit had been made (or) loss had been sustained. After deducting a lump sum of Rs. 49,000, in words forty-nine thousand for both the items Rs. 3,51,000, in words three lacs and fifty-one thousand in the lump be brought to account with reference to him and possession of the said Weaving Factory be taken by us and as owing to this the work of "*Vahivat*" (management) (to be done) by Pari. Kevaldas Tribhowandas would increase Rs. 8,000, in words eight thousand be continued to be paid every year to him and his heirs and representatives for his trouble after debiting the same to the account of expenses."

It is necessary to mention here that on the 4th November 1900, at a meeting of the shareholders a resolution had been adopted, which is extremely material in the consideration of this case. It is as follows :—

"The moneys of the Company shall not be lent to any one on personal security. And the *Vahivatdar* (the Manager) shall not keep the account of the Company in his own shop ; so also the *Vahivatdar* shall not withdraw by debiting in his own name, any amount whatever, except his own dues."

After the institution of the present suit, several meetings were held on the defendant's motion or at his instance, for the purpose of rescinding the resolution of the 4th November 1900, which certainly clogged his free handling of the Company's funds. There is an allusion to this alleged rescission in the resolution affirmed on the 15th May 1910, in these terms :—

"As to the special resolution which we passed on the 4th November 1900, clause (6) thereof was cancelled on the 10th April 1909, and the whole of the special resolution besides that be cancelled. Moreover, we do not consider the suit which has been filed by Sakarlal Bulakhidas in the Court of the First Class Subordinate Judge (at) Ahmedabad as a *bona fide* one and that on account of the said suit having been filed the Company's credit has suffered to a very great extent. This meeting is, therefore, of opinion that the Agents should seek remedy by taking proper steps for the said loss of credit to the Company. This meeting, therefore, resolves that, if the Agents think proper, proper steps be taken against Sakarlal Bulakhidas accordingly. Shah Nagindas Girdhardas seconded the said (proposal)."

Although the resolution, which the defendant now contends was an adjustment between the Company and himself, was affirmed on the 15th May 1910, no reference to it was made in the appeal to the District Judge, which was dismissed on the 8th February 1911. The defendant appealed from the decree of the District Judge to the High Court, which appeal was dismissed on the 18th September 1912. No reference was made to this so-called adjustment in the appeal to the High Court. No appeal was preferred from the dismissal by the High Court of the appeal from the preliminary decree of the Subordinate Judge holding him accountable for his dealings with the Company's funds and directing accounts. It is suggested before this Board by Counsel for the defendant that on the appeal from the final decree by the High Court, he is entitled

at this stage to question the preliminary decree. The certificate granted by the High Court to enable the defendant to come to His Majesty in Council does not cover any appeal from the preliminary decree. But even if it was open to the defendant to question in the present appeal the findings arrived at by the three Courts in India on the accountability of the defendant relative to his dealings with the Company's funds, their Lordships do not find any material on which his contention may be said to be legitimately based.

To proceed with the history of the case: on the dismissal of the appeal by the High Court on the 18th September 1912, the Commissioner proceeded with the taking of the accounts. It was only on the 21st October 1912, after the dismissal of his appeal from the preliminary decree by the High Court, that the defendant first applied to the Subordinate Judge stating that,—

> "During the pendency of our appeals, the Company settled this suit with us, and the Company has taken from us the possession of the weaving shed, which we had built with our own money, agreeing to pay us Rs. 3,51,000 as price of the said weaving shed, after taking into consideration the wear and tear (*i.e.*, depreciation) on account of the conducting of the work of the said weaving shed till this day and the profit and loss which had occurred; and a registered sale-deed has also been taken from us in the matter."

and he then proceeded to urge :—

> "The Company having agreed with us—the defendant—in this way, with regard to this suit, this suit cannot now proceed further. Therefore, a note should be taken of this settlement, and, after holding that this suit has been settled, this suit should be dismissed."

On the 1st November 1912, the plaintiff filed an affidavit in contradiction of the defendant's statement as set forth in his petition of the 21st October 1912, charging the defendant with having manipulated the shareholders' meetings ever since he was called upon to answer the charges made in the suit. He also alleged that the meetings of the 29th April, 1910, or the 15th May 1910, were equally worked by Kevaldas for the purpose of getting the resolution affirmed. The plaintiff further stated in his affidavit that on the 23rd December 1911, whilst the appeal from the preliminary decree was still pending in the High Court, certain arbitrators had been appointed with the object of settling the matter in dispute after examining the Company's account-books and the defendant's private books of account, but the defendant having failed to produce the necessary books, the reference to arbitration proved ineffectual and the arbitration failed. There appears to have been no mention in the application to refer the matter in dispute to arbitrators of the alleged settlement arrived at on the 15th May 1910. The Company were added as defendants, apparently soon after the settlement of the issues, and new agents had been appointed for carrying on the work of the Company. These agents, on the 21st November 1912, filed an affidavit in answer to the defendant's allegations, in which they stated as follows :—

> "Defendant Kevaldas' allegation in his application that the (defendant) Company had effected settlement with him in connection with the suit is entirely untrue. It appears from the records of the Company that no settlement has at all been effected in connection with the present suit. Subsequent to a "preliminary decree" for taking accounts being passed by the Court of first instance in this suit, the defendant Kevaldas filed an appeal, being Appeal No. 85 of 1910 in the District Court. It appears that prior to the hearing of the appeal Mr. Kevaldas, as Chairman of the Board of Directors, called an extraordinary meeting of the Company on an application of some shareholders and got some resolutions passed improperly at the said meeting. One of the resolutions got passed is to the effect that the weaving shed *Karkhana* (Factory) should be purchased from Mr. Kevaldas for Rs. 3,51,000, in words three lacs and fifty-one thousand, and that as he would be required to take more trouble for its *Vahivat* (management) he should be paid every year Rs. 8,000, in words, eight thousand, for that trouble. Before this resolution was got passed valuation of the machinery and premises of the weaving shed was not got made by any experienced man. . . . . As a resolution to the above effect has been got passed

simply on the strength of Mr. Kevaldas holding a large number of shares, a great fraud has been Committed on the defendant Company and the company has thereby sustained a very great loss."

It is clear that after this affidavit, which challenged the validity and *bona fides* of the resolutions adopted after the institution of the suit, the defendant abandoned, so far as the records show, proceeding with his contention that there had been a settlement on the 15th May 1910.

No order, however, appears to have been recorded in the order-sheet in respect of the defendant's petition of the 21st October 1912. The Commissioner submitted his report on the 11th July 1913, and on the 24th April 1924, the Subordinate Judge made his final decree in which he held that the Company was not entitled to recover anything from the defendant. The judgment also contains no reference to the question of settlement. The final order of the Subordinate Judge is in these terms :—

"Defendant No. I is thus entitled to Rs. 108, 703-10-8. At this rate plaintiff or the Company is entitled to recover nothing as profit. The plaintiff has brought suit No. 408 of 1910 against the defendant and the Company for getting the resolution under which the Company agreed to purchase the Factory from plaintiff set aside on the ground that the said resolution is illegally passed. That suit has been all along kept with this suit after settling issues. Under the resolution the sale has taken place and the defendant Company is actually in possession and enjoyment of the Factory since May 1910. The profit and loss of the sale transaction has been considered in this suit as shown above. So practically speaking that suit has been disposed of byitself.

"For the above reasons, I dismiss this suit. Plaintiff has succeeded in the preliminary decree but the final result is in defendant's favour. Under these circumstances, I order that each party should bear his or their own costs of this suit."

The plaintiff and the Company appealed from this decree of the Subordinate Judge to the High Court of Bombay, and the learned Judges disposed of the appeal on the 22nd August 1916. They criticised, not without reason, the view of the Subordinate Judge absolving the defendant from all liability in connection with his dealings with the Company's funds and with the profits made by him from the Weaving Factory with the funds of the Company. They held, in fact, that the defendant Kevaldas Tribhovandas had misappropriated the money of the appellant Company to his own use and then, being called upon to account and restore what he had appropriated, claimed a very large salary for "the time and skill" he had spent on the employment of that money ; and they justly ridiculed the idea of the Subordinate Judge giving him remuneration for his work. In the result they made a decree against the defendant for a considerable sum of money. There was an application for review of judgment on the question of the alleged settlement of the 15th May 1910, which was rejected. The present appeal to His Majesty in Council is from this decree of the High Court and the order on review.

The main contention on which the appeal is based relates to the orders of the High Court with regard to the alleged adjustment. In their main judgment the learned Judges had said as follows : —

"When the dispute arose, negotiations appear to have been entered into, and on the 29th of April 1910, upon a representation by the defendant that he had spent some there *lacs* and sixty six thousand rupees upon bulding and stocking the Factory, appellant-company agreeed by a majority resolution, which was confirmed on the 15th of May, to take over this Factory at a price of Rs.3,51,000 in part payment of the defendant's total indebtedness to them."

After stating that :—

"There was a clear misrepresentation by one who was under a very special obligation to make full and true disclosure, and, that being so, it follows without the need of pursuing the argument through the somewhat nice and difficult case law of England that the appellant-company was entitled to a refund of so much of this money as has been overpaid."

and dealing with the specific plea of adjustment, they state their views in the following terms :—

"On the 29th of April 1910, after the preliminary decree had been passed, a resolution was passed, which was confirmed on the 15th of May at a General Extraordinary Meeting, and it was contended on behalf of the respondent that that was a lawful adjustment of the suit which put an end to all further proceeding. This matter appears to have been brought before the lower Court and issues were raised upon it on the 21st November 1912, but the respondent or whoever was taking sides with him at the time pressed the matter no further. We cannot discover that any evidence whatever was offered to the Court in substantiation of this contention. The onus clearly lay upon the defendant-respondent and inasmuch as he failed to discharge it or even to attempt to discharge it, we are now in a position to express any opinion upon this last contention and to afford relief on that ground."

On the review application they deal with the contention more fully.

Their Lordships entirely conour with the views of the High Court on this point. They consider, in the first place, that there is absolutely no reality in the plea of adjustment ; that it was not a real adjustment after an examination of the accounts or ascertainment of the facts; that it was never brought to the notice of the District Judge or of the High Court when the preliminary decree was under appeal ; that it was never mentioned before the arbitators and that soon after the defendant Company filed its affidavit the allegation was dropped. Besides, on a reference to r. 3, of O. XXIII of the Civil Procedure Code, it is adundautly clear that whatever might have taken place at the shareholders' meeting it was not an adjustment within the provisions of the Code. Rule 3 provides as follows:—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit,"

In this case there is not the smallest proof of a *bona fide* adjustment, nor did the defendant even ask the Court to record satisfaction and pass a decree made in accordance with the alleged adjustment.

On the whole their Lordships are of opinion that the judgment of the High Court is correct and that this appeal should be dismissed with costs. They will, therefore, humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant :—Mr. *E. Dalgadeo.*

Solicitors for the Respondent :—Messrs. *T. L. Wilson & Co.,*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 415 OF 1916.

January 23, 1918.

Present:—Mr. Fawcett, A. J. C.

THE STANDARD OIL COMPANY—PLAINTIFFS—APPELLANTS

versus

HARIDAS VELJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bill of Lading—Clause prohibiting carriage of other goods—Oral agreement varying clause—Evidence, whether admissable—Evidyncc Act (I of 1872), s. 92—Shipment of cargo in lieu of ballast—Jettison, evidence of.

A Bill of Lading evidences the terms of the contract between the parties and no evidence of any oral agreement varying its clauses is admissable under section 92 of the Evidence Act. [p. 460, col. 1.]

A party to a Bill of Lading is bound by any conditions mentioned in it although he may not have read them or known that the Bill of Lading contained any conditions. [p. 459, col 2.]

When there is an exprers condition in a Bill of Lading that the ship owner is not to carry any other

cargo except that of the person shipping the goods, the shipowner cannot, even if ballast is necessary, obtain other cargo for that purpose, but must ship more ballast. [p. 460, col. 2.]

In a suit for compensation for short delivery of goods by a ship where it is urged by the ship owner that cargo was cast over in an hour of danger during a storm, the Court must exercise due caution in accepting the allegation of the jettison especially when the storm is not supported by meterological experts. [p. 461, col. 1.]

Mr. *G. T. Elphinston*, for the Appellants.

Mr. *Asanmal Bulchand*, for the Respondents.

JUDGMENT.—This is a suit for compensation for short delivery of goods shipped by the plaintiffs on a ship (country craft) called the "Kotia Khatao Persad" from Bombay for Karachi. Under a Bill of Lading, dated 8th April 1916, 2.060 bundles of "Shooks' were shipped for delivery to plaintiffs at Karachi, but of these the defendants delivered to the plaintiffs only 1,722 bundles and compensation is accordingly claimed for 338 bundles short delivered. That there was such short delivery is admitted by the shipowner, defendant No. 1, and his agent at Karachi, defendant No. 2. But they allege that the boat had its boom and sail damaged and shipped water owing to a storm and that to save life and cargo and the boat, the missing bundles were jettisoned.

Plaintiffs dispute this allegation and also rely on a clause in the Bill of Lading providing that "it is understood that this ship on this voyage carries no other cargo than coverd by this Bill of Lading and if any cargo is carried against the provision of this clause, the balance of frieght to be forfeited by the consignees and all damages incurred to the cargo covered by this Bill of Lading to be recovered from this ship." It is common ground between the parties that in addition to the 'Shooks' the ship carried 170 bundles of iron sheets belonging to a third party. Defendant No. 1 in his written statement meets this contention by alleging that plaintiffs were aware that these iron sheets had already been loaded on the ship, that it was essential to take some heavy cargo to serve as ballast for the safety of the boat and that the plaintiffs had agreed to allow it to be carried. He also denies that this clause of the Bill Lading was agreed to, and says his Tindal signed the Bill of Lading on the representation that it contained only the terms agreed on as mentioned above. Both defendants, therefore, disputed their liability for the plaintiffs' claim, and defendant No. 2 also pleaded that no cause of action was shown against him as he was to the plaintiffs' knowledge merely an agent of the defendant No. 1. On these pleadings the following issuee were settled :—

1. Was it agreed that defendant No. 1 should carry the iron sheets ?
2. Can defendants raise this plea in view of the terms of the Bill of Lading ? Was defendant No. 1's signature to the Bill of Lading obtained by fraud as alleged in para. 3 of the written statement of defendant No. 1 ?
3. Was it neceasary for defendants to carry cargo of the nature and amount of the iron sheets carried by them ? If so, was it open to defendant No. 1 to carry these iron sheets ?
4. Was defendant No. 1 justified in jettisoning plaintiffs' Shooks on account of storm ?
5. Is defendant No. 2 liable to plaintiffs ?
6. For what amount and interest are defendants or either of them liable ?

In the above the second part of No. 5 of the issues as originally settled has been put in issue 2, which seems its proper position.

I will first consider issues 1 and 2. On the first issue, the position taken up in the written statement was that the iron sheets had already been loaded to the plaintiffs' knowledge and it was agreed that no other cargo was to be carried except these iron sheets. This also was the allegation first put forward in the letter of 2nd May 1916 from the defendants' pleader (Ex. 10). This position has been supported by the evidence on commission of the defendant No. 1's son Ramdas (Ex. 21) who in answer to the cross-interrogatory No. 29 says that he and the broker Narainji told plaintiffs' representative about their having shipped iron sheets, and that plaintiff's man said they should take what

Shooks the ship could take in addition to the iron sheets. So also in his answer to interrogatory No. 27, he says, " the agreement was to ship shooks over and above the sheets that were already in the boat." The Tindal of the boat, Ishak Daya, in his evidence on commission (Exs. 19 and 20), also states that the iron sheets were lying in the boat when the terms as regards shooks were settled ; that there was an agreement to take iron sheets as well as the shooks, though he admits that he was not present when the terms and freight for carrying shooks were settled, and that a Parsi representative of the plaintiffs asked him what other goods were in the boat, to which he replied that there were 170 bundles of iron sheets and that the Parsi then said " Well." He also states that Narainji, broker, was present at that time. This evidence is, however, contradicted by Narainji (Exs. 25 and 26) who says that the iron sheets were not lying in the boat when the terms for the shooks were settled, and that they merely told plaintiffs' representative of their intention to load the iron sheets In answer to interrogatory No. 3, he further states that it was after the plaintiffs' representative had agreed to their putting iron sheets in the boat that they settled with the plaintiffs for the loading of the Shooks, and thereafter negotiated with the owner of the iron sheets for their loading. There is another contradiction between his evidence and that of Ramdas. The latter says that the freight for the sheets was settled on the 3rd April 1916, before the terms for the Shooks were settled which was after the sheets had been loaded on the 4th April, while Narainji says that the freight for the iron sheets and that for Shooks were settled the same day. Byramji, representative of the plaintiffs at Bombay, denies that any such agreement about the loading of the iron sheets was made, or that he had gone and seen the boat with the iron sheets in it. The question of the ship's carrying other cargo, was, he says, not raised at all (Exs. 31 and 32). I have not had the advantage of seeing the witnesses, but, on the evidence as it stand, I am clearly of opinion that the alleged agreement has not been proved. It is in evidence that this condition about not carrying other cargo has been in the form of Bill of Lading under which country crafts are engaged by the plaintiffs for about 22 years (Ex. 31), and it is unlikely that Byramji would assent to a variation of this term without reference to and authority from his principal. I also think it unlikely that there would be such contradictions as those already mentioned, if the agreement was really entered into. There is no documentary evidence adduced in support of it. Ramdas and the Tindal have a clear interest to support the defendants' case, and the broker Narainji who has admittedly acted as a broker for the defendant No 1 for 10 or 12 years, is also I think more likely to side with the defendants than with the plaintiffs, and cannot be treated as an entirely disinterested witness. I accordingly answer this issue in negative.

The first part of the second issue is based on section 92 of the Evidence Act. The second part of that issue puts forword a contention, which apparently was intended to bring the case under proviso 1 to that section. The written statement, however, does not in terms allege any fraud on the part of the plaintiffs or their agents. Para. 3 of the written statement of defendant No. 1 merely submits that the Tindal, relying on the terms agreed upon about the carrying of the iron sheets, and on the representation that the Bill of Lading contained only the terms agreed upon, signed the Bill of Lading contained in the printed form of the plaintiffs. The Tindal, however, does not support this case. In answar to the interrogatories Nos. 23 and 31, he says he knew nothing about the terms agreed upon, and that he was asked to sign the Bill of Lading at the time of sailing on the statement of plaintiffs' man that it was simply the receipt for 2,060 bundles of Shooks. This is different to a representation of the kind mentioned in the written statement. On this point Byramji in cross-interrogatory No. 17, was merely asked : "Did you not tell the defendant No. 1's man and the broker and the Nakhoda that the Bill of Lading contained terms agreed upon, before taking the signature," and he replies that 'no question or mention was made about the terms of the Bill of Lading before taking signature." The Bill of Lading purports to be signed by the broker on behalf of the Tindal, and Narainji admits that he must have signed it. He nowhere states

that any discussion as to the terms took place at the time of the signing and in his answer to cross-interrogatory No. 7 says : " We are never told what the terms in print are. We sign the Bill of Lading as usual without bothering ourselves with the terms." On this evidence I think it is clear that no such representation as that set up in the written statement is proved. Nor can the Tindal's statement that Byramji said that the Bill of Lading was simply a receipt for 2,060 bundles of Shooks be accepted. The probability is that the Bill of Lading was signed, as Narainji says it was, without any discussion as to its particular terms, about which, he says, they do not bother themselves. Byramji admits that the Bill of Lading was not read over, nor would one suppose that it ordinarily would be.

In these circumstances, the question whether this condition in the Bill of Lading about not carrying other cargo is binding upon the defendants, can admit of only one answer. Although the Tindal may possibly have considered that it was only a receipt for the Shooks loaded, in law it is not confined to this, but is also the document from which the terms of the contract on which the goods are carried are to be ascertained. (Halsbury's Laws of England, Vol. 26, para 232, at page 148). As already shown, there is no ground for supposing that it was signed under any misrepresentation that the document was other than what it really was, so as to bring the case in the class of those where the parties cannot be said to have agreed upon the same thing in the same sense : (cf *The Oriental Bank Corporation* v. *John Fleming* (1), and Pollock and Mulla's Indian Contract Act, 3rd Edition, pages 67 and 68). The question is, therefore, confined to one whether this condition of Bill of Lading was duly communicated to and accepted by the ship-owner. In this respect the case is somewhat similar to those generally known as ticket cases, where a contract for the conveyance of a passenger, or for carriage or custody of goods, for reward, is made by the delivery to the passengers or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to these conditions. As stated in Pollock and Mulla's Indian Contract Act, pages 28 and 29, the law is that it is a question of fact whether the person taking the ticket had (or with ordinary intelligence would have) notice of the conditions, or at any rate that the other party was minded to contract only on special conditions to be ascertained from the ticket. In either of these cases his acceptance of the document without protest amounts to a tacit acceptance of the conditions, assuming them to relate to the matter of the contract, and to be of a more or less usual kind. In this case the evidence is that this form of Bill of Lading had been in use for several years and the ship-owner had also had his boats chartered by the plaintiffs for some years through the same broker Narainji. The condition is not one put in an unusual or unnoticeable place, but appears in the main body of the document. In my opinion, the ordinary rule applies that the shipowner could, with ordinary intelligence and care, have ascertained that this was a condition on which the plaintiffs were alone minded to charter his boats and that he must be taken to have been aware of it. Even if the defendants, his son and the broker, did not know English, still they had every means of ascertaining the contents of the Bill of Lading. The recent case of *Roe* v. *R. A. Naylor Ld.* (2), is authority for holding that the defendants are bound by any conditions in the Bill of Lading, although they may not have read them or have known that the Bill of Lading contained any conditions. Numerous authorities could be cited to the same effect. The broker Narainji, at any rate, can hardly not have been aware of this condition, and I do not believe his evidence to the contrary. If, as he says, they never bothered themselves about the terms of the Bill of Lading, his firm did so at their own risk. But, as already remarked, there is a presumption that he really was aware of this condition, and even if the ship-owner did not know of it, his broker's knowledge would bind him under sections 226 and 229 of the Indian Contract Act. The condition in question was one material to the business in respect of which the broker was employed, so that notice of this condition

(1) 3 B. 242 ; 2 Ind. Dec. (N. S.) 163.

(2) (1917) 1 K. B. 712 ; 86 L. J. K. B. 771 ; 116 L. T. 542 ; 33 T. L. R. 203.

should, under the ordinary rule, be imputed to the principal (*cf.* Pollock and Mulla, page 594).

I hold, therefore, that the Bill of Lading evidences the terms of the contract between the parties and that no evidence of any oral agreement varying this clause in the Bill of Lading is admissible in evidence under section 92 of the Evidence Act. The first part of issue No. 2 is, therefore, answered in the negative. The second part is also answered in the negative for the reasons already given.

On the third issue, the defendants' contention is that it was necessary for them to carry cargo of the nature and amount of the iron sheets as the boat could not safely sail with only the Shook consigned by the plaintiffs, which were a light cargo. Some evidence has been given that ballast of a heavier kind is neassary in the case of boats like the "Kotia" in question. I do not, however, think it is necessary to decide whether this contention is correct, because, in any case, I think it is clear law that the defendants, if ballast were necessary, were not entitled to obtain other cargo for that purpose in view of the condition in the Bill of Lading against carrying other cargo. The general rule is stated in Leggett's Charter Parties, page 331, as follows: "If the shipowner has contracted to carry a cargo which necessitates the use of ballast, he may engage heavy cargo, for which he is paid freight, instead of ballast, if the charterer is not prejudiced by such cargo occupying more space than would be taken by the ballast, and leaves to the charterer the full space of the vessel for his cargo or by its being injurious to the other cargo contracted for.

"But where the option is given the charterer of shiping two or more kinds of cargo and he exercises his election by giving the ship a full and complete cargo of one or more kinds of the goods contracted for which are light, the shipowner cannot compel him to load other goods of those specified in the charter party, which are of a heavier nature in place of the ballast so as to earn further freight."

The case of *Moorsom* v. *Page* (3) on which the latter proposition is based, is referred to more in dedail in Abbott on Shipping, 11th Edition, pages 215, 216. And there a similar case of *Irving* v. *Clegg* (4), is also cited. In the latter case it was held that, even though the charterer undertook to ship 100 tons of rice or sugar to ballast the vassel, yet the Master was bound to supply any ballast still required and to suffer *pro tanto* a loss of freight. Here there is an express condition that the ship shall not carry other cargo; and, therefore, if ballast was required in addition to the Shooks I think it is clear that it was defendant No. 1's duty to ship more ballast for that purpose, and that he was not entitled to ship iron sheets for another merchant in lieu of ballast. I, therefore, answer the second part of issue No. 3 in the negative.

On issue No. 4, the only evidence as to the alleged jettisoning of plaintiffs' Shooks on account of storm is that given by the Tindal on commission and in his protest Ex. 16. He says that after leaving Bombay on the 9th of April, the storm arose when he was six days out; that at that time he was about 300 *kos* from Bambay; that the wind was from the westerly disrction and did not change during the storm; that he was blown in the southern direction, and that he was on the west side of the course taken by steamers plying between Krrachi and Bomboy, about 200 *kos* distant from it. There is an obvious motive for his saying that he was out of the course of steamers, as in thst case his evidence about the storm would be less open to test. And it certainly seems to me very imporbable that he would have been so far away from the coast. It is also difficult to understand why the westerly wind should have blown his boat to the south. No corroborative evidence has been given, although, at any rate, some members of the crew could have been called; and in view of the Tindal being the only witness on the point it is suspicious that defendants should not have produced him for examination before this Court, but have had him examined on commission, in spite of the protest of the plaintiff's Counsel.

Defendant No, 2 has given some evidence as to the ship arriving at Karachi in a

(3) (1814) 15 R. R. 731 ; 4 Camp. 103.

(4) (1834) 1 Bing. (N. S.) 53 ; 4 M. & Scott, 572. 3 L. J. (N.S.) C. P. 265 ; 41 R. R. 561 ; 131 E. R. 1037.

damaged state, but has adduced no documentary evidence as to any disbursement of expenses on that account. I do not think his and the Tindal's evidence can, in the circumstances, be accepted as sufficiently reliable to justify the Court's holding it proved that the jettisoning did take place as alleged by the Tindal. As stated by Abbott at page 526 (frauds by purloining goods from the ship and then pretending that they were cast over in the hour of danger have led in all cases and in all countries to its being required of the Master that he should draw up an account of jettison, and verify the same by the oath of himself and of some of his crew, as soon as possible after his arrival at any port.) There is no reason to think that such frauds do not occur in country, and the Court must exercise due caution in accepting allegations of this kind, especially where (as here) the alleged storm was prior to the Monsoon period and is not supported by the meteorological reports.

I therefore, answer issue No. 4 by saying that the alleged jettisoning on account of storm is not proved.

As regards the question of justification for jettisoning, Mr. Elphinston has urged that it should be shown, in any case, that the goods were properly stowed, and that there is no evidence to that effect. But, I think, plaintiffs would have given notice to defendants, if they wished to raise this point, by cross-interrogatories or otherwise; and I do not think that the absence of evideence of this point can properly be charged against defendants. Assuming that they had succeeded as regards the main point, the presumption would be that the goods were properly stowed.

Issue No. 5 : It is now admitted that the defendant No. 2 is liable to the plaintiffs in view of Ex. 42.

As regards issue No. 6, evidence has been given as to the calculations on which the claim is based, and I can see no sufficient reason for holding them erroneous. It has been urged that Rs. 118 on account of freight not paid to the defendants have been included in those calculations and should be deducted; but defendant No. 1 in his written statement says he will file a separate suit for the recovery of the balance of freight not yet paid and in view of this threat it may be treated as paid. The Bill of Lading also authorises the freight to be forfeited to the plaintiffs in the circumstances which have arisen. I think, therefore, it has been rightly included in the calculations. In any case, it only makes a difference of under Rs. 20, *viz.*, 338 bundles at Rs. 5-12 0 per 100.

I accordingly pass a decree in favour of the plaintiffs against both defendants for Rs. 1, 161-12-9 as compensation for the 338 bundles of Shooks short delivered, with interest on this amount at 6 per cent. per annum from date of suit to payment and costs of the suit.

N. H. C. *Suit decreed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2181 OF 1922

April 17, 1924.

Present :—Mr. Justice Martineau.

PUNJAB NATIONAL BANK LTD.—DEFENDANTS—APPELLANTS
versus
BALKISHAN DAS AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881) ss. 46, 50 —Bill of exchange—Indorsement, effect of—Delivery, conditional, effect of.

Under section 50 of the Negotiable Instruments Act, indorsement of a negotiable instrument alone is not sufficient to transfer the property in the instrument to the indorsee; in order to have that effect the indorsement must be followed by delivery, and section 46 of the Act provides that it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

Appeal against the decision of the District Judge, Karnal, dated the 19th July 1923.

Lala *Hargopal*, for the Appellants.

Lala *Madan Gopal*, Mr. *Brij Lal*, for *Diwan Mehr Chand*, and Mr. *Shamair Chand*, for the Respondents.

LAJJA RAM *v.* SHAMBU NATH RAM SARUP

JUDGMENT.—This second appeal arises out of a suit brought on a Bill of Exchange drawn by the Punjab National Bank on the Calcutta Branch in favour of K. R. Chop & Co., who indorsed it to Thakur Lachman Singh & Co., who in turn indorsed it to the plaintiffs. The latter have been given a decree against the drawers and this has been affirmed by the District Judge.

The first ground regarding the jurisdiction of the Courts has not been pressed, and it is the second ground on which arguments have been addressed to me, the contention for the appellants being that as the plaintiffs indorsed the Bill to Sheo Mukh Rai Lachmi Ram without any express reservation they cannot maintain the suit. The Courts below have held that the plaintiffs have a *locus standi* because their indorsees have admitted that the Bill was sent to them only for collection of the money on the plaintiffs' behalf, and that the plaintiffs alone are entitled to the money. Counsel for the appellants relies on section 50 of the Negotiable Instruments Act, which provides that the endorsement of a negotiable instrument followed by delivery transfers to the indorsees the property therein, and he argues that under this section the property in the Bill passed to the plaintiffs' indorsees. It is, however, to be observed that indorsement alone is not sufficient to transfer the property in a negotiable instrument to the indorsee, but that the indorsement must be followed by delivery, and section 46 provides that it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein. The Courts below having found that the Bill was delivered to Sheo Mukh Rai Lachmi Ram only as agents of the plaintiffs for the collection of the money it must be held that the property in the Bill did not pass to them under section 50 of the Act, and that the plaintiffs are entitled to maintain the suit. There is no force in the other grounds of appeal and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2469 OF 1916.

November 8, 1922,

Present :—Mr. Justice LeRossignol and Mr. Justice Zafar Ali.

LAJJA RAM—DEFENDANT—APPELLANT
versus
SHAMBHU NATH RAM SARUP, AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 2, —Abatement—Death of respondent—Legal representatives not brought on record—Separate shares—Property—Appeal whether abates in toto—New plea.

Plaintiffs sued for a declaration that defendant was not the owner of the house and land in suit but had merely a life interest of them. The defendant's pleas were that he had been adopted by the widow of the last male owner with the consent of his reversioners and that as an adopted son he was full proprietor and plaintiffs' suit was time-barred. The suit having been decreed by both the Courts below, the defendant appealed to the High Court. During the pendency of the appeal, one of the plaintiffs died and his representatives were not brought on the record within the statutory period:

Held, that as the plaintiffs were not joint tenants of the property and each one had his separate share in it any one of them might has maintained the suit in respect of his own share and, therefore, the appeal did not abate as against all the plaintiffs.

Second appeal from the decree of the Additional District Judge, Karnal, dated the 22nd June 1916, affirming that of the Junior Subordinate Judge, Karnal, dated the 28th February 1916.

Mr. *M. L. Puri*, for the Appellant.

Lala *Sardha Ram* and Lala *Moti Sagar*, R. B. for the Respondents.

JUDGMENT.—Ladli Parshad, one of the plaintiffs-respondents, died more than six months ago and no application for impleading his representatives has yet been presented to this Court. The appeal abates admittedly against Ladli Parshad's representatives, and for the respondents it is contended that it has abated against all the respondents. The suit was brought by all the plaintiffs for a declara-

that Lajja Ram was not the owner of the land and house in suit, but had merely a life interest in them. The plaintiffs are not joint tenants of the property in suit, but each one has his own separate share in it. Consequently, any one of them might have maintained the suit against the defendant in respect of his own share, and it follows that the defendant may maintain the appeal against the surviving respondents-plaintiffs.

A reference to the pedigree table appended to the judgment of the Court below shows that the defendant-appellant was the daughter's son of Sita Ram, the last male owner of the property in suit. The plaintiffs are Sita Ram's, brothers' sons or grandsons, and the basis of their suit was that, on the death of Sita Ram's widow *Musammat* Kirpa Devi in 1900, Lalja Ram, defendant, succeeded to a life interest in *Musammat* Kirpa Devi's share and the plaintiffs prayer was a declaration that Lalja Ram had only a life interest in the property and was not entitled to separate his share by partition. The defendants' pleas were that he was the adopted son of *Musammat* Kirpa Devi who had made the adoption according to her husband's Will and with the consent his reversionary heirs; *i.e.*, the plaintiffs, that he was an absolute proprietor, and that the suit was time-barred. The first Court found that defendant No. 1 had no permanent proprietary rights and decreed for the plaintiffs. On appeal to the District Judge the defendant wished to argue that even if it was not established that he was duly adopted by *Musammat* Kirpa Devi, he was nevertheless entitled to succeed Sita Ram as being his daughter's son, but the learned District Judge refused to allow him to set up a new plea and dismissed the appeal.

In second appeal to this Court the first contention raised is that as a daughter's son the defendant was entitled to succeed to his grandfather Sita Ram. In the Trial Court, it would have been quite simple for the defendant to defend his title on the plea that he was the direct heir of Sita Ram. He did not do so and we must take it that he did so advisedly, for it is asserted for the respondents before us that in the family of the parties a duaghter's son has never been allowed to succeed. That being the case, we cannot, at this late stage, allow the defendant to set up a plea of which he failed to avail himself in the Trial Court.

On the other hand, we are of the opinion that the appellant must succeed on his other pleas. Since 1900 he has been recorded as a full owner of his share in the joint estate and, as that is the case, the *onus* lies heavily on the plaintiffs to show that he has not the full ownership but only a limited interest. It is said that, under the Will executed in 1897 by *Musammat* Kirpa Devi, defendant No. 1, was given a life interest only and that mutation on her death was carried out on the strength of that Will. In the mutation proceedings, however, there is no mention of any limited interest. The Will itself is not forthcoming, the defendant alleges it was taken away by the plaintiffs and the plaintiffs suggest that it is being withheld by the defendant who, at the time of his grandmother's death in 1900, was a lad of five years of age. The fact remains that since 1900 the defendant has been recorded as a full owner of his share and the plaintiffs have been unable to prove that he was holding on anything but a full title. The suit was brought in 1915 more than twelve years after the mutation in defendant's favour and we must hold on that ground also that his status of a full proprietor is not open to challenge.

We accordingly accept the appeal and dismiss plaintiffs' suit with costs throughout.

K. S. D. *Appeal accepted.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NO. 300 OF 1918 AND 382 OF 1919.

January 25, 1922.

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Banerjee.

MUHAMMAD SHARIF KHAN—
PLAINTIFF—APPELLANT
versus
MUHAMMAD MOAZZUM ALI KHAN—
DEFENDANT—RESPONDENT.

Promissory-note, suit on—Consideration, absence of —Burden of proof—Plaintiff, evidence of, disbelieved, effect of,

In a suit upon a pro-note where execution is not denied, the onus lies on the defendant to prove that no consideration had passed. Where, however the pasing, of consideration is denied by the defeudant in his written staetment, and the plaintiff goes into the witness.box and the result of his examination is such that he fails to establish the point which he set out to make, namely, that he gave consideration for the pro-note and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and can ask that the suit be dismissed. This. in no way, trenches upon the ordinary rule that the defendant must prove absenee of consideration if that is his case.

Appeal against the decision of the Second Additional Sub-Judge, Aligarh, dated the 23rd August 1918.

Messrs. *Tej Bahadur Sapru*, *S.M. Sulaiman* and *Panna Lal*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—These two appeals have been heard together and can conveniently be dealt with in one judgment. The plaintiff, Kunwar Muhammad Shafi Khan claims, in the first case, suit No. 104 of 1918, the sum of Rs. 9,000 and interest and in the second case, the sum of Rs 10,000 and interest against Kunwar Muhammad Moazzum Ali Khan, a young man, who at the time of the transactions, had recently attained his majority. According to the statement of the plaintiff he is a man of independent means and a very remote relation of the defendant. The defendant has an elder brother, by name Kunwar Muhammad Makerram Ali Khan, who is dead, and is the grandson of Nawab Sir Faiyaz Ali Khan. He is a well-known *Rais* of Pahasu in the Bulandshahr District. There is reason to believe that the grandsons are regarded as his expectant heirs and the present recepients of his bounty. At the time of these transactions, the Nawab was a gentleman of about 65 years of age. The story as told by the plaintiff is, that he was approached by these two young men some time very early in July of 1915, with the request that he should lend them money. He stated that he was not on good terms with the family of the defendants, that these two young men had no property, no money, no business, nothing at all except their expectations from their grandfather. He stated that he did not know why these two young men wanted to borrow this sum of Rs. 18,000 and his only reason for making the loan was relationship. The exact relationship was that the grandfather's father's sister's daughter was the mother of the plaintiff. Although, he says, that the relationship between their family and his was such, and is even now, that is in 1919, that he could not visit their house, his heart was moved by this extremely remote relationship for the two young men who were already under the care of their grandfather, that he advanced to them on no security at all a sum of Rs. 18,000. The story does not end there, because, on the 15th December 1915, again moved by relationship, he advanced, according to his story, the further sum of Rs. 20,000 to these young men. He was unable to tell the Court what possible legitimate use the young men could either have for the Rs. 18,000 and still more for the Rs. 20,000 alleged to have been borrowed after so short an interval. The Suit No. 104 was in respect of the one-half share of the promissory-note of the 9th of July 1915, which he sought to recover from the younger brother, the elder having drifted into bankruptcy. After that suit had been decided, an application was made that Suit No. 163 of 1918 should be decided before another Judge and Mr. Lal Gopal Mukerji, who had decided the first case, very readily assented to the circumstances surrounding the second promissory-note being investigated by another Judge, and

consequently that second case was decided by Mr. Jagat Narain. The plaintiff, therefore, has had two opportunities of putting forward his claim. Both Courts have decided against him and when the judgments of both Courts are looked at, although they differ in form, yet, throughout both judgments, there runs a strong disbelief in the honesty and truth of the plaintiff. We share that disbelief in honesty and truth, and we think both of these were most regrettable transactions for a man who put himself forward as a man of position to enter into with these young men.

The matter, however, must be carefully analysed and legal grounds must be shown for our view that both of these appeals must be dismissed. The plaintiff sued on a promissory-note. The defendant denied the execution, denied receipt of the consideration, and set up a story in paragraph 7 of the written statement, which we must accept as being regarded as a defence of fraud. The plaintiff went into the witness-box. At the moment the case opened, all that the plaintiff need have done was to have proved the execution of the document sued upon, and if he had obtained an answer by the defendant to an interrogatory that the document bore the defendant's signature, then all that he need have done was to have put in the document. But it happened to be necessary in this case that the plaintiff himself should go into the witness-box to prove that he actually saw the defendant put his name to the promissory-note in suit, and having commenced the story in the examination-in-chief and proved the execution, he asserted that he gave Rs. 18,000 in currency notes to these two young men. He was cross-examined on that matter and both Judges disbelieved in the first case that he had paid Rs. 18,000 to the young men, and, in the second case that he had paid Rs. 20,000. They did not believe that he had made a true statement about that matter. He swore that Rs. 20,000 were paid over. They certainly had extremely good grounds on which they could have come to that conclusion, because when he was asked if he kept account-books, he said that he did; "an account-book is kept at my place but not in a regular way. In my account-book, there is an entry of Rs. 18,000 having been advanced. The daily cash balance of my treasury is entered in the accounts. The sum which was lent was included in the cash balance. I cannot produce my accounts. The reason is that, in the first place, they are not in a regular form, and, secondly, because all public and private matters are entered in them and I do not want to disclose them." If any thing more were needed to satisfy a Court as to the untruth of the statement which the plaintiff took upon himself to prove, namely, the giving of the consideration, it is to be found in the story of the money. He says that he had, in July 1918, lying in his house this large sum of money. He says that, in December, he had also Rs. 20,000 lying in his house. It was not deposited in any Bank but was simply a dead weight in the house. From the evidence, it would appear that the amount was in rupees, because, he says: "In order to carry the money to Delhi, I got the cash changed into notes. I do not remember from whom I obtained the notes." There was some evidence given to suggest that he himself was in debt and not likely to have so large a sum as Rs. 18,000 and then Rs. 20,000 lying idle at his house, available for a transaction of this kind. We agree entirely with the views expressed in the two judgments, and, though it is undoubted that the onus does lie upon the defendant, in cases of this kind, to prove that no consideration was given, nevertheless, if a plaintiff when, as in this case, consideration was denied in the written statement, goes into the witness-box and if the result of his examination is such that he fails to establish the point which he set out to make, namely, that he gave the consideration, and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to a decree. This, in no way, trenches upon the ordinary rule that the defendant must prove absence of consideration, if that is his case. The result, therefore, is that both these appeals must be dismissed with costs including fees on the higher scale.

Z. K. *Appeals dismissed*

MAHOMED MOOSA *v.* KAZI FATEHULLAH

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 3 OF 1916.

August 21, 1923.

Present :—Mr. Raymond, A. J. C., and Mr. Madgowkar, A. J. C.

MAHOMED MOOSA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAZI FATEHULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption suit—Mortgagor's title—Redemption suit, nature of—Suit against auction-purchaser from mortgagee—Limitation— Limitation Act (IX of 1908), Sch. I, Arts. 134, 144 and 148.

A suit for redemption against an auction-purchaser, purchasing the right, title and interest of the mortgage under a mistake that the mortgagee was the full owner of the property sold, is governed by Art. 148 and not by Art. 144 of Sch. I to the Limitation Act.

Pandurang Balaji v. *Dnyanu Balaji*, 12 Ind. Cas. 926 ; 36 B. 135 ; 13 Bom. L. R. 1169 ; *Ram Piari* v. *Budhsain*, 61 Ind. Cas. 546 ; 43 A. 164 ; 18 A. L. J. 995 ; 2 U. P. L. R. (A.) 332, distinguished.

A suit for redemption is not a suit for possession pure and simple. [p 469, col. 1.]

Article 134 of Sch. I to the Limitation Act in terms applies to property purchased from the mortgagee and not to the right, title and interest of the mortgagor purchased through Court at the instance of a decree-holder against the mortgagee. [p. 468, col. 2.]

It is not open to the mortgagee to raise in a suit for redemption the question of the title of the mortgagor from whom he obtained possession. [p. 469, col. 2.]

Bholanath Sen v. *Balaram Das*, 70 Ind. Cas. 932 ; (1923) M. W. N. 525 ; 31 M. L. T. 306 ; (1922) A. I. R. (P. C.) 382 ; 27 C. W. N. 607 ; 18 L. W. 48 (P. C.), followed.

Appeal from the judgments and decrees of the District Judge, Sukkur, in First Appeals Nos. 141, 142 and 171 of 1911, dated the 13th October 1915, filed from the judgment and decree of the Sub-Judge, Shikarpur, in Suit No. 1244 of 1908.

Mr. *Tolasing Khushalsing*, for the Appellants.

Messrs. *T. G. Elphinston*, *Kimatrai Bhojraj*, and *Kewalram Jethanand*, for the Respondents.

JUDGMENT.—This is a suit for redemption of a mortgage of 1852 by the deceased mortgagor Suleman in favour of the deceased mortgagee Kazi Mahomed. The plaintiffs-appellants claim to be the heirs of the mortgagor and their assignees. Defendants Nos. 1—13 were purchasers of a portion of the mortgaged property from two sons of the deceased mortgagee. Defendants Nos. 14—17 were the heirs of the deceased mortgagee who did not contest the suit. Defendants Nos. 18—22 were the contesting heirs of the mortgagee and are respondents Nos. 1—5 in the present appeal. Defendant No. 23, respondent No. 6, claims through a purchase at a Court sale in 1876 of the 4/13ths of the mortgage property, from the share of Abdulla, third son of the deceased mortgagee. Defendants Nos. 24 and 25, respondents Nos. 7 and 8, were joined during the suit as heirs of the deceased Emna, a daughter of the deceased mortgagor.

The contesting defendants did not admit the mortgage ; denied the ownership of the deceased mortgagor ; objected that the suit was bad for want of parties ; disputed the identity of the lands, and claimed that the suit was barred under Article 134 or 144 of the Indian Limitation Act. The prayer for accounts in the trying Court was given up. The Court of first instance decreed the suit except in regard to the lands in the possession of defendants Nos. 1—13 as against whom it held the suit barred under Article 134. It held that the defendants Nos. 24 and 25 had no right to redeem. In first appeal, after remand for evidence on the last point, the District Court held that the last two defendants were entitled to redeem as heirs of the daughter of the mortgagor, and otherwise on facts confirmed the findings of the trying Court. But it held that the suit was barred as against respondent No. 6 under Article 134. The suit was bad for the absence of one Ali Akbar Shah, assignee of 1/8th share of fifteen plaintiffs, and, therefore, dismissed the suit.

The plaintiffs appeal, respondents Nos. 1—5 being, as said above, the original defendants Nos. 18—22, the contesting heirs and sons of the mortgagee, respondent No. 6 being defendant No. 23 above, and respondents Nos. 7 and 8 being defendants Nos. 24 and 25. The suit was instituted in 1908 and was decided by the Sub-Judge in 1911 and

MAHOMED MOOSA *v.* KAZI FATEHULLAH

the first appeal was decided in 1915. It is a matter for regret that the present second appeal of 1916 has been so long delayed in disposal. The death of one or the other of the numerous parties and the necessity of bringing their heirs upon the record are, however, chiefly responsible for the delay.

It was sought in second appeal to raise several questions of fact. Where, however, both the lower Courts have joined in concurrent findings of fact it is not open to the parties to raise them now, as, for instance, the identity of the mortgaged lands. These lands were not on the date of the mortgage all surveyed or cultivated, and were described with reference to the Canal from which they were irrigated by somewhat rough and ready boundaries. Both the Courts below have, however, gone very carefully into the question and have decided upon the materials before them. With that finding we see no reason to interfere. Similarly, on the question of the relationship of the plaintiffs-appellants who claim to be the heirs of the deceased mortgagor.

Both the Courts held the mortgage proved on a certified copy of the mortgage-deed of 1851. Its admissibility is impugned in appeal. It is usual in Sind, as in other parts of India, for the original mortgage-deed to be deposited with the mortgagee. His heirs were unable or unwilling to produce it. Its existence was admitted by one of them in a previous suit for redemption in 1860. We agree, under these circumstances, that the certified copy of the registered deed of the mortgage is clearly admissible and both the Courts below were right in holding the mortgage proved. As to the persons now entitled to redeem, the vast majority of Mahomedans in Sind, particularly in the Mufasil, apart from certain immigrant Mahomedan sects, such as, Khojas and Dowoodi Boras, are Sunnis, the mortgagor must be presumed to be such, there is no evidence that he was a Shia, and the District Court was, therefore, right in holding that the appellants and the respondents Nos. 7 and 8 were the heirs of the mortgagor and *prima facie* entitled to redeem.

The history of the mortgaged lands is briefly as follows :—

The deceased mortgagor Suleman had sold a half share and had mortgaged with possession the other half to the deceased Kazi Mahomed. After his death Kazi Mahomed died leaving three sons and a daughter. In 1876 in execution of a money-decree against one of his sons Abdulla the 4|13ths share of Abdulla was put up to sale through Court and was purchased by the decree-holder Lalchand who disposed of it by a Will to his widow. Lalchand's brother Choithram, respondent No. 6, purchased the widow's interest in it. In 1879 the other two sons of Kazi Mahomed went under management and in 1888 the manager passed sale-deeds in respect of certain portions of the property of these two sons to the original defendants Nos. 1-13.

It was also contended for the defendants in first appeal that this litigation was begun through the instrumentality of one Chellaram at Shikarpur, that the plaintiffs had assigned a certain share of their claim to him, and that he was, therefore, a necessary party. The contention was not raised at the trial and was not admitted by the plaintiffs-appellants, and failed, but it succeeded in regard to Ali Akbar Shah, the learned District Judge holding that under a partnership deed Ex. 341 he was an assignee of 1|8th share and was a necessary party, under O. XXXIV. r. 1, Civil Procedure Code. We are of opinion that the Ex. 341 is not of itself sufficient to support the finding that the suit must fail in the absence of Ali Akbar Shah.

The assignment, if any, between the plaintiffs and Ali Akbar Shah is not in evidence. The document of partnership between third parties in para 11 recites : "We of the first party have before this conveyed an undivided share of one-anna from purchase of eight-annas to Syed Main Ali Akbar Shah, Md. Syed Main Sufan Ali Shah, resident of Garhi Budhal Taluka Shikarpur. We will give him that share of one-anna from our share of eight-annas. The second party will not be responsible thereto."

This statement of itself is not clear on the point whether the plaintiffs were to give to Ali Akbar Shah his one-anna share after the plaintiffs of the first part had obtained their share of eight-annas from the Court, or whether under the agreement between the plaintiffs and Ali Akbar Shah the latter was the proper party to sue in respect of that one-anna share. On the materials as they stand, therefore, Ali Akbar Shah might at the most be a

proper party but he is not proved to be a necesssary party under O. XXXIV, r. 1, Civil Procedure Code ; *Saduvalli* v. *Sodhashiv* (1). This suit is properly constituted even in (Ali Akbar's) absence and it cannot be dismissed on that account : *Shivubai* v. *Siddheswar* (2).

The other party on whose absence respondents Nos. 1-5 relied for dismissal of the suit is the Manager of Encumbered Estates. But when the property of the mortgagee goes into management the claim of the mortgagor can hardly be said to be a claim "against the debtor of the property under management" within the meaning of the said Encumbered Estates Act. The claim for redemption is not a claim for possession adversely to the mortgagee. It is the mortgagee whether with or without possession who is the creditor and who, in default of payment of the amount due to him, has a claim against the property. We are not prepared to agree with the observations in *Chakarkhan* v. *Hetumal* (3), that the test of such a claim is whether the assistance of a Court is required or not to enforce it.

The Courts are open to every legal claim. But as the lands now claimed are not in the possession of the manager the latter is not a necessary party. Similarly, it is not shown that Chellaram was a necessary party. The suit is not, therefore, bad for want of necessary parties.

The next question is as regards limitation. To the property purchased by defendants Nos. 1-13 and of which they have been in possession since 1888 Article 134 of the Indian Limitation Act of 1877 clearly applies. The good faith whether of these defendants or of defendant No. 23 (respondent No. 6) is not challenged. The valuable consideration is also not disputed and it is, therefore, immaterial whether the Limitation Act of 1871 or that of 1877 applies. In regard to the purchase by respondent No. 6 the 1-13th share of the daughter of the deceased mortgagee it is not shown to have comprised any portion of the mortgaged land. This sale may, therefore, be left out of account. In respect of the 4-13ths share purchased by this respondent through Court in 1876 and of which the manager subsequently effected a partition and handed over possession, the case is, however, different. That share admittedly comprises a portion of the mortgaged land and the question in regard to this is, whether, as contended for the appellant, Article 148 applies, or whether, as is contended for the respondent No. 6, Article 134 or 144 applies.

It is now well established that Article 134 in terms applies to property purchased from the mortgagee and not to the right, title and interest of the mortgagor purchased through Court at the instance of a decree-holder against the mortgagee: *Kalidas* v. *Kanhaiya Lal* (4), *Ahmed* v. *Raman* (5), *Bhagwan* v. *Bhagwan* (6), *Sher Nath Singh* v. *Mahipal Singh* (7), the decision relied upon for the respondents *Chintamoni Mahapatro* v. *Sarup Se* (8), was in respect of trust property and merely held that an auction-purchaser of such a property at a sale in execution of a decree against the trustee was not debarred by section 10 of the Limitation Act in relying upon limitation. The question whether Article 134 or 144 applied was left open. In the present case the sale-certificate Ex. 194 undoubtedly speaks of the property as "the following property of the defendants above-named" and, "out of these, thirteen shares are owned by the defendants." Neverthless, at the end it is recited that the plaintiffs, in the usual way have purchased all right and interest of the judgment-debtors in the "within mentioned property." It appears, therefore, that it was the then plaintiff-decree-holder who alleged that the property was of the ownership of the judgment-debtor Abdulla, son of the mortgagee, and purchased it himself evidently without enquiring from the Registration Office. It appears to us inadmissible, in these circumstances, that a decree holder on such mistake or misrepresentation of his own by purchasing the right, title and interest of the judgment-debtor-mortgagee could be in a better position than the latter as against the owner-mortgagor in a suit for redemption and, therefore,

(1) 51 Ind. Cas. 223 ; 43 B. 575 ; 21 Bom. L. R. 369.
(2) 61 Ind. Cas. 590 ; 45 B. 1009; 23 Bom. L. R. 405.
(3) 2 Sind Sadr. Court Sel. Dec. 33.
(4) 11 C. 121 at p. 131; 11 I. A. 218; 8 Ind. Jur. 638 ; 4 Sar. P. C. J. 578 ; 5 Ind. Dec. (N. S.) 839 (P. C.).
(5) 25 M. 99; 11 M. L. J. 323 (F. B.).
(6) 9 A. 97 ; A. W. N. (1886) 303 ; 5 Ind. Dec. (N. S.) 497
(7) A. W. N. (1905) 56; 2 A. L. J. 4.
(8) 15 C. 703; 7 Ind. Dec. (N. S.) 1052.

prima facie Article 148 would apply against him no less than against the mortgagee.

The only question is whether the auction-purchaser is entitled to rely on Article 144. For the respondents reliance is placed on *Pandurang* v. *Dnyanu Balaji* (9) and *Ram Piari* v. *Budhsain* (10). The former case was in regard to trust property and the auction-purchaser was apparently a stranger purchaser and the sale certificate was unqualified. There was no question of the application of Article 148 and the Court, therefore, held that the period of 12 years was applicable under Article 144. The latter case was a case of mortgaged property and is more favourable to the contention for the respondents. It may perhaps be distinguished on two grounds, first, that the property after being purchased had changed hands, and (2) that there had been large and substantial constructions and additions on the land in suit. At the same time, it appears to us that to give full effect to the view in that decision would be to extend the express words in Article 134 "purchased from the mortgagee" beyond what the Legislature appears to have contemplated. In the present case, as we have already said above, it was the deceased plaintiff Lalchand, brother of the present respondents, who attached and brought the property to sale alleging absolute ownership of the judgment-debtor, son of the mortgagee. But he himself purchased it and it is his brother who has taken it over from his widow under the Will. A suit for redemption is not a suit for possession pure and simple *Mulla Vittil Setti* v. *Kunhi* (11). *Taramiya* v. *Pir Saheb* v. *Shibeli Saheb* (12). A suit for redemption such as the present is expressly provided for under Article 148 and the auction-purchaser or his assignee or his brother cannot, in the circumstances of the present case, reduce the period of sixty years to a period of twelve years by virtue of Article 144, which only applies to suits for possession of immoveable property or any interest therein not specially otherwise provided for, such as suits for redemption. The suit as against respondent No. 6 and the portion of the mortgaged property in his possession is not, therefore, barred. The so-called releases by the brothers of the judgment-debtor do not affect this conclusion and need not, therefore, be considered. Similarly, in respect of the property which after the partition by the manager remained in possession of the heirs of the mortgagor, for the reasons already stated in considering the question whether the Manager was a necessary party, the suit is not barred.

It was sought for the respondents to raise the question of title of the original mortgagor Suleman to the property. It is not, however, open to the mortgagee to resist redemption on that ground. It is not open to the mortgagor to object to the passing of the usual mortgage-decree against the mortgaged property on the ground that they do not belong to him. As was held by the Privy Council in the very recent case of *Bholanath* v. *Balaram Das* (13). No more is it open to the mortgagee to raise in a suit for redemption the question of the title of the mortgagor from whom he obtained possession. Nor is there any question of partial redemption here or of the equities for or against it.

This substantially disposes of the present appeal. We set aside the decree of the District Court dismissing the suit, and grant the appellants and respondents Nos. 7 and 8, a decree modifying the decree of the Court of the first instance as suggested by the learned District Judge in case his view that the suit was bad for non-joinder of Ali Akbar Shah was set aside and adding to it redemption of the lands in the possession of the respondent No. 6, the total lands allowed to be redeemed being shown in the accompanying schedule. Respondents Nos. 1 to 6 must pay the costs of the appellants throughout except costs of the appeal by the appellants in the District Court in regard to the lands in the possession of defendants Nos. 1 to 13.

N. H. *Appeal accepted.*

(9) 12 Ind. Cas. 926 ; 36 B. 185 ; 13 Bom. L. R. 1169.

(10) 61 Ind. Cas. 546; 43 A. 164; 18 A. L. J. 995 ; 2 U. P. L. R. (A.) 332.

(11) 43 Ind. Cas. 31 ; 40 M. 1040 ; 33 M. L. J. 320 ; (1917) M. W. N. 609; 22 M. L. T. 236; 6 L. W. 464 (F. B.).

(12) 57 Ind. Cas. 568; 44 B. 614; 22 Bom. L. R. 802.

(13) 70 Ind. Cas. 932; (1923) M. W. N. 525; 81 M. L. T. 306; (1922) A. I. R. (P. C.) 382; 27 C. W. N. 607; 18 L. W. 48 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 453 OF 1921.

December 15, 1922.

Present :—Mr. Justice Rafique and Mr. Justice Piggot.

RAGHUNANDAN SINGH—DEFENDANT—APPELLANT

versus

MULAK RAJ SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Pre-emption—Wajib-ul-arz, *entry in, interpretation of*—Mahal *including shares in different villages*—*Co-sharers in* thoks, *position of.*

A certain *mahal* included shares in sixteen different villages, and a single *wajib-ul-arz* was drawn up for the entire *mahal*. The pre-emptive clause of the *wajib-ul-arz* placed persons entitled to claim pre-emption in three categories, *viz.*, near co-sharers, co-sharers in the same *thok* as the vendor, and co-sharers in *thoks* other than that of the vendor :

Held, (1) that for purposes of pre-emption the whole *mahal* must be treated as a single unit and every *thok* appertaining to the *mahal* in whatever village it may be situated was a *thok* of the *mahal* ;

(2) that under the third clause of the *wajib-ul-arz* no preference was given to co-sharers who shared in the proprietary rights in *thoks* other than that of the vendor but in the same village as the vendor, as against co-sharers in *thoks* other than that of the vendor situated in different villages.

Appeal from a decree of the District Judge, Azamgarh, dated the 23rd December 1920.

Mr. *K. N. Katju*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—The two appeals before us are by the vendee-defendant against decrees passed in favour of rival pre-emptors in respect of a single transfer by way of sale. The point upon which the two Courts below have differed is in reality a simple one. It depends upon the very peculiar constitution of the *mahal* to which the share which was the subject-matter of the transfer sought to be pre-empted appertains. This *mahal*, known as *mahal* Lalman, includes shares in sixteen different villages. A single *wajib-ul-arz* was drawn up for the entire *mahal*. In the records of proprietary rights drawn up for each of the sixteen villages there is a separate specification of the co-sharers in *mahal* Lalman and these co-shares are assigned to different *thoks* in each particular village. The transfer with which we are concerned included fractional shares in six different villages. The pre-emptive clause of the *Wajib-ul-arz* placed persons entitled to claim pre-emption in three categories,—near co-sharers, co-sharers in the same *thok* as the vendor, and co-sharers in *thoks* other than that of the vendor. It has been finally determined by the Courts below that neither the vendee nor the pre-emptor falls in the category of near co-sharers, and we have not been asked to re-consider that finding. Admittedly, neither the pre-emptor nor the vendee is a co-sharer in the same *thok* with the vendor. The Trial Court held that both fell in the third category of co-sharers in *thoks* other than that of the vendor, and on the basis of this finding dismissed both the claims for pre-emption. The lower Appellate Court has based its decision upon reasoning which we do not find it easy to follow even after hearing a full exposition of the point from the learned Counsel who represents the respondents. It seems to us to enter into metaphysical speculations which should not be permitted to influence the decision of the plain question now before the Court. That question is whether the vendee, as well as the pre-emptor does or does not fall under the category of being a co-sharer in *mahal* Lalman, holding a share in a *thok* other than the *thok* of the vendor. It seem to us that this question can only be answered in the affirmative. The learned District Judge has found that in one village only, namely Mohiuddinpura, are the names of the vendee and the pre-emptors to be found in the record of proprietary rights as co-sharers in *thoks* other than that of the vendors. In the remaining five villages affected by this sale-deed the pre-emptors appear as co-sharers in *thoks* other than that of the vendor while the name of the vendee does not appear at all. If, however, it be conceded, as it must be, that the Record of Rights on the basis of which pre-emption is claimed was drawn up for the *mahal* Lalman considered as a single unit, it follows that every *thok* appertaining to that *mahal*, in whatever village it may be situated, is a *thok* of *mahal* Lalman. The learned District Judge has really inserted a fourth category in the

Record of Rights between the second and the third. He thinks that it must have been intended to give preference to co-sharers who shared in the proprietary rights in *thoks* other than that of the vendor, but in the same village as the vendor, as against co-sharers in *thoks* other than that of the vendor situated in different villages. We can only say that, whatever the reasons for it may be, the *wajib-ul-arz* does not contain such a category and we are unable to read any such category into the specification therein given. We, therefore, accept these appeals and set aside the decree of the lower Appellate Court and restore those of the Court of first instance, with costs in favour of the defendant, Raghunandan Singh, throughout, including in this Court fees on the higher scale.

Z. K. *Appeals allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 10 OF 1923.

December 21, 1923.

Present:—Mr. Baker, Offg. J. C., and Mr. Prideaux, A. J. C.

SONBA—APPLICANT—APPELLANT

versus

NARAYAN—NON-APPLICANT—RESPONDENT.

Guardians and Wards Act (*VIII of* 1890), *ss.* 29, 47—*Order sanctioning sale of minor's property—Review, power of—Appeal, whether lies.*

An appeal lies under section 47 of the Guardians and Wards Act against an order of the District Judge reviewing his own previous order sanctioning a sale of the minor's property.

Lachmi Prasad v. *Baldeo Dube*, 44 A. 458; 20 A. L. J. 390 ; (1928) A. I. R. (A.) 14, distinguished.

It is open to a District Judge in the interests of a minor, to review his own order sanctioning a sale of the minor's property.

Babu Ram v. *Said-un-nissa*, 20 Ind. Cas. 916 ; 35 A. 499; 11 A. L. J. 783 ; *Prem Sukhdas* v. *Lachmi Tewari*, 46 Ind. Cas. 542, distinguished.

Chhitar Mal v. *Jagannath Prasad*, 29 A. 213 ; 4 A. L. J. 24 ; A. W. N. (1907) 25 ; *Nagardas Vachraj* v. *Anandrao Bhai*, 31 B. 590 ; 9 Bom. L. R. 495 ; *Sultan Singh* v. *Hashmat Ullah*, 29 Ind. Cas. 804 ; 100 P. R. 1915 ; 119 P. W. R. 1915 ; 38 P. L. R. 1916, relied on.

Appeal from the order of the District Judge, Nagpur, dated the 22nd April 1921, in Mis. Judicial Case No. 30 of 1921.

Dr. *H. S. Gour*, for the Appellant.

Sir *B. K. Bose* and Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—Govindrao Badkas, a pleader of Nagpur, died some years ago, leaving a minor daughter named Manorama. *Mst.* Radhabai was made guardian of the girl's person and Vishwanath Sadasheo Anekar, pleader of Khamgaon, was appointed guardian of her property. The latter on the 4th of January 1922 applied to the Court for permission to sell an eight-annas share in *mouza* Saonga belonging to the minor, the object of the sale being to pay off debts due by the deceased father. He stated in his application that he had agreed on 3rd January 1922 to sell the said half share to Sonba Patel for Rs. 37,500 and he asked for permission to execute a sale-deed in Sonba Patel's favour. We quote in full the following order passed on the 7th January 1922 on this application. It is as follows :—

> "Guardian of minor Manorama has applied for permission to sell minor's interest in *mouza* Saonga for Rs. 37,500 to enable him to pay off the debts incurred by minor's deceased father Govindrao Badkas. I am satisfied that the sale is inevitable and is fully supported by legal necessity and I, therefore, accord my sanction to the same. Draft of the sale-deed should be put up for my approval before execution of the sale-deed by the guardian."

No sale-deed was, however, executed in accordance with the above order, the reason for the delay being that the guardian had to apply to the Collector for sanction to sell cultivating rights in the *sir* appertaining to Manorama's share of *mouza* Saonga. On the 21st

SONBA *v.* NARAYAN

of January 1922 Sitaram Patel, the owner of the other half share in the village, applied to the Court to allow him to purchase the minor's eight-annas share for Rs. 42,000, and on the 1st of February 1922 Narayan, son of Raghoba Patel, also applied to the Court stating that he was willing to purchase the girl's share for Rs. 40,000. Sonba Patel was told of these applications and the statements of the parties were recorded on the 1st of April 1922. On that date Sitaram and Narayan Patel offered Rs. 46,000 for Manorama's share. Sonba raised his bid to Rs. 45,500 without prejudice to his rights under the contract, dated 3rd January 1922 entered into by him with the guardian of the property. He refused to give more for the share. Sitaram and Narain deposited Rs. 46,000 in Court.

The lower Court holds that in a case like the present it was not bound by the order sanctioning the sale to Sonba but that in the interest of the minor it was bound to accept the highest offer after having given Sonba a chance of buying at the same price.

It is argued here that the District Judge did not set the sale to Sonba aside. But though there was an order sanctioning the sale it is obvious that the document that would evidence that sale had not been executed and no real sale had taken place. It is contended that, under section 48 of Act VIII of 1890, the District Judge's order sanctioning the sale to the appellant was final and not open to review or revision by the District Judge. He was *functus officio* once having passed the order. The order, it is argued, might be open to revision in this Court but could not be changed by the District Judge himself. We are referred to the following cases : *Babu Ram* v. *Said-ud-Nissa* (1) and *Prem Sukhdas* v. *Lachmi Tewari* (2) but in the latter case the sale-deed had been executed and registered before the District Judge changed his mind. Under section 29 of the Act a guardian is bound to get the sanction of the Court for sale and he got the general sanction on the 21st September 1921 before he could sell either Kanri or Saonga to pay off the debts of the minor's deceased father. He then had to negotiate and on the 7th January 1922, having found a purchaser, placed the matter again before the Court and the sale was then sanctioned.

It is contended for respondents that Sonba's case had not advanced beyond an agreement to convey, the document not being executed, and that the transaction was in a preliminary stage where it was open to the District Judge to resile from his former sanction. It is also contended that no appeal lies. *Lachmi Prasad* v. *Baldeo Dube* (3) is quoted in support of the last contention, but that case merely lays down that no appeal lies from an order passed under section 30 of the Guardians and Wards Act. It seems to us that under section 47 an appeal does lie in the present case. We are of opinion that the District Judge was, in the interest of the minor, competent to review his own order. There is authority for this proposition : see *Chhitar Mal* v. *Jagan Nath Prasad* (4), *Nagardas Vachraj* v. *Anandrao Bhai* (5) and *Sultan Singh* v. *Hashmat Ullah* (6). The District Judge had, when he first sanctioned the sale of the half share of the village to Sonba, obviously made no attempt to ascertain the real value of that half share or what could be obtained in the open market for it. The 37,000 rupees was not even approximately the correct figure, and we think, looking to the detriment that would accrue to the minor if the first order had been sustained, that the District Judge was right in accepting the offer of the highest bidder. A belated offer is made in this Court by the appellant that he is willing to pay Rs. 47,000 for the property, but this is far too late. His former offer of Rs. 45,500 was a conditional offer and the Judge was within his rights in refusing it. The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondents' costs.

Z. K. *Appeal dismissed.*

(1) 20 Ind. Cas. 916 ; 35 A. 490 ; 11 A. L. J. 783.
(2) 46 Ind. Cas. 542.
(3) 44 A. 458 ; 20 A. L. J. 390 ; (1923) A. I. R. (A.) 14.
(4) 29 A. 213; 4 A. L. J. 24 ; A. W. N. (1907) 25.
(5) 31 B. 590 ; 9 Bom. L. R. 495.
(6) 29 Ind. Cas. 804 ; 109 P. R. 1915 ; 119 P. W. R. 1915 ; 38 P. L. R. 1916.

MAHOMED ISMAIL KHAN *v.* HASAN ALI KHAN

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 168 OF 1919.

January 3, 1922.

Present :—Mr. Justice Rafique and Mr. Justice Lindsay.

MAHOMED ISMAIL KHAN—PLAINTIFF—APPELLANT

versus

HASAN ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Breach of contract—Sale of goods—Mutual obligations—Burden of proof.

In a case arising out of the breach of a contract for the sale of goods, in which there are mutual obligations on the parties, it is for the plaintiff to show that on the date fixed for performance of the contract he was ready and willing to perform his part of the contract. If he is the purchaser it may not be necessary for him to prove that he made an actual tender of the money, but it is incumbent on him to show that he had made arrangements for the purchase-money and was in a position to hand it over to the defendant as soon as he was satisfied that the bulk of the goods was in accordance with the sample and that everything was satisfactory. [p. 477, col. 1.]

Appeal from the decision of the Sub-Judge, Meerut, dated the 30th January 1919.

Messrs. *Tej Bahadur Sapru* and *Surendra Nath Sen* and *Iqbal Ahmed*, for the Appellant.

Mr. *S. Sulaiman*, for the Respondents.

JUDGMENT.—The plaintiff, Mohamad Ismail Khan, who has died since the institution of the suit and is now represented by his heirs, brought the suit, out of which this appeal has arisen, to recover Rs. 9,000 odd by way of damages for breach of contract.

There were two defendants in the case (1) Hasan Ali Khan (2) Najirulla Khan.

Briefly put, the case for the plaintiff was that, on or about the 14th September 1916, he entered into a contract with the first defendant for the purchase of a quantity of indigo at the rate of Rs. 200 per factory maund. The agreement between the parties was that the indigo should be delivered to the plaintiff about the end of October. The case for the plaintiff was that, on the 7th of November 1916, the defendant, Hasan Ali Khan, refused to give him delivery, thereby breaking the contract.

It may be mentioned here that the second defendant was more or less a nominal defendant in the case. He is the servant of the first defendant and is said to have been a partner in the indigo business to the extent of a one-anna share.

The defence raises two main pleas, namely :—

(1) that there was no complete contract between the defendants and the plaintiff, and

(2) that, if there was a contract between the parties, the defendants had not been guilty of breach of contract, but, on the other hand, the plaintiff himself had made default.

The learned Subordinate Judge seems to have been of opinion that there was no complete contract between the parties. He further held in the defendants' favour that, if there was a contract, the party in default was the plaintiff himself who was, therefore, not entitled to recover.

In appeal here, the case which was raised by way of defence to the effect that there was no complete contract between the parties, has been abandoned and rightly so. There can be no doubt whatever on the evidence in the case that a contract was entered into between these parties on the 14th September 1916, for the sale and purchase of indigo.

The necessary facts are all admitted in the statement made by the first defendant when he was examined as a witness in Court and the letters which passed between the parties amply prove that there was a contract made between them on the date above mentioned.

There can, indeed be no doubt that the first defendant seems to have desired that the terms of the contract should be reduced to writing. He seems further to have desired that a substantial sum of money should be deposited with him as earnest-money, and it was because the plaintiff had refused to reduce the contract to writing and to supply the Rs. 2,000 demanded by way of earnest-money, that the plea was put forward to the effect

that the contract between the parties was not complete.

We need say nothing more about this part of the case. If the first defendant desired to have any special terms made after the date upon which the contract was entered into, that would not affect the contractual relations already established between the parties.

The only question, therefore, with which we have to deal is, whether the plaintiff himself was in fault or whether the defendant wrongfully refused to give the delivery and was thereby guilty of breach of contract.

It appears that, in the month of September when the contract was made, the indigo which was the subject-matter of the bargain between the parties, had just been manufactured. It was not possible at that time to fix a definite date for delivery before the manufactured cakes had been dried. It was not possible at the time the parties entered into the contract to fix any definite time by which the drying process would be complete. Consequently, it must be taken that, under the arrangement come to between the parties, it was for the first defendant to fix the date of delivery. He was in charge of the indigo which was stored in his Factory and he was responsible for getting the indigo into marketable condition. He was further under an obligation to see that the indigo was properly packed.

There can, we think, be no doubt that at the time the contract was made, a sample of the indigo was given to the plaintiff. Consequently, when the time for delivery came, it was the plaintiff's right to have an inspection of the indigo which was being offered to him, so that he might compare it in bulk with the sample which was in his possession. Lastly, it is clear that, on the terms of the contract, the plaintiff was under an obligation to pay for this indigo at the time of delivery. The amount in question was about Rs. 11,000.

We have been referred to certain letters which passed between the parties from the middle of September till the beginning of November. We do not propose to discuss this correspondence. It is sufficient to say that it appears that the partice were not disposed to trust each other regarding the fulfilment of the contract. Each party seems to have regarded the other with suspicion and, in short, they seem to have been dealing with each other at arm's length.

On the 1st November 1916 the defendant wrote a letter, Exhibit 6, page 30 of the appellant's book, informing the plaintiff that the goods would be ready for delivery at the Factory at Chidauli on the 15th November 1916. The plaintiff was asked to attend at the Factory on that date, either in person or through a *karinda* and to bring with him a sum of Rs. 11,000, the approximate value of the goods In this letter the defendant, Hasan Ali Khan, wrote that, if the plaintiff did not appear on the date in question or send an agent, he would hold the plaintiff liable for a breach of contract and would arrange otherwise for the disposal of his goods.

The plaintiff replied to this letter by a letter dated the 4th November 1916. He took up a controversial attitude over the matter and said that he did not understand what the first defendant meant by saying that the time for delivery had been fixed. He disputed this statement and said that no time had been fixed for delivery nor was it possible that any time could be fixed because the indigo could not be weighed until it was in a dry state. In this letter, moreover, the plaintiff wrote to the defendant that the latter's indigo was not yet dry and he suggested that nothing more should be done until the plaintiff himself had seen the indigo and was satisfied that it was in a dry condition. We may say here that it is not apparent how the plaintiff could possibly know whether the indigo which was lying in the Factory was or was not in a dry state. His statement that it was not fit for delivery seems to have been based on some inferences which he drew from the state of indigo in some other Factories of which he professed to have some knowledge.

The plaintiff admittedly did not attend at the Factory at Chidauli on the 5th November 1916. When he was cross-examined on this point and asked to explain, his answer was that he did not go to the Factory on the date in question because he had no time. He admittedly turned up in the village of Chidauli late in the evening, on the 6th and, on the 7th, he appears to have written a letter or two to the defendant.

MAHOMED ISMAIL KHAN *v.* HASAN ALI KHAN

The defendant admitted that he had received one of these letters and stated in Court that he had sent an answer to the plaintiff, a copy of which is on the record (Exhibit D). The plaintiff, in his turn, denied ever having received this letter.

In his cross-examination, the plaintiff admitted that when he went to Chidauli on the 6th November, he had no money with him. His statement in Court was that the defendant had asked him to send the money in notes after weighment of the goods had been made. This latter statement, it may be observed, does not appear to be true, for it is in direct conflict with what had been stated by the first defendant in his letter of the 1st November, in which he insisted that the purchase-money, namely, Rs. 11,000, should be brought to the Factory on the 5th November.

The plaintiff remained in Chidauli the night of the 6th, the whole of the 7th of November and left there on the morning of the 8th of November. It is an admitted fact that all this time he never went near the first defendant's Factory although the evidence shows it is situated only a hundred yards from the house in which the plaintiff was staying.

The plaintiff was cross-examined on this point and said that he would have weighed the indigo if he had known that it was in a dry condition. He went on to say that the defendant did not show him the indigo, and he seems to have put forward this as an excuse for not taking delivery. With regard to this, it may well be asked how the defendant could have shown the plaintiff the indigo when the latter refused to go near the Factory. The plaintiff added by way of explanation that he did not care to come to the Factory because he and the defendant were not on good terms after the correspondence which had passed between them.

As opposed to this, we have the sworn statement of the first defendant whose story is to the effect that, after sending the letter of the 1st November 1916, he went to the Factory at Chidauli on the 5th and was ready to give delivery to the plaintiff whenever he came. The plaintiff failed to appear on the 5th or on the 6th, and the story is that, in these circumstances, the first defendant came to the conclusion that the plaintiff did not intend to take delivery. The defendant, therefore, began packing up the indigo in lines. He admits that he met the plaintiff at dinner on the evening of the 7th at the house of a common friend, one Raham Ali, and he deposed to a certain conversation which he had with the plaintiff—a conversation which the plaintiff denies.

We have on the record the statement of Raham Ali, the gentleman at whose house both the parties dined on the night of the 7th of November. We have no reason to doubt the truth of the statement made by Raham Ali in Court. He seems to have been a friend of both parties. Raham Ali knew about the indigo business which was being carried on at Chidauli and he states that when the first defendant came to Chidauli on the 5th of November, indigo cakes were dry and ready for packing. The witness himself saw some of the packing done and he states definitely that he examined the goods and found that the cakes were in a dry condition. Speaking about the visit of the plaintiff, he deposes that the plaintiff wrote a letter which he sent to the first defendant by one Mahfuz Ali and he further swears that Mahfuz Ali brought a reply to his letter. In addition to this, the witness stated that, in consequence of a request made to him by the first defendant, he spoke to the plaintiff Mahomed Ismail about taking delivery of the indigo. The witness swears that when this message was given to the plaintiff, the latter said that he would have the indigo weighed and that the money would be paid on the date fixed for payment. The plaintiff further added that he had brought no money at that time and he concluded by saying that if the first defendant refused to deliver the indigo, he would "see to it." In other words, he threatened to take proceedings against the first defendant.

We have no doubt at all, on the statement of this witness Raham Ali, that, on the 5th of November, the indigo in the defendant's Factory was ready for delivery and in good marketable condition. There is no foundation whatever for the position taken up by the plaintiff, namely, that the indigo could not, on that date, have been in a fit condition for packing on account of its being wet. As we have said, the plaintiff had no personal

knowledge whatever of the state of the indigo inside the Factory for he never went near it.

We have also mentioned a letter, Exhibit D, which was admitted in evidence in the Court below. This is an office copy of the letter which the first defendant says he sent to the plaintiff on the 7th November 1916. It has been objected before us that this document ought not to have been received in evidence as it was produced at a late stage of the case. The record shows that the other documents in the case were filed on the 6th April 1917. This document, on the other hand, was not put into Court till the 19th December 1917, the date on which the witnesses began to be examined. It is apparent, however, that before this, *i.e.*, in the month of July, the defendant had called upon the plaintiff to produce the original letter of which Exhibit D was a copy. The record shows that this notice was served upon the plaintiff's Counsel and there is nothing to show that the document was brought to Court. In fact, from what the plaintiff himself afterwards stated in the evidence, the document could not have been brought to Court on the assumption that the plaintiff's statement is true, for his story is that he never got any such letter. We do not believe the story for the plaintiff on this point. We have the statement of Rahman Ali that when a letter was sent to the defendant on the morning of the 7th of November, a reply to that letter was brought by Mahfuz Ali; the messenger Mahfuz Ali was examined and, when making his statement regarding this particular incident, he stated that he took the letter to the defendant in the morning and came back with a letter. He at once withdrew his latter statement and said that he got no letter from the defendant, saying that he had made a mistake in stating that an answer had been given to him by the defendant. We think we may safely take it that, as a matter of fact, the first defendant did reply to the letter sent by the plaintiff on the morning of the 7th November, and that Exhibit D represents the contents of the letter which was sent by defendant No. 1. If that letter is acted upon, it seems to us to be abundantly clear that the defendant offered delivery of the goods on the 7th of November. In this letter he says that he had been waiting for the plaintiff for two days and that he had lost all hopes of the plaintiff taking delivery and had, therefore, begun to pack the indigo up with the object of sending it to Khurja. He, however, offered the plaintiff another opportunity of taking delivery and said that he might examine the indigo which was already packed and inspect the indigo which had not been put into the boxes. He intimated that delivery would be on the spot but only on condition that the plaintiff brought the money with him.

We have to chose, therefore, between these conflicting stories told by the plaintiff on the one hand, and the first defendant, on the other, and, after a careful consideration of all the evidence, we hold that the story of the defendant ought to be accepted. It is, we think, supported in very material particulars by the testimony of the witness Raham Ali whose *bona fides* we have no reason to suspect.

It has been urged upon us with considerable force that the probabilities are all in favour of the defendant having refused delivery and the plaintiff being desirous of taking it. There can, we think, be no doubt that subsequent to the date of the contract, the market price of indigo had risen considerably. The plaintiff says that the first defendant wanted to back out of his bargain in order to profit by the rise in the price, and it is argued that, with this rise in price, the plaintiff stood to make a very substantial profit and would not, therefore, likely have declined the delivery if the goods were ready for him. There is, no doubt, considerable force in this argument but one thing has to be remembered and that is this, namely, that, under the terms of the contract, the plaintiff was under an obligation to produce a sum of about Rs. 11,000 at the time the delivery was to be given and, after an examination of the evidence, we have come to the conclusion that the real reason why the contract was not completed was that the plaintiff could not find the money. His conduct on the 7th of November at Chidauli seems to us to have been altogether inconsistent with any notion of an intention on his part to take delivery. It is quite inexplicable to us why he failed to go over to the Factory a few hundred yards away, and satisfy himself that the goods which were being

offered to him were up to sample and in a fit condition to be put upon the market. He asks us to hold that the defendant really had no intention of offering delivery on that date and that, in fact, the goods were not in a fit condition to be delivered on that date. On this latter point, the plaintiff admittedly has no knowledge of his own and the other evidence in the case shows that the indigo was dry and fit for packing. Again, we are not satisfied with the plaintiff's explanation of his failure to go to Chidauli on the 5th of November, the date which was fixed by the first defendant. As we have pointed out, the only answer he could give regarding this failure was that, on the date in question, he could find no time.

In a case like this, in which there were mutual obligations on the parties, it was for the plaintiff to show that, on the date fixed for performance of the contract, he was ready and willing to perform his part of the bargain. It may perhaps not have been necessary for him to prove that he made an actual tender of the money but it was, at any rate, incumbent on him to show that he had made arrangements for the purchase-money and was in a position to hand it over to the first defendant as soon as he was satisfied that bulk of the goods was in accordance with the sample and that everything was satisfactory. He admittedly made no attempt to compare the bulk of the goods with the sample or, in fact, to do any other thing which he was bound to do under the terms of the contract. As we have said, the impression which is left upon us after a perusal of the evidence in the case is that the plaintiff was in embarrassed circumstances and could not find the money, Rs. 11,000, at the time when it was wanted. We are satisfied, therefore, that, though the judgment of the Court below is open to criticism on certain other grounds which we need not pause to consider, the learned Subordinate Judge was right in holding that the plaintiff had failed to prove his case that the defendant was guilty of breach of contract. In these circumstances, the suit was rightly dismissed and this appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 18 OF 1917.

January 10, 1921.

Present:—Mr. Kennedy, J. C., and Mr. Madgowkar, A. J. C.

DONALD GRAHAM & Co.—
APPELLANTS
versus
KEWALRAM AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Award proceedings, whether suit—Order in execution—Appeal, whether competent—Limitation Act (IX of 1908), Sch. I, Art. 182—Proceedings necessary to ascertain set off—Decree, whether declaratory.

For the purposes of section 47, Civil Procedure Code, an award must be considered to be a decree in a suit and the award proceedings must be deemed to be a suit. Therefore, an appeal would lie against an order under execution although that execution was of an award and not of a decree in suit.

If in a case where no appeal really lies an appeal is *bona-fide* presented to the Court which would have the power to entertain an appeal if such a one lay, the proceedings are sufficiently of the nature of an appeal to be considered an appeal for the purposes of Article 182 of the Limitation Act.

The mere fact that in a certain view of the matter further proceedings might be necessary to ascertain what set off the judgmentdebtor is entitled to against a decree : adjustment does not make the decree declaratory.

Gokaldas Dwarkadas v. *Olandas Dwarkadas*, 2 S. L. R. 33; *Lahibai* v. *Valiram Ghanshamdar*, 24 Ind. Cas. 861; 7 S. L. R. 192, distinguished.

Per *Madgowkar, A. J. C.*—It is now well settled that at least where the appeal imperils the whole decree, the words 'where there has been an appeal' in Art. 182 of Sch. I to the Limitation Act must be construed in their plain sense, and that the Courts cannot add to these words provisions such as 'where an appeal lies' or 'by the judgment-debtor proceeded against.'

Ashfaq Husain v. *Gauri Sahai*, 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 ; 8 A. L. J. 332 ; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367 ; 4 Bur. L. T. 121; 21 M. L. J. 1140; 38 I. A. 37; (1911) 2 M. W. N. 177 (P. C.) ; *Wazir Mahton* v. *Lalit Singh*, 9 C. 100; 4 Ind. Dec. (N. S.) 718 ; *Lokanathsingh* v. *Gaju Singh*, 31 Ind. Cas. 426; 20 C. W. N. 178 ; 22 C. L. J. 333, followed.

DONALD GRAHAM & CO. *v.* KEWALRAM

Appeal from the order of the Sub-Judge, Sukkur.

Mr. *Rupchand Billaram*, for the Appellants.

Messrs. *Wadhumal Oodharam* and *Sri Kishendas H. Lula*, for the Respondents.

JUDGMENT.

Kennedy, J. C.—In this case an award was obtained by Messrs. Donald Graham and Co. on the 9th July 1909 against two firms. Various negotiations took place which led to the award " remaining on the file." Under the award the firms were held liable to pay something like Rs. 49,000. Various other proceedings took place and finally the present application for execution was filed by Donald Graham and Co., principally to recover a certain sum from the original defendant No. 8, who subsequently died and is represented by his legal representatives. The executing Court has thrown out this application for execution on certain grounds of laws and facts and the decree-holder now comes here on appeal, against that order. In the beginning there was an objection that no appeal lies. It is admitted that there can be no appeal from the order of a Subordinate Court unless the Code allows such an appeal and it is said that there is nothing in the Code which gives any person a right of appeal against any order passed in execution of an award. It is strange that this point seems not to have been raised or decided before in view of the numerous awards that are filed in this Court and the numerous execution proceedings in those awards.

Appeal lies only against a decree and the word 'decree' includes " determination of any question within section 47 " and, therefore, unless this is a proceeding under section 47 there can be no appeal. Reading section 47 one sees that the reference in that section is to the decree passed *in a suit*. Unless, therefore, this award is to be deemed a decree passed *in a suit* section 47 can have no application, and, therefore, the order thereunder is not an order under section 47 and no appeal lies. " Suit" is nowhere defined in the Code, but it clearly does not *ex-vi-termini* include an arbitration proceeding. But the mere statement of this seems to show that this method of dealing with the case is wrong for under the Arbitration Act although an award is not a decree in a suit it is to to be executed as such, and if it is not executable as such under section 47, it is not executable at all. It will be clear, therefore, for the purposes of section 47 that the award must be considered to be a decree in a suit and the award proceedings must be deemed to be a suit for the purposes of that section. It would, therefore, appear that an apeal would lie against an order under execution although that execution was of an award and not of a decree in suit. I can see no reason why the Legislature should have intended orders in execution passed by Subordinate Judges to be exempt from appeal merely on the ground that they were passed in execution of an award. The very cogent reasons why no appeal lies from an award here do not exist. I think, therefore, that an appeal lies.

Coming now on to the merits of the case I find some difficulty in exactly following the reasons for the order of the Trial Court. A great deal of the argument of the respondent apparently was this. There was a protracted struggle between Donald Graham and Co. on the one side and his debtors on the other in the Arbitration Court before the arbitrators and the debtors were not satisfied with the award and certain of those not satisfied took measures to get the award declared invalid. Each defendant, after correspondence and with the sanction of the Court, agreed to withdraw his opposition to the award on certain terms, and the creditors accepted these terms, and the Court sanctioned them, the result being that the award was filed subject to certain terms agreed on between the parties which were entered as partial satisfaction of the award. The Trial Court seems to have thought that there was not one award but several separate agreements and that, therefore, for some reason, the award cannot be executed, but the parties should be refered to a suit on the agreement. This is also argued now in the appeal. I cannot see myself that the matter is in any way different to an ordinary case where a decree is passed and where a partial satisfaction is entered on it. It is true that the adjustment in the present case is very much more elaborate than is usually the case with adjustment, but that does not make it any less an adjustment and to say that where a decree has been passed and partial satisfaction or adjustment entered,

the Court cannot execute so much of the decree as remains unsatisfied but must go behind the decree and see what the real agreement between the parties was and execute that or require the parties to get a further decree on the agreement, seems to me unsupported by law.

The fact that the Court ordered certain agreements to be filed with the award is immaterial. Such an order could not have been intended to modify the award. It must have been intended to guarantee the interests of the parties thereto in case of any further litigation, contribution suits or the like which might take place between the defendants in the action.

As far as I can see, therefore, this award must be treated as a decree with partial satisfaction entered into it in respect of No. 8. If the award is considered in this way it seems to get over a great deal of the difficulty felt by the Trial Court. Now this award is an award against several persons jointly and although the liability of one of them No. 8 is limited on account of the adjustment, nevertheless that does not entirely separate his interest from that of others, and it still remains an award against all the eight persons jointly and, therefore, any proceedings taken against any of them to keep the award sufficiently alive would keep it in time against all. Admittedly, certain proceedings were taken which would keep the decree alive against the persons against whom they were taken. The decree is, therefore, alive against defendant No. 8 and his legal representatives. This is quite apart from the question of appeal against the order filing the award which in itself, I think, will be sufficient to conclude the matter of limitation. The appeal was not decided till June 1911 and this application was made on the 28th March 1915. It is true that no appeal really lay. But I think if in such a case an appeal is *bona fide* presented to the Court which would have the power to entertain an appeal if such a one lay, the proceedings are sufficiently of the nature of an appeal to be considered an appeal for the purposes of Article 182 of the Limitation Act. It is true also that the present respondent did not appeal, but he was interested in the result of the appeal and the appeal was filed by the appellants to test the validity of the whole award, and if it had succeeded the only order that could have been passed would be to set aside the whole award, in that case the liability of No. 8 also would have disappeared. It would appear, therefore, to me that this application for execution was in time. The next point taken by the Subordinate Judge is that the decree is declaratory. This is due to the confusion which apparently has arisen between an adjustment of a decree and a fresh agreement. The decree in itself is not declaratory as it directs the principal judgment-debtors to pay a sum of Rs. 49,000 odd and this is the decree which the decree-holder now wishes to execute. There is nothing declaratory about it. It is true that, in a certain view of the matter, further proceedings might be necessary to ascertain what set off the respondent was entitled to against the decree in the adjustment, but that does not make the decree a declaratory decree.

It seems to me, therefore, that the lower Court was wrong as far as this goes in dismissing the execution application, and the question that now remains is whether the decree-holder has succeeded in establishing what is now due to him under the decree. The form that the adjustment took was *inter alia* that respondent No. 8, should only be called on to pay a particular part of the amount which may be found due. There were five members of the partnership who would have their liabilities ascertained and deducted from the amount of the decree. There would then be left four members on whom the remaining liability would fall and No. 8 Chimansing was to pay one-eighth of the amount payable by these four members. It is, therefore, necessary that it should be ascertained as to what the amounts payable or paid by these original five members were, and after deducting that amount from the decretal amount, the amount payable by the other four members will be ascertainable and a simple division by eight will give the amount payable at the time by Chimansing, and from that sum Rs. 2,500 must be deducted and the balance, with any interest that may be admissible, will be due under the decree thus executable. There is also the dispute as to whether it is the duty of the defendants to prove that amount or whether it is for the decree-holder to prove it

and whether both parties had agreed to accept the word of Bhagwandas who is a sort of '*persona designata*', and, if so, whether he has stated the amount due. All these points have to be settled. None of them have been dealt with in the judgment of the First Class Sub-Judge, now under appeal. Owing to the view that he took of the law he did not think it necessary to go into the question as to what, if anything, Chimansing was liable for, under the agreement and he seems to have passed over the whole matter very summarily. We do not feel inclined ourselves to go into this question of accounts or to consider the bearing of evidence thereunder and it will be necessary I think to send this case back to the Trial Court for decision on these matters. The exact form of the order of remand can be settled at the next hearing.

Madgowkar, A. J. C.—The appellant, Messrs. Donald Graham & Co., applied in the Sub-Court of Sukkur in execution against the legal representatives of the deceased Chimansing. The question in this appeal is, whether, as held by the lower Court, the decree is declaratory and not executory and the application for execution barred by limitation.

One Bhagwandas was guarantee broker to the appellants Messrs. Donald Graham & Co. He was also partner with four others in the firm of Bagwandas Asanmal. These five with certain others constitute the firm of Bhagwandas Kewalram.

Both firms dealt with the appellants. Disputes arose between the firms and the appellants. A reference to arbitration was made and the arbitrators made an award on 9th July 1909 for Rs. 49,602-2-3 in favour of the appellants against nine persons including Chimansing as composing the second firm. Application numbered as Suit No. 253 of 1919 was made under the Indian Arbitration Act in this Court to file the award. Chimansing, who was alleged by the appellants to be a partner in the second firm, but did not admit his liability before the arbitrators, was defendant No. 8 in this suit.

Four out of the nine defendants raised objections to the filing of the award. Chimansing was not one of them. On 23rd July 1909 during the pendency of the matter in Court he had written a letter (Ex. 129, 293) to the appellants offering to accept liability only for an eighth share of the amount found due from four of the partners he named, after the liability of the other five which appeared to be more limited, was settled. As to the letter "the extent of the liability of these persons mentioned above can be told by your guarantee broker Mr. Bhagwandas." So the letter ran. He offered to pay Rs. 2,500 in advance.

The appellants accepted the offer and notified it and their acceptance to the Court. On 17th August 1910, the Court ordered the award to be filed along with the letter of Chimansing and satisfaction by him to the extent of Rs. 2,500. The case is reported as *Donald Graham and Co.* v. *Kewalram* (1).

Kewalram and others appealed. Chimansing was made a party to the appeal. The Appellate Court held on 8th June 1911 that no appeal lay, but treating it as application in revision dismissed it ; *Kewalram* v. *Donald Graham and Co.* (2).

On 22nd August 1912, the appellants, Messrs. Donald Graham and Co., applied in execution against two partners Kewalram and Harbhagwandas. On 4th June 1913, they applied to transfer execution against these two persons to the District Court of Sukkur and on 17th June 1913 against these and a third to the Subordinate Court. On 16th December 1913, they applied to this Court to join the legal representatives of Chimansing who had died. On 24th March 1914, they applied for execution for Rs. 2,799-11-1 against the heirs of Chimansing. Execution was transferred to the Subordinate Court of Sukkur which has dismissed the application on the ground that the decree was declaratory and execution was barred by limitation under Article 182 of the first Schedule of the Limitation Act. Hence this appeal.

A preliminary objection is taken for the respondent that no appeal lies. It is argued that there was no suit and no decree, and no appeal is expressly provided by Statute.

Section 15 of the Arbitration Act is, in my opinion, a sufficient reply to this objection. The award on being filed is, under this section, enforceable as if it were a decree, This right of execution in the absence of other statutory provision for procedure, is only enforceable

(1) 9 Ind. Cas. 712 ; 4 S. L. R. 196.
(2) 10 Ind Cas. 211 ; 5 S. L. R. 61.

under section 47 of the Code of Civil Procedure, the lower Court has so treated it and the questions so determined are included in "decrees" under section 2 of the Code and an appeal lies under section 96.

As to the nature of the decree, there has been a certain amount of argument as to what it is that is sought to be enforced. It is contended for the respondents that the award of the arbitrators has been admittedly modified by an agreement between the appellants and Chimansing which is not a part of the award ordered by the Court to be filed. This agreement is not, therefore, enforceable under section 47. For the appellants it is argued that the agreement is at the most a notification of part-satisfaction by the appellants who remain entitled even against Chimansing and his heirs to enforce the award. The latter can at the best set up the agreement as a defence and may prove if they can, that the amount sought in execution is beyond the terms of the agreement.

The other defendants to the suit are not parties to the present application and appeal and it is not, therefore, necessary to consider as against them the effect on the award of the agreement notified and noted by the Court. For the purposes of the present appeal and as between the parties to it the agreement consists of two parties. Chimansing's liability is separate and defined and he pays Rs. 2,500 in part satisfaction of it. Had there been a decree by a regular suit between the parties and not an award filed and the appellant Chimansing asked the Court after decree to note this agreement including part satisfaction, the appellants could still have proceeded by execution to obtain the balance. The legal position is, in my opinion, precisely the same as under an adjustment certified under O. XXI, r. 2 of the Code of Civil Procedure, limiting the rights of the judgment-creditor and the liability of the judgment-debtor.

As to the nature of the award plus the agreement on which the present application is founded the former is not declaratory within the meaning of section 42 of the Specific Relief Act. There is no question of *quia timet* or uncertain contingency, on the happening of which the respondents would be liable. The five persons in the partnership had apparently a limited interest in certain transactions of wool only; and their liabilitjes and the amounts on these transactions had to be settled. These accounts were kept back by Harbhagwandas. But this ascertainment did not make the decree any the less executory in respect of the one-eighth share of the remaining liabilities, which Chimansing admitted and against which he had paid Rs. 2,500. The last action of his is itself almost a conclusive test and renders it needless to expatiate on the point. The cases of *Gokaldas* v. *Otandas* (3) and *Lalibai* v. *Valiram* (4) relied upon by the learned Sub. Judge are clearly distinguishable. In each of these cases the decree or a portion of it declared a certain right in case a certain event happened, and the Court asked in execution to enforce the right, would have had to determine, first, whether the event had happened—a very different thing from the settlement of accounts, which alone was necessary before the appellants could execute the decree against Chimansing.

On the question of limitation even if the application against the other defendants by reason of the agreement defining Chimansing's liability did not save limitation against the latter, it is so saved by the appeal of the other defendants. That appeal sought to invalidate the whole award. It is at least doubtful if any liability could have remained to or been admitted by Chimansing only upon the agreement if the appellants in that appeal had succeeded. By their appeal those appellants sought to imperil the whole claim of the present appellants including their claim against Chimansing. The present appellants could not clear up accounts nor proceed to execution against Chimansing until the appeal has been decided in their favour. Where, therefore, in this case, there has been an appeal even by some of the other defendants the present appellants could, under Article 182 of the Schedule of the Limitation Act, apply within three years of the final decree of the Appellate Court. It is now well settled that at least where the appeal imperils the whole decree, the words 'where there has been an appeal' must be construed in their plain sense and that the Courts cannot add to these words provisions such as 'where an appeal lies,' or 'by the judgment-debtor

(3) 2 S.L.R. 33.
(4) 24 Ind. Cas. 861; 7 S.L.R. 192.

proceeded against': *Ashfaq Hussain Gauri* v. *Sabai Gauri Wazir Mahton* (5) *Lulit Singh* (6) *Gokenathsing* v. *Gaju Singh* (7) where the authorities are fully detailed and considered. And, clearly, even where it is ultimately decided that no appeal lies, if the appellant succeeds in getting his appeal admitted and is at liberty to obtain a stay of judgment, it would hardly be equitable and logical to hold that the respondent must nevertheless take upon himself the responsibility of deciding that no appeal lies and must apply for execution, without waiting for the decision of the question by the Appellate Court. In the present case the final decree of the Appellate Court was not passed till 8th June 1911. The present application for execution was made on 24th March 1914 and is, therefore, in time.

As to the amount for which Chimansing was and his estate is liable, the appellants must place before the executing Court the statement of accounts by which they arrive at the sum now claimed. The respondents must make their objections and the executing Court must decide what sum is due. Bhagwandas and the accounts should suffice for the purpose; but the parties will be at liberty to adduce further evidence if necessary. The costs in this Court on the respondents 8 (*a* to *g*). Other respondents to bear their own costs. Costs below to be costs in the cause.

Kennedy, J. C.—I agree to the proposed order.

K. S. D. *Case remanded.*

(5) 9 Ind. Cas. 975 ; 33 A. 264 ; 15 C. W. N. 370 ; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 267; 4 Bur. L. T. 121; 21 M. L. J. 1140; 38 I. A. 37; (1911) 2 M. W. N. 177 (P. C.).

(6) 9 C. 100; 4 Ind. Dec. (N. S) 718.

(7) 31 Ind. Cas. 426; 20 C. W. N. 178; 22 C. L. J. 398.

RANGOON HIGH COURT.

CIVIL REVISION No. 253 OF 1922.

July 20, 1923.

Present:—Mr. Justice Duckworth and Mr. Justice Po Han.

ASHROF ALI—APPELLANT

versus

MAHOMED MORDEN—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XLI, r. 33—Plaintiff, failure of, to produce evidence—Suit dismissed—Remand directing Court to take fresh evidence—Decree not set aside—Appeal against order of remand, whether competent—Revision.

Plaintiff having failed to produce his witnesses his suit was dismissed. On appeal the Court remanded the case for taking any evidence which may be offered by the plaintiff, but did not set aside the first Court's decree. The defendant filed a second appeal against this order.

Held (1) that the lower Appellate Court's order must be taken to have been made under its inherent powers, as given under section 451 and O. XLI, r. 33, Civil Procedure Code and inasmuch as the decree of the Court of first instance was not set aside, no appeal lay;

(2) that there was, however, a right to apply for revision and the memorandum of appeal could be treated as an application under section 115 of the Civil Procedure Code.

Gokal Prasad Har Prasad v. *Ram Kunwar*, 64 Ind. Cas. 878; 44 A. 176; 19 A. L. J. 971; (1922) A. I. R. (A.) 254 ; *Kulsoomunessia* v. *Ram Prasad*, 67 Ind. Cas. 713; 44 A. 492; 20 A. L. J. 321; (1922) A. I. R. (A.) 226; 4 U. P. L. (A.) 168, distinguished.

Jethalal Girdhar v *Varajlal Bhanismba*, 63 Ind. Cas. 478; 46 B, 184; 23 Bom L. R. 769; (1922) A. I. R. (Bom.) 267; *Sarada Sundari Dassya* v. *Gangadhar Shala'* 52 Ind. Cas. 801; 46 C. 738, followed.

Revision against the order of the Divisional Court, Tenasserim, in Civil Appeal No. 75 of 1921.

Mr. *Anklesaria*, for the Appellant.

Mr. *Bannerji*, for the Respondent.

JUDGMENT.—In this case the respondent sued the appellant in the District Court for removal of the eaves of appellant's house, which hung over the respondent's

ASHROF ALI *v.* MAHOMED MORDEN

wall. The appellant-defendant denied that there was any such encroachment, and set up that the eaves of his house had not been altered, since it was erected about 25 years before. The respondent and appellant attempted to settle matters, after defendant-appellant and his witnesses had been examined, but without success. Upon the date fixed for hearing the plaintiff-respondent did not appear, and his Advocate, stating that he was in Rangoon, prayed for an adjournment, but this was refused, it being held that plaintiff had taken no proper steps to procure the attendance of his witnesses. The case was then decided on the merits under the provisions of O. XVII, r. 3, Civil Procedure Code, and the plaintiff-respondent's suit was dismissed. Against this decree he appealed to the Divisional Court, the principal point taken being that the adjournment prayed for in the District Court should have been granted, and that in the interests of justice, the plaintiff should be given an opportunity to call his witnesses and prove his case. Affidavits and counter-affidavits were filed, and the learned Judge of the Divisional Court then delivered the following order :—

> "The facts stated in the affidavits filed by the appellant (now the respondent in this Court) are more likely to bé true than those filed by the respondent. It is impossible to believe that the appellant would have wilfully abstained from attending Court on the 18th November 1921, if he really knew that his case was fixed for hearing on that day. He was prosecuting the case warmly enough, and was not likely to have abandoned it at a critical period. I, therefore, direct the District Judge to take any evidence, which may be offered by the appellant, and to return the record to this Court by 15th of May 1922."

Against this order the defendant has filed this appeal before this Court.

A preliminary objection has been taken by the respondent that inasmuch as the order was not passed under O XLI, r 23, Civil Procedure Code, there is no appeal, and that, supposing that the order was made under the Divisional Judge's inherent powers under O. XLI, r. 33 and section 151, Civil Procedure Code, *then* there is also no appeal, inasmuch as he did nct set aside the decree of the District Court. There is no doubt that this objection must prevail. It cannot be argued that the order was passed under O. XLI, r. 23, Civil Procedure Code. There was no decision on a preliminary point, and the decree of the Trial Court was not set aside. The order was clearly not made under O. XLI, r. 25, and it cannot be held that it was a proper order under O. XLI, r. 27. In this connection the case of *Ambuja Ammal* v. *Appaduri Madali* (1), has been quoted, but *there* the fresh evidence consisted of some documents, and the case is not parallel. The present order was apparently intended to have been passed under O. XLI, r. 27, Civil Procedure Code, but, if so, it was not warranted. It thus seems that the lower Appellate Court's order must be taken to have been made under its inherent powers, as given by section 151, and O. XLI, r. 33, Civil Procedure Code. Inasmuch as the decree of the District Court was *not* set aside, there is obviously no appeal to this Court for the test for an appeal in all such cases is, whether the decree of the Court of first instance has been set aside or not. However, there *is* a right to apply for revision, and, after hearing Counsel on the matter, the present memorandum of appeal has accordingly been treated as an application under section 115, Civil Procedure Code.

Now, there can be no doubt that, on the respective merits of the affidavits filed in the lower Appellate Court, the learned Judge of that Court was right, and that the plaintiff in the District Court showed sufficient reasons for his absence in that Court on the date in question. That being so, (the fact was scarcely disputed at the argument of the appeal), the proper course for the learned Divisional Judge to have taken was to set aside the decree, and remand the case for hearing and decision upon the merits. The case of *Jethalal Gridhar* v. *Varajlal Bhaishankar* (2), is clear upon the point, as also is the case of *Sarada Sundari Dassya* v. *Gangahari Saha* (3). In not setting aside the decree and passing an order, as though he were acting under the provisions of O. XLI, r. 27, Civil Procedure Code, the learned Divisional Judge

(1) 30 Ind. Cas. 402; 38 M. 414.
(2) 63 Ind. Cas. 478; 46 B. 184; 23 Bom. L. R.769; (1922) A. I. R. (B.) 267.
(3) 52 Ind. Cas. 801; 46 C. 738.

acted with material irregularity and without jurisdiction, and, therefore, interference under section 115, Civil Procedure Code, is warranted.

The decisions of the Allahabad High Court in the cases of *Gokul Prasad Har Prasad* v. *Ram Kumar* (4), and *Kulsum-un-Nissa* v. *Ram Prasad* (5), are not parallel, as *there* the decrees of the Trial Court had been set aside, and it is not necessary, therefore, to discuss the finding of that Court that O. XLI, r. 23, Civil Procedure Code, should be given as wide a meaning as possible in order to permit of a right of appeal in cases of remand, though this finding is not entirely consistent with the wording and spirit of O. XLI, r. 23, Civil Procedure Code.

The result is that the order of the lower Appellate Court is set saide, and the case is remanded to the lower Appellate Court for decision according to law. The costs of this application will be borne by respondent, with Advocate's fees four gold mohurs.

K. S. D. *Revision allowed.*

(4) 64 Ind. Cas. 878; 44 A. 176; 19 A. L. J. 971; (1922) A. I. R. (A) 254.

(5) 67 Ind. Cas. 713; 44 A. 492; 20 A. L. J. 321; (1922) A. I. R. (A) 226; 411 P. L. R. (A) 168.

LAHORE HIGH COURT.

SECOND MISCELLANEOUS CIVIL APPEAL No. 2385 OF 1923

April 16, 1924.

Present:—Mr. Justice Martineau.

BHARAT SINGH—DEFENDANT—APPELLANT

versus

SHAFI MUHAMMAD AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11 Expl. VI —Res judicata—*Suit by reversioner to contest alienation, dismissal of, effect of.*

A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners, and all the reversioners are bound by the decision given in the suit.

Venkatanarayana Pillay v. *Subbammal*, 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125 (P. C.); *Janaki Ammal* v. *Narayanasami Aiyar*, 37 Ind. Cas. 167; 39 M. 634; 31 M. L. J. 225; 20 M. L. T. 168; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. C.); *Challagundla Varamma* v. *Madala Gopaladasayya*, 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461 (F. B.), relied on.

Appeal against the decision of the District Judge, Karnal, dated the 11th August 1923.

Mr. *Shamair Chand*, for the Appellant.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—One Faiz Ali sued for a declaration that a sale by his collateral, Nawab Ali, should not affect his reversionary rights. The suit was dismissed on the ground that the property sold was not proved to be ancestral, and Faiz Ali's appeal was dismissed on the same ground. A similar suit has now been brought by other collaterals, who were *pro forma* defendants in the former case. The Sub. Judge dismissed the suit, holding that it was barred by the rule of *res judicata*. On appeal the District Judge held that the suit was not barred, because two of the present plaintiffs were minors at the time of the former suit and although they were represented in the first Court by the Civil Nazir, who was appointed their guardian *ad litem*, they were not represented at the hearing of the appeal in that case. He, therefore, remanded the case to the Trial Court and the present appeal has been filed from the order of remand.

The learned District Judge's decision must be reversed. A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners: see *Venkatanarayana Pillay* v. *Subbammal* (1), *Janaki Ammal* v. *Narayanasami Aiyar* (2), *and Challagundla*

(1) 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125 (P. C.).

(2) 37 Ind. Cas. 161; 39 M. 634; 31 M. L. J. 225; 20 M. L. T. 168; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207. (P. C.).

Varamma v. *Madala Gopaladassyya* (3), and all the reversioners are bound by the decision given in the case, Explanation VI to section 11 of the Civil Procedure Code being applicable. There is no question of any negligence on the part of the guardian of the minors in the appeal in the former case, as the minors were purely formal respondents and the contest was only between Faiz Ali and the vendee.

I accordingly accept the appeal, set aside the order of the District Judge, and restore the decree of the Trial Court dismissing the suit. The plaintiffs-respondents will pay the appellant's costs in this Court and the lower Appellate Court, and costs in the Trial Court will be borne by the parties incurring them, as directed by that Court.

Z. K. *Order set aside.*

(3) 46 Ind. Cas. 202 ; 41 M. 659 ; 35 M. L. J. 57 ; 24 M. L. T. 115 ; 8 L. W. 62 ; (1918) M. W. N. 461 (F. B.).

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 24 OF 1923.

August 6, 1923.

Present : –Mr. Justice May Oung.

M. P. L. M. P. CHETTY—APPELLANT
versus
MA NGWE SIN—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Gift of immoveable property—Deed of gift not registered—Donee in possession—Donor, heirs of, whether can claim possession—Equitable relief.

PS and his wife *ML* made a gift of certain lands to their grandchild *MN* a minor. Mutation was accordingly effected and the land stood in the name of *MN* on the death of *PS* his son *PS* (the father of the donee) who was managing the estate on behalf of his mother, acting in collusion with the plaintiff, a money-lender, fraudulently induced the donee to execute a deed of sale of the lands in suit on a misrepresentation that it was only an instrument of exchange. The fraud was, however, discovered and the donee refused to subscribe to the registration of the deed. Thereupon the plaintiff sued to recover possession together with mesne profits:

Held, that the donee being in possession neither the donors nor any person claiming through them could dispute her right to the possession of land and it would be most unjust and inequitable if they could be allowed to do so.

The Transfer of Property Act was enacted in order to prevent fraud and deception, and it is founded on the highest principles of justice, equity and good conscience.

Appeal against the decree of the Divisional Court, Hanthawaddy, in Civil Appeal No. 62 of 1922.

Mr. *Hay*, for the Appellant.

Mr. *Villa*, for the Respondent.

JUDGMENT.—In 1913, Po Shwe Hman and his wife, Ma Le Ywe, reported to the Revenue Authorities that they had made an outright gift of two pieces of paddy land belonging to them to their grandchild, Ma Ngwe Sin (respondent), then a minor, aged 11 years. Mutation of names was accordingly effected and the lands have stood in the names of Ma Ngwe Sin to the present day. In 1921, Po Shwe Hman being dead, Maung Ba Shwe, his only son by Ma Le Ywe and father of the respondent, was managing his aged mother's estate. On the 2nd May of that year the appellant, a money-lender, to whom Ba Shwe was indebted, acting in collusion with his debtor, fraudulently induced the respondent to execute a deed of sale of the lands in question on a misrepresentation that it was an instrument of exchange whereby she would obtain certain lands in lieu of the lands which stood in her name. She, however, discovered the fraud in time and refused to subscribe to the registration of the deed. The appellant made a fruitless attempt to gain possession of the lands and in December instituted the present suit, basing his claim on the deed and praying for possession, with mesne profits. The suit was dismissed and on appeal was unsuccessful. Hence this second appeal.

The facts found by the Courts below can no longer be contested, but it is urged, first, that the sale by Ba Shwe, the *orasa* son, with the concurrence of his mother, Ma Le Ywe, gave appellant a good title ; secondly, that since

respondent had no title (the gift to her not being evidenced by registered deed), she could not resist the sale.

Ma Le Ywe's alleged concurrence is by no means clear. Specifically asked, she says : "If the Chetty asked me to sign the sale-deed executed by Ngwe Sin and Ba Shwe, I would not sign it because I do not like to be indebted."

The claim based on the right of Ba Shwe as an *orasa* was an after-thought raised for the first time in appeal. Ma Le Ywe's evidence shows that her son has been enjoying a large share in the estate and it is not improbable that he has exhausted his quarter share ; in any case, no evidence was offered specifically on this point.

The main point in the case is the deliberate act of the old couple in 1913. They clearly professed to divest themselves of the ownership of these lands in favour of a minor, who was unable to protect her interests by perfecting her title. That minor has now grown up and is still in possession ; she is not suing but is merely resisting an attempt to deprive her of that possession. Can the alienors or any person or persons claiming through them be now heard to dispute her right to such possession? I consider it would be most unjust and inequitable to allow such a contention. When, further, it is found that a fraud was practised on her, the position becomes worse.

The Transfer of Property Act was enacted in order to prevent fraud and deception, and it is founded on the highest principles of justice, equity and good conscience.

Taking the peculiar circumstances of this case into consideration, I must hold that it is not open to the appellant to question the respondent's right to retain possession of the lands, This appeal is, therefore, dismissed with costs.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 204 OF 1921.

November 2, 1922.

Present :—Mr. Justice Stuart.

THE HON'BLE RAI BAHADUR PANDIT SADANAND PANDEY—PLAINTIFF —APPELLANT

versus

SHEIKH TUFAIL AHMAD AND ANOTHER —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Mortgagee decree-holder purchasing property—Suit for possession of property purchased—Question relating to satisfaction of decree—Suit whether barred.

Z hypothecated certain property to *T* and *M* by way of a simple mortgage ; subsequently plaintiff purchased certain property which included a portion of the mortgaged property. *T* and *M* obtained a decree on foot of their mortgage and purchased what purported to be hypothecated property in execution thereof. Plaintiff was a party both to the suit and the execution proceedings. *T* and *M* then took possession of a certain share on a certain *mahal* on the authority of their sale certificate. Plaintiff, therefore, sued for a declaration that only a small share of the *mahal* was mortgaged and that he was entitled to possession of the remainder:

Held, that the question whether the mortgagor had mortgaged more than he had a right to mortgage was a question relating to the executor, discharge and satisfaction of the decree, and as such could only be determined by the Court executing the decree, and that, therefore, the plaintiff's suit was barred by section 47 of the Civil Procedure Code.

Bhagwati v. *Banwari Lal*, 1 Ind. Cas 416; 31 A. 82; 5 M. L. T. 185; 6 A. L. J. 71 (F. B.), distinguished.

Second appeal against the decree of the District Judge, Ghazipur, dated the 13th August 1920.

Dr. *S. N Sen* and Mr. *Durga Prasad*, for the Appellant.

Mr. *Ikbal Ahmad*, for the Respondents

JUDGMENT.—The facts of the suit out of which the present appeal arises, in so far as it is necessary to state them, are these :— A certain Zahurul Hasan executed a deed of simple mortgage on the 15th July 1895, in favour of Tufail Ahmad and Muhammad Wasi by which he purported to hypothecate certain

property. The plaintiff, the Hon'ble Rai Bahadur Pandit Sadanand Pandey, purchased later certain property which included a portion (at any rate) of the property so hypothecated, from the brother of Zahural Hasan. Tufail Ahmed and Muhammad Wasi instituted in 1911 a suit on the mortgage of 1895. In that suit they made the plaintiff a party. They obtained a final decree on the 20th September 1913. In execution of that decree what purported to be the property hypothecated was brought to sale and was sold on the 20th December 1916 to Tufail Ahmad and Muhammad Wasi. The plaintiff was a party to the suit and to the execution proceedings. On the 9th December 1917, Tufail Ahmed and Muhammad Wasi, on the authority of their sale certificate, took possession of a 2-anna 2-pie share in a certain *mahal*. The plaintiff then instituted the suit, out of which this present appeal has arisen, for a declaration that the property in that *mahal* originally hypothecated by the deed of 1895 amounted only to a small share thereof, and that he, the plaintiff, was entitled to the possession of the remainder. He also sued for mesne profits. The Additional Subordinate Judge decreed his suit. The learned District Judge, on appeal, partially decreed the suit holding, that a portion was barred by section 47. The main point upon which the plaintiff comes here in second appeal is that section 47 of the Code of Civil Procedure does not bar the present suit. In supporting the appeal the appellant's learned Counsel, Dr. Sen, urged mainly that under the authority of the Full Bench decision reported in *Bhagwati* v. *Banwari Lal* (1), Tufail Ahmed and Muhammad Wasi must be considered, since their purchase, as auction-purchasers, and, as such, not parties to the suit in which the decree was passed or their representatives, and that the questions before the Courts in this present suit were not questions relating to the execution, discharge, or satisfaction of the decree I do not find that the Full Bench decision exactly covers the point before me. It is necessary to look very closely at the result of that decision. It was a decision by a bare majority. In so far as the point before the Full Bench was concerned, the decision is clear enough, but how far that decision can be utilised to support a broad rule of law, is not so clear. The point in that appeal was this : A decree-holder in a suit on a mortgage herself purchased the mortgaged property The judgment-debtors refused to give up possession. She instituted a regular suit against them. Stanley, C. J., and Knox, J., decided that such a suit was barred under the provisions of old section 244. Banerji, J , Aikman, J., and Griffin, J., decided that such a suit was not barred. The views of the majority of course prevailed. But it is to be noted that the question there was in respect of something which had arisen after the sale. What is the point in dispute there? It is this : What property could be sold under the mortgage-decree ? That question arose before the sale became effective What the plaintiff now asserts is that Tufail Ahmad and Muhammad Wasi had obtained a mortgage of property, a large portion of which the mortgagor had no right to mortgage ; that he was the vendee of the property which the mortgagor had the right to mortgage and in addition that he was the owner of certain other property which the mortgagor had no right to mortgage but which had been incorrectly recorded as transferred by the mortgage. During the suit and the execution proceedings, the plaintiff was the person most directly interested in respect of the property which the mortgagor had the right to mortgage. He had the right of equity of redemption (which he could or could not exercise, as he desired and which, as a matter of fact, he did not exercise) and he was a party to the suit in which the decree was passed ; and up till the confirmation of the sale, there could be no question as to the mortgagees being considered to have lost their title as mortgagees and acquired the title of auction-purchasers. One question at the time of execution was the question which arises in the present suit. Had the mortgagor mortgaged more than he had a right to mortgage ? And the only person interested in asserting that he had mortgaged more than he had a right to mortgage, was the present plaintiff. The question was thus, in my opinion, a question relating to the execution, discharge and satisfaction of the decree and as such could only be determined by the Court

(1) 1 Ind. Cas. 416 ; 31 A. 82 ; 5 M. L. T. 185 ; 6 A. L. J. 71 (F.B.).

executing the decree and not by a separate suit The learned District Judge thus, in my opinion, was right in holding that the suit was barred by section 47.

There remains the question of the cross-objections put forward by the defendants. Their case is that section 47 applies. I have already dealt with that point. But they go on further to question the decision of the learnend District Judge which is to the effect that a portion of the property claimed by the plaintiff was not covered by the execution proceedings and the sale certificate. The plaintiff-appellant contends that the cross-objections endeavour to controvert a finding of fact. On reading the judgment I am of opinion that the appellant's objection must prevail. The finding is a finding of fact. I, therefore, dismiss the appeal and dismiss the cross-objections. The appellant will pay his own costs of the appeal and those of the respondents including fees on the higher scale. The respondents will pay their own costs of the cross-objections and those of the plaintiff-appellant.

K. S. D. *Appeal dismissed.*
Cross-objections dismissed.

LAHORE HIGH COURT.

CIVIL REVISION NO. 291 OF 1921.

April 28, 1924.

Present :—Mr. Justice Raoof and
Mr. Justice Harrison.

HAR PHUL—DEFENDANT—PETITIONER
versus
BHAGMAL—PLAINTIFF—RESPONDENT.

Punjab Courts Act (IV of 1919), ss. 41 (c), 44—Appeal, second—Custom, question of—Certificate, refusal to grant—Procedure.

One of the questions raised in the lower Appellate Court was whether certain property would revert to a certain line by the law of reversion in accordance with custom, and the lower Appellate Court found that such a right of reversion did exist. The aggrieved party applied for a certificate to enable them to file a second appeal, but their applicatfon was rejected on the ground that no question of custom was involved. On second appeal:

Held (1) that a question of custom was involved in the case;

(2) that the case must be remanded to the lower Appellate Court to re-consider the question whether it was prepared to grant a certificate.

Sarup Singh v. *Jawabhri*, 44 Ind. Cas. 732; 8 P. R. 1918; *Nathu* v. *Batan Singh*, 67 Ind. Cas. 759; 4 L. 102, followed.

Revision against the decision of the District Judge, Karnal, dated the 19th March 1921.

Lala *Jagan Nath*, for the Appellant.

Messrs. *Shamair Chand* and *Sagar Chand*, for the Respondent.

JUDGMENT.—One of the questions raised in this case before the Court below was whether, upon the extinction of the line of Sahib Singh, the property would revert by law of reversion in accordance with custom to the descendants of Bhai Ram. The learned Judge of the Court below has found that such a right of reversion did exist. The defeated defendants applied for a certificate to enable them to file a second appeal The learned District Judge rejected the application by the following order.—

In my opinion, no question of custom is involved and I regret that I cannot grant a certificate."

In our opinion a question is certainly involved, and we adopt the procedure adopted in *Nathu* v. *Batan Singh* (1) and *Sarup Singh* v. *Jawahri* (2) and send the case back to the learned District Judge for a re-consideration of the question whether he is now prepared to grant the certificate. The second appeal may be put up again after the District Judge has disposed of the application for certificate.

Z. K. *Case remitted.*

(1) 67 Ind. Cas. 759 ; 4 L. 102.
(2) 44 Ind. Cas. 732 ; 18 P. R. 1918.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 179 OF 1921.

August 21, 1922.

Present:—Mr. Justice Shah and Mr. Justice Crump.

GANDHI VADILAL CHHAGANLAL—APPLICANT—APPELLANT

versus

GANDHI MANAKLAL CHHAGANLAL—OPPONENT—RESPONDENT.

Execution of decree—Decree based on award—Execution, whether can be refused on ground of non-payment of Court-fees—Court-fees, whether payable.

Where a decree has been properly drawn up on an award, the executing Court cannot refuse to execute it on the ground that Court-fees have not been paid on the decree.

Nawab Mir Sadruddin v. *Nawab Nuruddin*, 29 B. 79; 6 Bom. L. R. 894, followed.

Quære:—Whether any Court-fees are payable on a decree based on an award.

Appeal against the decision of the Sub-Judge, Nadiad, in *Darkhast* No. 239 of 1920.

Mr. *M. H. Metha*, for the Appellant.

Mr. *D. G. Dalvi*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. Defendant No. 2 filed a *darkhast* in the Court of the First class Sub-Judge at Nadiad to recover Rs. 1,157-14-0 payable to him under the decree in Suit No. 753 of 1915. The learned First class Subordinate Judge has dismissed the application for execution on the ground that there is no decree, apparently because the necessary Court fees had not been paid. It does not appear from the order made by the learned Judge as to how the payment of the Court-fees under the circumstances of this case was necessary, nor does it appear why this decree, which in form is a complete decree, should not be treated as a decree capable of execution. Apparently, there is no provision with regard to the payment of Court-fees in respect of the sum in question in the decree: and on the facts, so far as they have been elicited in the case and the arguments, it is by no means made clear to us as to whether any Court-fees would be

payable at all in respect of this sum. In the absence of further information as to the circumstances under which the decree on the award came to be passed, we do not desire to express any opinion as to whether at the time when the decree was passed an order could have been made for the payment of Court-fees before execution could be taken out by defendant No. 2. The decree has been drawn up, and we see no reason whatever to hold that it is not a proper decree. It seems to us that defendant No. 2 is admitted to the execution thereof. We do not think that for such a plain position any authority is needed, but we may refer to the decision in *Nawab Mir Sadrudin* v. *Nawab Nurudin* (1) which puts the question beyond doubt. We allow the appeal, set aside the order made by the lower Court and remit the *darkhast* to that Court in order that the decree may be executed in accordance with law. The appellant is entitled to the costs of this appeal. The costs in the lower Court will be costs in the *darkhast*.

Z. K. *Appeal allowed.*

(1) 29 B. 79; 6 Bom. L. R. 894.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 67 OF 1923.

June 6, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Rankin.

IBRAHIM MALLICK—APPELLANT

versus

LALIT MOHAN ROY—RESPONDENT.

Contract Act (IX of 1872), s. 25—Limitation Act (IX of 1908), s. 19—Decree—Verbal contract to pay amount—Contract, whether enforceable.

Where a judgment-debtor, in consideration of the decree-holder not enforcing the decree, verbally promises to pay the decretal amount at some future date, the contract is valid and enforceable in law, even though the decree has by that time become time-barred.

Heera Lall v. *Dhunput Singh*, 4 C. 500; 3 C. L. R. 554; 2 Ind. Dec. (N. S.) 317, followed.

IBRAHIM MALLICK *v.* LALIT MOHAN ROY

The fact that an acknowledgment of a debt under section 19 of the Limitation Act is required to be in writing, does not in any way affect the validity of a verbal contract such as the above, which is a new promise for a new consideration and is a cause of action in itself.

All that is required by section 19 of of the Limitation Act is an acknowledgment of an existing debt. A new consideration is not required nor is an actual promise to pay.

Civil Rule No. 67 of 1923, against the order of the Munsif, Burdwan, dated the 16th January 1923.

Moulvi *A. S. M. Akram*, for the Appellant.

Babu *Panchanan Chowdhury*, for the Respondent.

JUDGMENT.—This is an application on the part of the defendant under section 25 of the Provincial Small Cause Courts Act. It appears that the plaintiffs, on the 28th February 1918, obtained a judgment against the defendant and certain co-sharers of the defendant for rent. On the 11th February 1920, according to the plaintiff's case, the plaintiffs entered into a contract with the defendant that, in consideration that the plaintiffs would not seek to enforce their judgment, the defendant would pay the amount thereof with interest at 12 per cent. per annum in April 1921. By April 1921, the original judgment would become and has become time-barred and execution proceedings could no longer be taken upon it. The present suit was brought against the defendant on the 31st March 1922. The plaintiffs have proved the contract alleged and the present application is based upon the contention that such a contract as is alleged and proved is not valid in law. It is pointed out that the contract sued upon is a verbal contract and it is said that, as section 19 of the Limitation Act requires the acknowledgment to be in writing, it stands to reason that such a verbal contract as here alleged cannot be enforceable. That contention seems to be unsound. All that is required by section 19 of the Limitation Act is the acknowledgment of an existing debt. A new consideration is not required and an actual promise to pay is not required. Acknowledgment alone is required. That must be in writing and signed by the defendant and the original debt can be enforced. But a new promise for a new consideration is a cause of action in itself and is, in no way, obnoxious to the Limitation Act: see per Mitter, J., in *Dukhi Sahu* v. *Mahomed Bikhu* (1). Having regard to the time at which it was to take effect, the defendant's promise, as pleaded, may very well have been intended as a fresh bargain and not as a mere giving of time by plaintiffs for payment of the old debt. The learned Judge has found a contract and there is nothing to show that he is wrong.

The present case may be viewed in the light of the 3rd clause of section 25 of the Contract Act, a clause which, as has been held in most of the Courts in India, covers the case of a judgment-debt. Section 25 is directed to stating by way of exception that in certain cases an agreement although without consideration is not void. One of those cases is a case of promise to pay a barred debt if that promise is made in writing and is signed by the party to be charged. In such a case as that although the judgment-debt is barred, the promise to pay it, although there is no new consideration, would be good if in writing and signed. The present case has these differences that the judgment-debt was not barred at the time; that there was good consideration; but the promise is not in writing or signed. On principle, where a person has given consideration for the purpose of obtaining a fresh promise to be acted on as in this case at a time, namely, April 1921, when all remedy under the previous judgment would be barred, such a promise seems valid and enforceable. The case of *Heera Lall* v. *Dhunput Singh* (2) especially the first branch of the decision, is in the plaintiffs' favour.

No doubt, there is room, with the assistance of a certain amount of perjury, for driving a gap through the provisions of the Law of Limitation by setting up a false verbal agreement. At the same time, the Courts have always to distinguish between true and false evidence and this is, by no means, the only kind of case in which they are likely to be

(1) 10 C. 284 at p. 290; 13 C. L. R. 445; 5 Ind. Dec. (N. S.) 190.

(2) 4 C. 500; 3 C. L. R. 554; 2 Ind. Dec. (N. S) 317.

called upon to do so. We cannot satisfy ourselves that there is any objection in law to the plaintiffs' case as pleaded and as found.

The only other observation which seems necessary is this, that this suit is no wise a suit upon a judgment nor is it a proceeding under a judgment to enforce a judgment. Indeed, the whole logic of the matter is that the judgment was superseded by the new agreement. The suit is upon a contract made no doubt with reference to an amount found due by the plaintiffs' judgment. But it is a suit on a simple contract. No exception can be taken to the frame of the suit. Under these circumstances, this Rule must be discharged with costs.

N. H. *Rule discharged.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 231 OF 1921.

January 16, 1922.

Present :—Mr. Justice Macleod.

NANCHI KOM KHATAL MD. GHORI SAUDAGAOR—PLAINTIFF—APPELLANT
versus
SHITITI KULSAMBI KOM SAYAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee put in possession of area larger than that mortgaged—Redemption—Mortgagor, whether can recover excess area.

Where on a partition between a mortgagor and his co-sharers a mortgagee is by mistake put in possession of a larger area of land than was originally mortgaged to him, the mortgagor is entitled, on redemption, to the whole of the area of which the mortgagee was put in possession.

Appeal against the decision of the District Judge, Belgaum, in A. No. 162 of 1920.

Mr. *J. C. Rale*, for the Appellant.

Mr. *S. G. Desai*, for the Respondents.

JUDGMENT.—Strictly speaking, the finding of the lower Court that the plaintiff was only entitled to redeem 2 acres and 34 *gunthas* area out of Survey No. 1075, as mentioned in the mortgage of 1901 to the defendant, was correct. But it cannot be denied that the plaintiff was entitled on a partition between himself and the other sharers to 4 acres and 7 *gunthas* out of Survey No. 1075 and in 1917 she seems to have put the defendants into possession as mortgagees of more than was specifically mortgaged by the deed of 1901 with the result that the defendants had been in possession of that extra land not as if it were an accretion to theproperty in the original mortgage but as a substitution through mistake: obviously, the plaintiff in a suit for possession would be entitled to recover that property. There is no reason why in second appeal we should not do justice by directing that, on the plaintiff's paying the decretal amount within six months from the date the record goes back to the lower Court, defendant No. 1, should give back possession not only of 2-34 acres but also the remaining portion of the land making a total of 4-7 acres to which the plaintiff became entitled on partition.

The appellant to pay costs of the Respondents throughout.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2204 OF 1921.

June 14, 1923.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

SUKUR MAHOMED—APPELLANT
versus
ASMOT MANDAL—RESPONDENT.

Muhammadan Law—Inheritance—Representation, doctrine of, whether applicable.

Under the Muhammadan Law there is no representation of the family as under the Hindu Law, by one or more members of it so that the act of the

SUKUR MAHOMED *v.* ASMOT MANDAL

karta or the head binds the other members of the family. As soon as succession opens under th at law, each heir gets his specified share in the inheritance.

Abdul Majeeth Khan Sahib v. *Krishnamachariar*, 40 Ind. Cas. 210 ; 40 M. 243; 32 M. L. J. 195 ; (1917) M. W. N. 346 ; 5 L. W. 767; *Khiarajmal* v. *Daim*, 32 C. 296 ; 32 I. A. 23 ; 1 C. L. J. 584 ; 8 Sar. P. C. J. 734 ; 9 C. W. N. 201 ; 2 A. L. J. 71 ; 7 Bom. L. R. 1 (P. C.), followed.

N died leaving three sons a widow and three daughters as his heirs. The property left by him was sold in execution of a decree obtained in a suit brought on a mortgage executed by him. Thereafter two of his sons sold a portion of the land to the plaintiff and a portion to another person and with the money thus realised they paid off the mortgage-decree and got back the property. The defendants-purchasers from the other heirs of *N* dispossessed the plaintiff whereupon he brought this suit for recovery of possession :

Held, that the sale to the plaintiff was not binding on the other heirs of *N* and he was, therefore, entitled only to the share of his vendors.

Appeal against the decree of the Offg. Subordinate Judge, Bogra, dated the 10th August 1921, modifying the decree of the Munsif, dated the 16th June 1920.

Babu *Manindranath Roy*, for the Appellant.

Babu *Atul Chandra Gupta*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The facts giving rise to the suit from which this appeal arises are these. One Naibulla was the owner of a *jote* of Rs. 4-6. He died leaving three sons, Bisha, Bahulla and Abdul, and a widow, the defendant No. 5 in the present case, and three daughters, defendants Nos 6, 7 and 8, as his heirs. There was a mortgage of this *jote* ffected by Naibulla. A suit was brought upon the mortgage and a decree obtained and the property was sold in execution of that decree. The plaintiff's case is that thereafter two of the sons of Naibulla, namely, Bisha and Bahulla, who were in possession of the property left by Naibullah sold two *pakhis* of land to them for Rs. 100 and some other land to another person and with the money thus realised they paid off the mortgage-decree and got back the property, The plaintiff further says that he was in possession of the two *pakhis* purchased by him from October 30th, 1900, the date of his purchase, till he was dispossessed from a moiety of the said land by the defendants Nos. 1, 2 and 3, who were the purchasers from defendants Nos. 4 to 8, that is, the heirs of Naibulla except the plaintiff's vendors. The case before the Court was that these two sons of Naibulla, namely, Bisha and Bahulla, were in possessionof the entire property and they sold a portion of it in order to pay off the ancestral debt, and, therefore, the sale was binding upon all the heirs of Naibulla, even though they were not parties to the sale. The plaintiff further claimed title to the land in suit by adverse possession.

The learned Munsif gave effect to the plaintiff's contentions and gave him a decree for the entire land in suit which is one *pakhi* out of the two *pakhis* purchased by him. On appeal, the learned Subordinate Judge held that the sale by Bisha and Bahulla was not binding upon the other heirs of Naibulla as they were not parties to the transaction—even though the sale was made for payment of ancestral debts. He further found that it was not a case of representation, namely, that Bisha and Bahulla represented the other heirs of Naibulla in the transaction, and he did not distinctly find that these two persons were in possession of the entire property on behalf of the co-sharers. On the findings arrived at by the learned Judge, I am of opinion, that the conclusion he has drawn from the facts is correct and in accordance with the principles of the Muhammadan law. In that system of law, there is no representation of the family, as under the Hindu law, by one or more members of it so that the act of the *karta* or the head binds the other members of the family. As soon as succession opens, under that law, each heir gets his specified share in the inheritance. The law upon this subject has been very elaborately discussed in the Full Bench case of *Abdul Majeeth Khan Sahib* v. *Krisknamachariar* (1). It has been held in that case that the act of one of the heirs meddling with the property of a deceased Muhammadan is not binding upon any of the other heirs. Reference in this connection is made to the case of *Khiarajmal* v. *Daim* (2), where it has been

(1) 40 Ind. Cas. 210; 40. M 243 ; 32 M. L. J. 195; (1917) M. W. N. 346 ; 5 L. W. 767.

(2) 32 C. 296 ; 32 I. A. 23 ; 1 C. L. J. 584 ; 8 Sar. P. C. J. 734 ; 9 C. W. N. 201 ; 2 A. L. J. 71 ; 7 Bom. L. R. 1 (P. C.).

SUKUR MAHOMED *v.* ASMOT MANDAL

laid down that the sale by one of the heirs of a Muhammadan for discharging the debt due by the ancestor would *prima facie* pass only his share in the property. Reliance has been placed before us on certain decisions of this Court. Without examining now the view expressed in those cases, which may require reconsideration when a proper occasion arises, it seems to me that these cases proceeded upon the assumed representation by one of the heirs of a deceased Muhammadan in alienating the ancestral property for the benefit of all the other heirs. But here the learned Judge's finding on this point is in these words : "In the present case, it was not even alleged that Bahulla and Bisha represented the other coheirs." It is further found by the learned Judge that, at the time of this sale, three of the heirs of Naibulla, namely, his son Abdul and two of his daughters, were minors and, as being minors, they could not give their consent express or tacit, it cannot be said that the vendors of the plaintiff represented all the cosharers in the property. On the findings come to by the learned Judge, it appears to me that his decision on this point is correct.

The next point taken on behalf of the plaintiff-appellant is that the learned Judge ought to have granted the plaintiff some relief against the defendants Nos. 1, 2 and 3 on equitable considerations. No relief has been asked for upon any equitable ground by the plaintiff, nor do I see on what consideration the plaintiff is entitled to any relief against the defendants Nos. 1, 2 and 3, who are as much *bona fide* purchasersfr om the other heirs of Naibulla as the plaintiff is from his vendors. Besides, any equitable relief that the plaintiff may claim must be against the other defendants, namely, the other heirs of Naibulla who have not parted with possession of the property and the claim against them cannot but be of a different character and must be asked for in a differently constituted suit.

The third point urged by the learned Vakil who appears for the appellant is that the finding of the Court of Appeal below on the question of adverse possession is not distinct. No doubt, there is great force in this contention. The learned Munsif has found upon evidence that the plaintiff has succeeded in proving adverse possession of the property for more than twelve years. The plaintiff purchased the property in 1900 and, according to him, he was in undisputed possession of it till June 1916, when he was dispossessed by the defendants Nos. 1, 2 and 3. It appears that in 1911, the plaintiff prosecuted the defendants Nos. 1, 2 and 3 for cutting or taking away the crops grown on the land in suit and they were convicted but acquitted on appeal. We do not know whether the act of the defendants was of such a character as to cause total dispossession of the plaintiff or whether it was only a case of theft of crops. The learned Judge has not come to any distinct finding on this point. Moreover, he has misread the evidence in the case. In many places of his judgment on this part of the case, he has transposed the word " plaintiff " for "defendants:" where it should have been written that the defendants were convicted, he has mentioned the conviction of the plaintiff. This confusion, it appears, led the learned Judge to find that the plaintiff failed to prove adverse possession. It is, therefore, necessary that thewhole evidence upon this point should be carefully scrutinized and a correct decision arrived at.

The learned Vakil for the respondent has raised two questions by way of cross-objection. The first is that the decree passed by the learned Subordinate Juge declaring the plaintiff's 6 annas and odd share and awarding him joint *khas* possession with the defendants Nos. 1, 2 and 3 of the land in dispute is wrong, because, on the plaintiff's own case, he is in possession of a part of the land which he has purchased. The learned Vakil for the appellant, however, says that the one *pakhi* which is in the possession of the plaintiff was not purchased by the defendants and so his client is entitled to 6 annas odd share of the one *pakhi* which is now in the possession of the defendants Nos. 1, 2 and 3. This statement is contradicted by the other side and we are not in a position to say who is correct. As we intend that the case should be remitted to the lower Appellate Court for the determination of the question of adverse possession, we direct that this point be also considered by that Court.

The next objection taken by the respondent's Vakil is with regard to the order as to costs. The lower Appellate Court has directed both parties to bear their respective costs. No reason is assigned for this order. But there

may be some considerations which led the lower Appellate Court to pass an order of this kind. As the case is going back to the Court of Appeal below, the learned Judge will consider this question of costs also.

The result, therefore, is that the decree of the lower Appellate Court is set aside and the case is remitted to that Court for re-hearing in accordance with the observations made above. The learned Judge will come to a finding on the question whether the plaintiff has acquired any title to the land in suit by adverse possession. He will also consider whether the decree awarding possession to the plaintiff to the extent of 6 annas odd share jointly with the defendants Nos. 1, 2 and 3 is correct or ought to be modified. Further, the learned Judge will consider the question as to which party, if any, is entitled to the costs of the Courts below. His findings on the other points are affirmed. After coming to the proper findings on the points mentioned above, the learned Judge will finally dispose of the appeal in accordance with law. Costs of this appeal will abide the result.

Walmsley, J.—I agree.

K. S. D.

Appeal allowed ; *case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 550 OF 1922

August 8, 1922.

Present :—Mr. Justice Broadway.

MUGHLA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABHE RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings and proof—Possession, suit for—Mutual arrangement for purposes of cultivation, cancellation of.

Certain *shamilat* land was partitioned and the plot in dispute was allotted to the plaintiffs, and another plot was allotted to the defendants, but, as a matter of convenience, the defendants continued in cultivating possession of the former plot and the plaintiffs of the latter plot. At some time the defendants got their names recorded in the revenue papers as proprietors of the plot in dispute and subsequently ejected the plaintiffs from the plot of which they were in possession. The plaintiffs thereupon sued to recover possession of the plot in dispute :

Held, that the plaintiffs' suit was based not on an alleged exchange but on an arrangement which was convenient to both parties, and the arrangement having come to an end owing to the action of the defendants the plaintiffs were entitled to recover possession of the plot in dispute.

Appeal from the decree of the District Judge, Karnal, dated the 11th January 1922, reversing that of the Munsif, 1st class, Karnal, dated the 9th December 1921.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Sunder Das*, for the Respondents.

JUDGMENT.—In the suit giving rise to this appeal, the plaintiff sued for possession of 3 *bighas* 15 *biswas* of land. The averments in the plaint were (1) that this land was the property of Thulla Surta ; (2) that the plaintiff and defendant Kanaya were the proprietors of the said *Thulla* (Kanaya was a *pro forma* defendant); (3) that the defendants other than Kanaya who had been cultivating the land under the plaintiff had, unknown to the plaintiffs in 1908, got themselves entered as proprietors of it ; (4) that the plaintiff had been cultivating 4 *bighas* 19 *biswas* of land belonging to the defendants from which they had recently been ejected; (5) that it was only when they had been so ejected; that the plaintiff discovered that the defendants had got the entries made *qua* the land in suit, and as the defendants would not yield possession of it this suit had been instituted.

Kanaya admitted plaintiffs' claim and added that he had surrendered his rights in the *Thulla* to the plaintiff and had no further interest in the matter.

The other defendants contested the suit and, while admitting that the plaintiffs were the proprietors of *Thulla Surta*, alleged that the land in suit had never been made over to that *Thulla*, and that the proceedings in 1908 merely amounted to a rectification of the mutation register. The Trial Court decreed the plaintiffs' claim, holding that the land which had once been *shamilat deh* had, on partition, been allotted to *Thulla Surta*, and that the plaintiffs had been cultivating 4 *bighas* 19 *biswas* of the defendants' land, and the

latter had been cultivating the land in suit merely as a matter of convenience. The defendants appealed and the learned District Judge dismissed the plaintiffs' suit on the broad ground that the plaintiffs had failed to prove the exchange alleged. The plaintiffs have come up to this Court in second appeal through Mr. Shamair Chand and I have heard Mr. Sundar Das for the defendants-respondents. Is has been urged that the learned District Judge has entirely misunderstood the nature of the plaintiffs' case, and that no exchange had ever been set up by them. In this contention Mr. Shamair Chand is quite correct. What was apparently alleged was that the cultivation of the two plots of land had been the subject of an exchange as a matter of convenience, but neither side alleged or admitted that any exchange of proprietorship had been effected. It is true that in the mutation proceedings in 1908 an "exchange" is referred to, but the plaintiffs cannot be bound by those proceedings and the defendants allege that the reference was an error. The reference itself is vague inasmuch as no mention is made of the land for which the land in suit had been exchanged.

Up to 1908 the entries regarding this land showed the defendants in cultivating possession and in the proprietary column the entry was *Thulla Surta*. It seems that this land, as well as 4 *bighas* 19 *biswas* cultivated by the plaintiffs, formed a part of the village common land, and when this common land was partitioned according to *Thullas*, the land in suit was allotted to *Thulla Surta* and the other plot to *Thulla Kanoa*. The plaintiffs were in possession (cultivating) of the latter plot and the defendants were similarly in possession of the land in suit, and although the ownership was changed at partition the parties continued in possession of their respective plots. The learned District Judge, in thinking the plaintiffs set up an exchange, has made out a case never advanced by them, and his conclusions cannot, therefore, be regarded as binding. He also seems to have lost sight of the admitted fact that the plaintiffs are the proprietors of *Thulla Surta*.

In my opinion the decision of the Trial Court was correct and I accordingly accept this appeal and, setting aside the judgment of the lower Appellate Court, restore the decree passed by the Trial Court. The appellants will get their costs throughout.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 385 OF 1922.

February 7, 1924.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BABU SAMAR BAHADUR SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JIT LAL AND ANOTHER—PLAINTIFFS

AND

AHMAD ZAMAN KHAN—DEFENDANT—RESPONDENTS

Pre-emption—Exchange—Right, when can be exercised—Plaintiff what must prove—Wajib-ul-arz.

In a case where the plaintiff claims a right of pre-emption in respect of an exchange the question for consideration is whether the incidents of the particular custom set up cover an exchange.

Bhagwan Singh v. *Raj Kunwar*, 38 Ind. Cas. 157, followed.

The plaintiff in each case must prove not merely that some custom prevails but he must prove a custom under which he is entitled to claim pre-emption.

By an agreement some land situated in village *R* was given by one *A* in exchange for other land situated in another village given by one *S* with the object of constructing a road. Plaintiffs, as co-sharers in the village *R*, sought to pre-empt the land given by *A*. The *wajib-ul-arz* provided that any co-sharer wishing to sell or mortgage his property should first offer it to his co-sharers and only on their refusal to a stranger :

Held that the custom recorded in the *wajib-ul-arz* was not applicable to an exchange.

Niamat Bibi v. *Asmat Bibi*, 7 A. 626; A. W. N. (1885) 183; 4 Ind. Dec. (N. S.) 740; *Bhagwan Singh* v. *Kherag Singh*, 4 A. L. J. 756; A. W. N. (1907) 280, followed.

Daryao Singh v. *Jahan Singh*, 3 Ind. Cas. 903; 6 A. L. J. 735; 31 A. 539, distinguished.

Second appeal from the decree of the Judge of the Court of Small Causes, exercising the

powers of a Subordinate Judge, of Allahabad, dated the 21st December 1921.

Dr. *K. N. Katju*, for the Appellants.

Dr. *S. N. Sen*, Messrs. *Iqbal Ahmad* and *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—The question for consideration in this case is whether a right of pre-emption can be claimed in respect of an exchange. By an agreement, dated the 21st October 1919 some land situated in the village Ramnagar Gansiari was given by Ahmad Zaman Khan in exchange for other land situated in the village Balika Jalalpur given by Samar Bahadur Singh and Jaduraj Singh. The object of the latter in taking the former property in exchange was to construct a road running from their village through the former village The plaintiffs claim to be co-sharers of the village Ramnagar Gansiari and seek to pre-empt the land given by Ahmad Zaman Khan for the construction of the road. The *wajib ul-arz* of that village provides that any co-sharer wishing to sell or mortgage the whole or part of his property shall, on the receipt of the price offered by a stranger, transfer it first to co-sharers who are descended with him from a common stock and are closely related, then to the other co-sharers of the village, and, on their refusal, to a stranger.

The Courts below, relying on the decisions in *Niamat Bibi* v. *Asmat Bibi* (1) and *Bhagwan Singh* v. *Kherag Singh* (2), came to the conclusion that the custom recorded in the *wajib-ul-arz* was applicable to an exchange ; and they granted a decree for pre-emption subject to the payment of the value of the property mentioned in the deed of exchange An exchange implies an interchange of property with another, and, except in so far as the price may not be payable in money, the rights and obligations attaching to an exchange, are analogous to those of a sale. Section 120 of the Transfer of Property Act lays down that, save as provided in Chapter VI of that Act, each party to an exchange has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of the buyer as to that which he takes. But those are rights and liabilities, which are enforceable between the parties to the exchange *inter se*. Third persons cannot be substituted in the place of either of them, because they cannot give what does not belong to them. The intrinsic value of the property given in exchange, as distinguished from its market-value, would, moreover, vary according to the purpose or necessity for which the exchange was effected. The custom recorded in the *wajib-ul-arz* is in terms confined to a sale or mortgage ; and in either of those cases a money equivalent would be an adequate compensation to the party concerned. The price which a person receives for the property exchanged, is represented by the value of the property he gives and the convenience which he secures for himself. The latter cannot always be valued in money.

Indeed, as pointed out in *Bhagwan Singh* v. *Rajwanta Kunwar* (3) the question for consideration in such a case is whether the incidents of the particular custom set up cover an exchange. The plaintiff in each case must prove not merely that some custom prevails but he must prove a custom under which he is entitled to claim pre-emption. The language used in the *wajib-ul-arz* in the above case was closely approximate to the language used here.

In *Niamat Bibi* v. *Asmat Bibi* (1), the language used was much more general. The right of pre-emption was there allowed in the case of a transfer of any kind, whereas in the present case the right is allowed only in the case of a transfer by sale or mortgage.

In *Bhagwan Singh* v. *Kherag Singh* (2) the language used was not so general ; but the decision in that case must be deemed to be qualified by the latter decision in *Bhagwan Singh* v. *Rajwanta Kunwar* (3).

A reference has also been made to the decision in *Daryao Singh v. Jahan Singh* (4), but the language used in in the *wajib-ul-arz* in that case was similarly more general, and the decision arrived at on the construction of the *wajib-ul-arz* there relied upon cannot, therefore, apply to the facts established in the present appeal. This appeal must, therefore, be allowed and the claim of the plaintiffs dismissed with costs in all Courts.

K. S. D. *Appeal allowed.*

(1) 7 A. 626 ; A. W. N. (1885) 183 ; 4 Ind. Dec. (N.S.) 740.

(2) 4 A. L. J. 756 ; A. W. N. (1907) 280.

(3) 38 Ind. Cas. 157.

(4) 3 Ind. Cas. 903 ; 6 A. L. J. 735 ; 31 A. 589.

JAWAHARA *v.* DATA RAM

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 157 OF 1924.

April 16, 1924.

Present :—Mr. Justice LeRossignol.

JAWAHARA AND OTHERS—PLAINTIFFS —APPELLANTS

versus.

DATA RAM—DEFENDANTS—RESPONDENTS.

Hindu Law—Custom—Alienation by female—Reversioner, remote, whether can chtallenge.

Both under Hindu Law and under the Customary Law of the Punjab, a remote reversioner may maintain a suit to challenge an alienation made by a female holding a qualified estate, where the immediate reversioner is a female and is herself only the holder of a life estate

Rani Anand Kunwar v. *The Court of Wards on behalf of Chandra Shekhar*, 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shome L. R. 78; 4 Sar P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jacksons P. C. No. 63; 3 Ind. Dec. (N.S.) 495 (P.C.), distinguished.

The object of the rule is to permit the nearest male riversioner who has not colluded or otherwise disqualified himself from maintaining the suit to protect the estate.

A reversioner so remote that his chances of succession are speculative is not allowed to maintain the suit, but this does not apply where the only intervening reversioners are females who may or may not produce heirs to the estate.

Appeal against the decision of the District Judge, Karnal, dated the 26th November, 1923.

Mr. *Shamair Chand* for the Appellants.

Lala *Badri Das*, R. B. for the Respondent.

JUDGMENT.

This appeal arises out of a suit by remote reversioners for a declaration that their reversionary interest shall not be affected by a mortgage of land granted by two widows who hold only a qualified estate in the land. The Trial Court found that the mortgage was without necessity and decreed the plaintiffs' suit but the learned District Judge on appeal has dismissed the suit on the ground that the plaintiffs are not the presumptive heirs and, therefore, are not competent to maintain the suit.

The learned Judge has not decided whether the parties are governed by Hindu Law or by custom, but finds that their suit is unmaintainable both under Hindu Law and custom.

With regard to the position under the Hindu Law, the learned Judge has referred to the case of *Rani Anand Kunwar* v. *The Court of Wards on behalf of Chandra Shekhar* (1) but that case is distinguishable from the present inasmuch as a male heir intervened between the alienor and the plaintiff. In this case the presumptive heirs are females, namely, the daughters of the alienors, and the rule of Hindu Law, *vide* Mayne's Hindu Law, 8th Edition, paragraph 646, is that a more remote reversioner may maintain the suit when the immediate reversioner is herself only the holder of a life estate. This view has been held consistently by all the High Courts. The object of the rule clearly is to permit the nearest male reversioner who has not colluded or otherwise disqualified himself from maintaining the suit to protect the estate.

The principle underlying the Customary Law on the subject is the same. A reversioner so remote that his chances of succession are speculative is not allowed to maintain the suit, but this does not apply when the only intervening reversioners are females who may or may not produce heirs to the estate

For these reasons, the balance of authority, I hold, is in favour of maintainability of the suit by the plaintiffs without the necessity of setting forth in their plaint the grounds on which they might maintain the suit, although they were not the presumptive heirs. I accept the appeal, set aside the lower Court's decree and remand the case for decision on the merits. Stamp on appeal to be refunded and costs to follow the final event.

Z. K.

Doree set aside.

Case remeanded.

(1) 6 C. 764 ; 8 C. L. R. 381 ; 8 I. A. 14 ; 4 Shome L. R. 78 ; 4 Sar. P. C. J. 195 5 Ind. Jur. 161 ; Rafique and Jackson's P. C.No. 63 ; 3 Ind. Dec. (N. S.) 495 (P. C.)

PRIYA LAL *v.* BOHRA CHAMPA RAM

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 142 OF 1922.

December 5, 1922.

Present :—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

PRIYA LAL—PLAINTIFF—APPELLANT
versus
BOHRA CHAMPA RAM AND ANOTHER —DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 148 —*Transfer of Property Act* (*IV of* 1882), *s.* 75—*Prior and subsequent mortgagees*—*Property sold in execution of decree obtained by prior and subsequent mortgagees*—*Pusine mortgagee, position of Redemption, suit for, maintainability of*—*Limitation.*

Certain mortgaged property was sold in execution of a mortgage decree obtained by a puisne mortgagee to which the prior mortgagee was not a party and was purchased by the puisne mortgage. It was subsequently sold in execution of a mortgage decree obtained by the prior mortgagee to which the puisne mortgagee was not a party and was purchased by the prior mortgagee. In a suit by the representative of the puisne mortgagee to redeem the representative of the prior mortgagee :

Held, that the puisne mortgagee's right of redemption was still alive and the suit being one for redemption was governed by Article 148 of Schedule I to the Limitation Act.

Appeal against the decree of the District Judge, Agra, dated the 13th July 1921.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are as follows: —Daya Ram made a mortgage of two properties to Jia Lal (now represented by the defendants) on the 1st of October 1875. He made a second mortgage of one of the properties to Durga Prasad (now represented by the plaintiff) on the 8th September 1877 On the 28th of November 1878 Durga Prasad sued on his mortgage without impleading Jia Lal the prior mortgagee and obtained a decree for sale. In execution of this decree he purchased the property on the 20th of June 1879 and on the 29th of July 1891 he obtained formal possession.

On the 15th of March 1889 Jia Lal, the prior mortgagee, brought a suit on his mortgage but did not implead the puisne mortgagee Dugra Prasad in the suit. He obtained a decree and in execution of his decree purchased the property on the 20th of February 1891 and later on obtained possession. The position of affairs on that date was that the prior mortgagee had purchased the property without impleading the puisne mortgagee auction-purchaser and thus the rights of the puisne mortgagee Durga Prasad to redeem the prior mortgagee of Jia Lal remained unaffected. In other words, the title obtained by two auction-purchasers remained defective. Jia Lal was liable to be redeemed by Durga Prasad and Durga Prasad was under a liability to pay off Jia Lal before he could obtain an absolute title to the property.

On the 5th of June 1916 Durga Prasad made a gift of the property to Priya Lal, plaintiff, and on the 23rd of January 1919 Jia Lal's son Champa Ram sold the property to Babu Lal. The present suit was then brought by Priya Lal, the representative of the puisne mortgagee, to redeem the prior mortgage of 1875 against Babu Lal, the representative-in-interest from the prior mortgagee auction-purchaser. He further claimed mesne profits on the ground that the mortgage had been satisfied by the usufruct. The defence pleaded was that the plaintiff had no subsisting rights to possession. It was also contended that Durga Prasad had no right to sue without payment of the prior mortgage and, therefore, the decree of Durga Prasad was altogether null and void and the present suit was barred by time. They claimed the entire amount of the mortgage and interest and contended that the claim for mesne profits was improper. Babu Lal, defendant, further pleaded that he and his predecessor had been in adverse possession for more than twelve years' and the claim was barred by twelve years adverse possession. He denied the liability to pay mesne profits and contested the correctness of the amount claimed by the plaintiff.

The learned Subordinate Judge before whom the case came on for hearing decreed the plaintiff's claim for redemption on payment of the amount due but dismissed the claim for mesne profits. The defendant Babu Lal

went up in appeal and the learned District Judge has allowed the appeal and dismissed the plaintiff's claim as being barred by time.

The plaintiff comes here in second appeal and his first contention is that the suit is not barred by time because the plaintiff being no party to the suit by the prior mortgagee, the decree in that suit is not binding on him and his right to redeem the prior mortgage had not ceased to exist, and the relationship of a puisne mortgagee and a prior mortgagee still subsists between them and as such the plaintiff is entitled to redeem the prior mortgage and thus to remove the defect in his title to the property. This point has not been the subject of any direct decision, but on principle we think that the plaintiff is right. We have been referred to several cases in this connection but the case which seems to be most in point is the case of *Babu Lal* v. *Jalakia* (1). That was a converse case. In that case there was a contest between two auction-purchasers in execution of mortgage-decrees to none of which the other mortgagee was a party. The suit was by the purchaser in execution of the prior mortgage-decree to compel the defendant to redeem his prior mortgage and, in case of default by the defendant to do so, for possession of the property. The matter has been fully discussed in the judgments pronounced in that case and we cannot do better than to refer to the discussion of this question by Mr. Justice Lindsay at page 1156 of the report. "It seems clear to me that the rights of the parties are not to be determined solely upon a consideration of the rights which accrued to the first and second mortgagees under their respective mortgages. In each case there has been a decree on the mortgage followed by a sale of the property and in each case the parties have, by virtue of their respective purchases, obtained qualified titles to the property the nature of which must be examined for the purpose of awarding possession. It is, I think, impossible to ignore the fact that these sales have taken place, and to deal with the matter in issue as if they had not in fact occurred. The title of either party is immediately traceable to his purchase in execution and reference to the rights under the mortgages is only necessary for the purpose of ascertaining the equities existing between them; each has an imperfect title acquired by purchase and we have to determine which has the stronger equity in his favour. As for the title of the plaintiff it cannot, I think, be argued that she acquired nothing under her purchase. It will not, I imagine, be denied that had she joined the subsequent mortgagee as a defendant in her suit she would by her purchase have acquired an absolute title to the property including the right to possession. To what extent, then, is her title defective by reason of her omission to implead the puisne mortgagee? Only to the extent that her title as owner is qualified by right of redemption which was vested in the second mortgagee and which has now passed to the appellant as purchaser under the decree obtained on the second mortgage.

"That is the only right which the second mortgagee could have enforced against her as prior incumbrancer, for the right of the subsquent mortgagee to bring the equity of redemption to sale to satisfy his claim is a right which is exercised against the mortgagor only. The right of the first mortgagee to have the property sold is in no way affected by the second mortgagee's rights of sale. As between the first and second mortgagees (or their representatives) the only right of the latter is one of redemption.

"As for the title of the auction-purchaser under the second mortgage, that, too, is circumscribed by the liability to redeem the earlier mortgage. The title could only become absolute by a discharge of the prior incumbrance."

As we have already stated, the relationship of the mortgagor and the mortgagee still subsists between the parties and there is no rule of law which prohibits the suit for redemption. The question of twelve years' rule of limitation does not arise. Article 148 of the Limitation Act of 1908 provides a period of sixty years for a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged, and the present suit is such a suit. In our opinion the decree of the Court of first instance was a right decree and should not have been disturbed. We, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court

(1) 37 Ind. Cas. 843 ; 14 A L. J. 1146.

of first instance with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Decree set aside.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1778 OF 1916.

October 26, 1922.

Present :—Mr. Justice Broadway and Mr. Justice Campbell.

KAHAN CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Mt. JAWANDI, MINOR, THROUGH KISHEN SINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872) s. 68—Will—Attestation, proof of—Execution— Identification of signatures of witnesses, effect of.

The mere identification of the signatures of the witnesses to a Will, does not amount to proof of execution of the will.

Appeal from the decree of Senior Sub-Judge, Amritsar, dated the 31st May 1916.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Sardha Ram*, for the Respondent.

JUDGMENT.—This is an appeal against a decree by the Subordinate Judge, Amritsar, in favour of *Musammat* Jawandi giving her possession of a certain shop which is now admitted to have been owned exclusively by her father Ram Saran Das.

The two defendants were Har Bhagwan, the half brother of Ram Saran Das, and Kahan Chand, son of Har Bhagwan. The plaintiff's case, which the Subordinate Judge upheld, was that after the death of Ram Saran Das she and *Musammat* Puran Devi, mother of Ram Saran Das, were in possession of the shop in question and that when *Musammat* Puran Devi died, the defendants unlawfully took possession.

The pleas of the defendants were that Har Bhagwan had no connection with the shop, that Ram Saran Das devised it to *Musammat* Puran Devi, his mother, who in turn devised it to Kahan Chand, and that *Musammat* Jawandi was not competent to sue, in any case since her mother *Musammat* Rikh Devi, widow of Ram Saran Das, was alive.

The plaintiff rejoined that the two defendants were members of a joint Hindu family; that both were in possession of the shop; that there was no Will by *Musammat* Puran Devi in favour of Kahan Chand, and that *Musammat* Rikh Devi was dead. A further plea by Kahan Chand that *Musammat* Jawandi could not obtain possession, even if she were the heir of Ram Saran Das, without refunding payments made by the defendants in connection with the marriage and funeral of Ram Saran Das, was also traversed.

The issues were :—

(1) Whether *Musammat* Rikh Devi had not been heard of for the last seven years by those who would have naturally heard about her?

(2) Whether she is living or dead?

(3) Whether Ram Saran Das made a Will in respect of the shop in dispute in favour of his mother, *Musammat* Puran Devi, on 24th July 1901 and the latter in favour of Kahan Chand, defendant No. 2, on 24th September, 1908?

(4) Whether the defendants spent anything on the marriage or funeral rites of Ram Saran Das, or on improvements to the property, and, if so, whether it was a valid charge on Ram Saran Das's property?

(5) Whether the defendant Kahan Chand had been in adverse possession of the shop for more than 12 years?

The learned Subordinate Judge decided issue No. 1 in favour of the plaintiff, held that the defendants had failed to prove that *Musamtmat* Rikh Devi was alive, held further that the Wills specified in issue No. 3 were not proved to have been lost as alleged by the defendants and consequently refused to admit secondary evidence of them and also found that no expenditure of the nature referred to in issue No. 4 had been proved to have been incurred by the defendants. Issue No. 5 was decided against the defendants.

MA THEIN YIN *v.* MAUNG THA DUN

When the appeal first came before a Bench of this Court the defendants pleaded successfully that they had not been given sufficient opportunity in the Court below of producing their evidence and a remand was granted to enable them to examine eight witnesses. One of these eight witnesses was a certain Sant Ram, said to be dead. At the end of the proceedings in the lower Court consequent on the remand one Nika Mal, alleging himself to be the son of Sant Ram, produced a Will, dated 24th July 1901, which he said he had found 18 months previously among his deceased father's papers. This document purports to be a Will of Ram Das in which the shop in question was bequeathed to *Musammat* Puran Devi.

The alleged Will by *Musammat* Puran Devi in favour of Kahan Chand has never been produced.

Before us Mr. Tek Chand for the appellants has confined himself parctically to one point, the question of the existence of *Musammat* Rikh Devi. We have been through the evidence dealing with this matter. The plaintiff produced the woman's mother, brother, step-brother and uncle, all of whom declared that they had not heard of her within the past seven years. The defendants rejoined with five witnesses, including Kahan Chand, defendant, himself. Of these one Sundar Das said that a month before he made his deposition he had seen the woman at Dipalpur in the Montgomery District (the parties reside in Amritsar). Kahan Chand, deposing on the 22nd May 1916, said that he had seen *Musammat* Rikh Devi twelve days previously. The other three witnesses did not profess to have seen her later than four or five years previously. One of them Hukam Singh, *Zaildar*, in the Montgomery District, gave the name of a man Saudagar Mal with whom he had seen *Musammat* Rikh Devi living about the year 1911 (the last occasion on which he had seen her) and stated that Saudagar Mal was still alive. Saudagar Mal was one of the eight witnesses to be examined after the remand, but the defendants were unable to produce him in Court.

It is impossible to hold on this evidence that the defendants have discharged the onus which lay on them, under section 108 of the Indian Evidence Act, of proving that *Musammat* Rikh Devi was alive. We see no reason to doubt the genuineness of the statement of the relatives that they had not heard of her for seven years, and we agree with the Court below that the statement of Sundar Das is worthless.

The only other thing mentioned by Mr. Tek Chand is the Will produced by Nika Mal. There is no proof, however, that this was ever executed by Ram Saran Das. Nika Mal professes to identify his father's signature as a witness on the document and one Karam Chand has stated that the signature of another witness Ram Ditta is that of his own father. There can be no inference from these statements that the signature purporting to be that of Ram Saran Das is that of the plaintiff's father.

We have not thought it necessary to call upon Counsel for the plaintiff-respondent to reply and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION
No. 63 OF 1923.

December 3, 1923.

Present:—Mr. Justice Heald and Mr. Justice May Oung.

MA THEIN YIN—APPLICANT
versus
MAUNG THA DUN AND OTHERS—
RESPONDENTS.

Buddhist Law—Succession—Inferior wife, rights of.

According to the Buddhist law, a wife of inferior status who did not live with her husband has no right of inheritance but is allowed to retain such property which has passed into her possession during her husband's life time.

Ma Gywe v. *Ma Thi Da*, 2 U. B. R. (1892—96) 194; *Ma Hmon* v. *Maung Puw Dun*, 2 U. B. R. (1897-1901) 138; *Ma U. Byu* v. *Ma Hmyin*, 2 U. B. R. (1897-1901) 160; *Mi Shwe Ma* v. *Mi Me*, 12 Ind. Cas. 191; 1 U. B. R. (1910-13) 114; 4 Bur. L. T. 235; *Mi Kin Gale* v. *Mi Kin Gyi*, 8 Ind. Cas. 1169; 1 U. B. R. (1910-13) 42, relied on.

MA THEIN YIN *v.* MAUNG THA DUN

Appllication for Review.

Sir *Robert Giles*, for the Applicant.

Mr. *Higinbotham* (with him Mr. *Tun Byu*), for the Respondents.

JUDGMENT.

May Oung, J.—This is an application for review of the decision in *Maung Tha Dun* v. *Ma Thein Yin* (1).

The application is grounded on an assumption that our decision in the appeal was that Ma Thein Yin was an "inferior wife" of U Po Tok. It is argued that we "did not purport to discuss the law as to the right or inheritance of an inferior wife and went upon the mistaken footing that no question of law remained to be decided," that through such error we did not attempt to decide the question of law to what share Ma Thein Yin would be entitled as an inferior wife, and that there is, therefore, a mistake or error apparent on the face of the record.

The actual decision was expressed in the following words :—"Having considered all the circumstances in favour of the plaintiff's case, I hold that the plaintiff was *at best* no more than an "inferior wife" of U Po Tok *living separately from him and only receiving his visits*, and that, therefore, she is not entitled to any portion of U Po Tok's estate."

Learned Counsel who appeared for Ma Thein Yin at the hearing of the appeal did not attempt to argue that an inferior wife living separately from the husband is entitled to inheritance. That she is not so entitled has been laid down in several cases: *Ma Gywe* v. *Ma Thi Da* (2), *Ma Hmon* v. *Maung Paw Dun* (3), *Ma U Byu* v. *Ma Hmyin* (4), *Mi Shwe Ma* v. *Mi Me* (5). It is open to the claimant to rebut the presumption, arising from separate residence, that she is not entitled to inherit, by proving a superior status, and this is all that learned Counsel endeavoured to do.

In view, however, of the confusion which not infrequently arises from the use of the word "wife" in Burmese Law, the matter has been re-heard, and Counsel for both parties have dealt fully with the rules applicable in such cases. These rules were discussed in *Mi Kin Gale* v. *Mi Kin Gyi* (6), wherein it was laid down that a Buddhist might marry two or more women at the same time, and that they might all have the status of a wife and not that of a concubine. Such wives, whether they live together with the husband or not, inherit on equal footing. The Buddhist Law, however, clearly contemplates the existence of other women, who are sometimes referred to as " wives " but who are given a distinctly inferior status. The terms " lesser wife" and "concubine" have more or less indiscriminately been applied to such persons, but there are manifest objections to the continued employment of these names. The position is cleared by the use of the expression " superior wife " for all who inherit on equal footing, and the expression "inferior wife " for those of humble standing. In this way, effect is given to the wording employed in most of the Dhammathats ; and, in addition the peculiar status of one who is not a wife in the strict sense of the English word and yet is not a mere mistress, is recognised. Such a person is accorded certain rights under the Dhammathats cited in section 276 of the Kinwun Mingyi's Digest, Vol. 1, and it is on the extract from the *Manugye* in that section that the applicant now relies. According to this authority, a wife of inferior status or "ordinary concubine " is entitled to three shares out of seven shares and a half, that is, to two-fifths of the husband's estate. This applies, however, to the case of "wives" living together with the husband. In the period during which the Dhammathats were written it was not unusual for a man to maintain several " wives " in one household. Ordinarily, there was one chief wife, one or more "ordinary " or "recognised " concubines, and one or more slave concubines. It was to meet such a case that the *Manugye* text cited was laid down. Where the wife of an inferior status lived apart, she was allowed to retain only such property as was in her actual possession : *cf.* the *Manuvannana* and *Dhammasara* in section 280.

(1) 73 Ind. Cas. (1044) 1 R. 1 ; (1924) A. I. R. (R) 87.
(2) 2 U. B. R. (1892-96) 194.
(3) 2 U. B. R. (1897-1901) 138.
(4) 2 U. B. R. (1897-1901) 100.
(5) 12 Ind. Cas. 191 ; 1 U. B. R. (1910-13) 114 ; 4 Bur. L. T. 235.
(6) 8 Ind Cas. 1169 ; 1 U. B. R. (1910-13) 42.

The *Manugye* in section 277 classes the "inferior wife" among the six kinds of concubines, describing her as a free born woman who is not purchased and with whom the husband does not "eat out of the same dish." On the death of the husband, each of the six "shall retain the property which has passed into her possession during his life time."

It is thus clear that a wife of inferior status who did not live together with the husband has no right of inheritance.

Ma Thein Yin was such a wife; she was not taken to live in U Po Tok's house either at Tharrawaddy or at Letpadan, but was kept apart and occasionally visited by him. She was, therefore, not entitled to inherit.

I would, accordingly, dismiss the application for review with costs.

Heald, J.—I concur.

N. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 124 OF 1921.

July 13, 1922.

Present:—Mr. Justice Gokul Prasad

KALIDIN—DEFENDANT—APPELLANT
versus
CHANDIKA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Public nuisance—Special damage proof of.

A person who sues to remove a nuisance on a public thoroughfare must prove special damage over and above that suffered by him along with the public at large.

Second appeal against the decree of the Additional Subordinate Judge, Basti, dated the 8th September 1920.

Mr. *S. P. Ghosh*, for the Appellant.

Mr. *K. R. Dang*, for the Respondents.

JUDGMENT.—This appeal raises a very simple question. The plaintiffs-respondents brought a suit for the removal of certain constructions which the defendants had made on a public thoroughfare in collusion with the second set of defendants, the remaining *zemindars*. The first Court decreed the claim in part and dismissed the rest on the grounds (1) that those constructions were not made on the plaintiff's land, and (2) that they did not interfere with the thoroughfare, and further that the plaintiffs had not proved any special damage. The plaintiffs went up in appeal. The learned Judge has on appeal modified the decree of the first Court on the ground that the finding of the first Court that some of the constructions did not interfere with the thoroughare was erroneous. The learned Judge of the lower Appellate Court has omitted to consider the fact that, so far at least as the *shaeban* on No. 67-2 was concerned, it being admitted that the plaintiffs were not the owners of the plot No. 67-2 on which it stood, it was for the plaintiffs to show that they had suffered a special damage over and above that suffered by them along with the public at large. This the learned Judge has not found and on no principle of law could his decree directing the removal of the *shaeban* on plot No. 67-2 aforesaid be sustained. Mr. Sital Prasad Ghose, the learned Advocate for the appellant, has relied on the case of *Bhawan Singh* v. *Narottam Singh* (1). and Mr. Chaube, the learned Vakil for the respondents, has relied on the case of *Tota* v. *Sardul Singh* (2). The case *Bhawan Singh* v. *Narottam Singh* (1), is only an exception to the general rule that any one who sues to remove a nuisance on a public thoroughfare must prove special injury. Having regard to the general law as laid down in the case of *Bhawan Singh* v. *Narottam Singh* (1), and giving effect to the exception in favour of the *zemindar* as laid down in the case of *Tota* v. *Sardul Singh* (2), I modify the decree of the lower Appellate Court to this extent only that I dismiss the plaintiffs' claim as to the *shaeban* on plot No. 67-2 and allow the rest of that decree to stand. Under the circumstances of the case, I direct the parties to bear their own costs of this appeal.

Z. K. *Decree modified.*

(1) 2 Ind. Cas. 365; 31 A. 414; 6 A. L. J. 499.
(2) 10 A. 553; A. W. N. (1888) 263; 6 Ind. Dec. (N. S.) 372.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATIONS NOS. 85 AND 86 OF 1923.

November 29, 1923.

Present :—Mr. Justice Young, Acting Chief Justice, and Mr. Justice May Oung.

MAUNG SAW MYAING AND ANOTHER—APPLICANTS

versus

MG SEIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Appeal to Privy Council—Appeal to High Court dismissed for default—Restoration, application for, rejection of—Order, whether decree or final order.

An order of a High Court rejecting an application for restoration of an appeal dismissed for default is not appealable to His Majesty in Council inasmuch as it is not a decree or final order, nor is it an order passed in the exercise of Original Civil Jurisdiction of the High Court.

Bismillah Begam v. *Hiralal*, 37 Ind. Cas. 832, followed.

Applications for leave to appeal to His Majesty in Council.

Mr. *Burjorjee*, for the Applicants.

ORDER.—These are two applications for leave to appeal to His Majesty in Council, the first being Civil Miscellaneous Application No. 85 an application for leave to appeal against an order of this Court dismissing Civil First Appeal No. 68 of 1922 for default of appearance, the second being an application for leave to appeal, as stated in the petition, against an order dated the 21st May 1923 made in Civil First Appeal No. 68 of 1922.

The first application was withdrawn by Counsel for the applicant and we are concerned only with the second.

We may remark that the order dated the 21st May 1923 was an order dismissing the appeal No. 68 of 1922 and is an obvious mistake for the order dismissing the application for restoration of the appeal which is the order complained against, and which was also the order argued before us, and which was the order referred to in para. 2 of the grounds.

We do not think it necessary to be technical and will treat the application as one for leave to appeal against the order refusing the restoration of the appeal dated the 18th June 1923.

In *Bismillah Begam* v. *Hiralal* (1) a similar application was rejected on the ground that an order rejecting such an application was not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court. We agree with the above decision and also agree that we cannot certify that the case is "otherwise" a fit one for appeal.

We reject both applications with costs 2 gold *mohurs* in each case.

N. K. *Application dismissed.*

(1) 37 Ind. Cas. 832.

LAHORE HIGH COURT.

MISCELLANEOUS APPLICATION NO. 494 OF 1919.

February 16, 1920.

Present :—Mr. Justice Broadway.

BALMOKAND—DEFENDANT—PETITIONER

versus

WAZIR CHAND—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal—Dismissal for default—Restoration—Absence unintentional.

An appeal was dismissed for default but appellant's Counsel appeared soon after and satisfied the Court that his failure to appear when this appeal was called on for hearing was wholly unintentional ;

Held, **that the appaal ought to be restored.**

Petition under $\frac{\text{O. XLI, R. 19}}{\text{O. XLII, R. 1}}$ of the Civil Procedure Code, for re-admission of the above noted appeal case dismissed in default by the High Court on the 13th November 1919.

MG PE THEIN *v.* S BOON KYAN

Dewan *Mehar Chand*. for the Petitioner.

Dr. *Nand Lal*, for the Respondents.

ORDER.—This is an application for the re-admission of Civil Appeal No. 2569 of 1917 which was dismissed by me on the 13th of November 1919 owing to the fact that when the appeal was called on neither the appellant nor his Counsel appeared.

Dewan Mehar Chand, the appellant's Vakil, appeared soon after the appeal had been dismissed and I am satisfied that the failure to appear was wholly unintentional. I accordingly restore the appeal and proceed to hear it.

Z. K. *Appeal restored.*

RANGOON HIGH COURT.

CIVIL REVISION NO. 89 OF 1923.

November 19, 1923.

Present :—Mr. Justice Carr.

MG PE THEIN—PETITIONER
versus
S BOON KYAN—RESPONDENT.

Rangoon Rent Act (*Burma Act II of* 1920), *s.* 10—*Ejectment, suit for, by guardian of landlord whether maintainable.*

The guardian of a minor cannot sue to eject a tenant on the ground that he requires the premises for the occupation of the minor, as he is not the landlord within the meaning of section 10 of the Rangoon Rent Act.

Civil Revision Petition.

Mr. *Robertson*, for the Petitioner.

Mr. *Maung Maung*, for the Respondent.

JUDGMENT.—This is an unfortunate case. The premises in dispute are the property of two minors, whose guardian is the plaintiff-petitioner. The defendant-respondent is the tenant. Plaintiff sued to eject defendant on the ground that he required the premises for for the occupation of himself and the two minors. His suit has been dismissed on the ground that he is not the "landlord" for the purposes of the Rangoon Rent Act, section 10.

Plaintiff is clearly the "landlord" within the terms of the general definition given in section 2 (*c*) of the Rent Act.

Section 10 (1) of that Act lays down that no decree for recovery of possession of the premises shall be made so long as the tenant pays the rent allowable under the Act. But there is a proviso, the portions of which applicable to the circumstances of this case are, "provided that nothing in this section shall apply...where the premises are reasonably and *bona fide* required by the landlord for occupation by himself or by any member of his family or for the occupation of any person for whose benefit the premises are held, or where the landlord can show any cause which may be deemed satisfactory by the Court."

So far it would seem that on adducing the necessary proof the plaintiff whould be entitled to succeed. But we come next to clause (5) of section 10, which lays down that, "for the purposes of this section, notwithstanding anything contained in clause (*c*) of section 2, the term "landlord" shall not include any person who has become landlord otherwise than by a *bona fide* transfer thereof for value or by the devolution of the premises upon him under a testamentary disposition or intestacy or a settlement made before the first day of April 1918."

Under this it seems clear that the plaintiff is not the landlord for the purposes of section 10. The premises in question appear to have devolved by intestacy, but upon the minors and not upon the plaintiff. He is the landlord by virtue of his appointment by the Chief Court of Lower Burma as guardian of the minors and it would be straining the meaning of the terms to say that the premises had devolved on him by intestacy.

It must be held, therefore, that the plaintiff is not the "landlord" for the purpose of section 10 and it necessarily follows that the fact that he requires the premises for the occupation of the minors for whose benefit he holds them does not entitle him to the benefit of the proviso to section 10 (1). He can

therefore, not obtain a decree for ejectment on that ground.

My conclusion, therefore, is that the decision of the learned Judge of the Small Cause Court is correct.

It can hardly be supposed that the Legislature intended clause (5) of section 10 to exclude from the benefits of the proviso a landlord such as the plaintiff. But the effect of the clause is clear and it must be applied.

I, therefore, dismiss this application. In view of the circumstances, I make no order as to costs.

N. K. *Application dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 46 OF 1919.

May 5, 1920.

Present :—Mr. Justice Leslie-Jones and Mr. Justice Abdul Raoof.

BARIAM SINGH—PLAINTIFF—APPELLANT
versus
PHAGGU MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation by widow—Necessity, proof of—Decree ex parte *against widow, value of.*

The mere fact that an *ex parte* decree has been obtained against a widow by a creditor does not of itself amount to evidence of legal necessity for the amount of the decree so as to justify an alienation by the widow of her husband's estate.

Appeal, under section 10 of the Letters Patent, against the decree of Mr. Justice Martineau, dated the 3rd November 1919, in Civil Appeal No. 451 of 1919.

Mr. *Gullu Ram*, for the Appellant.

Mr. *H. D. Bhalla*, for the Respondents.

JUDGMENT.—The facts of this case appear sufficiently from the judgments. The decree obtained by Phaggu Mal has been treated as if in itself it amounted to legal necessity. But the decree was *ex parte*, and the real question is whether there was any necessity for the original bond which was executed by the widow in favour of Phaggu Mal. The latter alleged in his pleas that the first bond was on account of a debt incurred by *Musammat* Ram Devi's husband, but he made no attempt to prove it, though the point was evidently realised and was fully covered by the issue.

We allow the appeal and decree the plaintiff's suit with costs throughout.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 311 OF 1922.

December 10, 1923.

Present :—Mr. Justice Young, Acting Chief Justice, and Mr. Justice Carr.

RAJ CHANDRA DHAR—APPELLANT
versus
Messrs. K. D. O. C. RAY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. IX, r.* 13—*Decree,* ex-parte—*Appeal, grounds of—Summons, service of, whether can be questioned.*

Where an *ex-parte* decree is passed, the defendant can challenge it by way of appeal on the ground that the evidence adduced by the plaintiff was not sufficient to justify the decree but he is not entitled in appeal to go into any question connected with his non-appearance at the hearing, as that is the subject-matter of the special proceedings under O. IX of the Civil Procedure Code.

Jonardhan Dobey v. *Ramdone Singh*, 23 C. 738 at p. 743 ; 12 Ind. Dec. (N. S.) 491 ; *Hunny* v. *Aziz-ud-din*, 36 Ind. Cas. 277 ; 39 A. 148 ; 14 A. L. J. 1226, relied on.

Sadhu Krishna Ayyar v. *Kuppan Ayyangar*, 30 M. 54 ; 1 M. L. T. 268 ; 16 M. L. J. 479, dissented from.

Mr. *Lambert*, for the Appellant.

Mr. *Chari*, for the Respondents.

RAJ CHANDRA DHAR *v.* MESSRS. K. D. O. C. RAY

JUDGMENT.—The only arguments raised before us in this appeal were whether the appellant had been duly served with a summons, and whether this was material in a regular appeal from a decree. The appellant appeals as the *Karta* or Manager of a joint Hindu family and claims that he was never rightly served.

The suit was brought against the individual members of this alleged family firm who were described as merchants carrying on business in partnership under the name and style of K. C. Dhar by their managing partner, Gour Chandra Dhar, who was younger brother of the appellant.

The suit was filed on the 11th August 1921, and on the 20th September 1921, defendants Nos. 1 to 5 put in a written statement through the said Gour Chandra Dhar, who, it is not disputed, was duly served on behalf of himself and his brothers, as though the proceedings had been taken against the firm. On the 16th January, over four months after the summons was so served, and over 3½ months since a written statement had been put in on behalf of defendants Nos. 1 to 5 by defendant No. 2, and after various steps had been taken in the case, the first defendant appeared by his agent, Pershonath Chowdury, and his Pleader, Rai Hpaw, and applied for an adjournment to file a written statement alleging that the five brothers had been sued in their own names, and yet the summons had been served on the 2nd defendant alone, and the written statement was filed by him alone, though he had no power-of-attorney to represent them in any Court of Law.

The Trial Judge passed the following order on this application :—"This application is belated. Service was effected on G. C. Dhar as managing partner of the firm of K.C. Dhar under O. XXX, r. 3. The service on him is effectual. If the 1st and 3rd to 5th defendants refrained from appearing in Court these four months, they have only themselves to blame. I decline to give another adjournment." Defendants' agent and his pleader then left the Court, and the case proceeded *ex parte* so far as defendants Nos. 1 to 5 were concerned, with the result that a decree was passed against defendants Nos. 1 to 5 and the suit was dismissed as against defendant No. 6.

It was argued before us for the appellant (*a*) that the summons was rightly served ; (*b*) that it was immaterial whether it was rightly served or not: it being urged that the 1st defendant had appeared to ask for time and had thereby waived service, and that the real question was whether the Court was justified in refusing the application for time and in proceeding *ex parte*, and that this question, though it would have rightly found a place in an application to set aside the decree and restore the case, could not be considered in a regular appeal, in which the only question was whether the evidence upon the record was sufficient to sustain the decree.

Obviously, this contention must be considered first, as, if it is upheld, there is no advantage to be gained by considering whether the summons was duly served.

In the first place, I may say that I am clearly of opinion that the 1st defendant waived the question of service by appearing to ask for time, and that the only question is whether the Judge was right or wrong in refusing to grant time. The question whether this can be considered in an appeal from the decree, or only in proceedings to set aside the decree and restore the case, has been the subject of conflicting decisions.

In *Jonardhan Dobey* v. *Ramdone Singh* (1) it was observed as follows :—" When a decree is passed *ex parte* against a defendant a remedy by appeal is now always open to him by section 540 of the Code of 1882, as amended by Act VII of 1888, (section 96 of the present Code). But such a remedy can be efficacious only in those cases, and their number must be small, in which the *ex parte* decree is either wrong in law on the face of the proceedings or is based on evidence so weak that, even though unrebutted, it is insufficient to sustain the decree. In the great majority of cases in which a defendant having a good defence has had an *ex parte* decree passed against him, the disadvantage he labours under is that he has not been able to substantiate his defence by evidence before the Court. Upon the record as it

(1) 23 C. 738 at p. 743; 12 Ind. Dec. (N. S.). 491,

stands the *ex parte* decree may be unassailable but if the defendant has an opportunity (which he was prevented from having owing to some sufficient cause) of placing upon the record, evidence which he could have adduced to substantiate his defence, no such decree should have been passed. The remedy in such a case cannot be by way of appeal which must ordinarily proceed upon the record as it stands."

On the other hand, it had been decided by a Full Bench of the Madras High Court, in *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar* (2) that when a suit is decided *ex parte* an Appellate Court to which an appeal from the decree is preferred under section 540 of the Code of Civil Procedure, (section 96 of the present Code) has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and remand the suit for re-hearing, referring to the Calcutta *dicta* as *obiter*. "I think," said the C. J., "it must be taken that the Legislature by accident or design has given a right of appeal apart from the merits against an order on the ground that the defendant was not in default in failing to appear and against an *ex parte* decree also, apart from the merits, on the same grounds".

The same question also came up in appeal for decision before the Allahabad High Court before Richards, C. J., and Banerji, J., in *Humminy* v. *Aziz-ud-din* (3), and was answered in the opposite way. Richards, C. J., observing as follows: "In my opinion once the Munsif had made the decree in the absence of the defendants he must be deemed to have passed his decree *ex parte*, and if the defendants complained that the decree should not have been passed in their absence, their only remedy was to apply to have it set aside and the case restored. They could, no doubt, challenge the decree by way of appeal upon the ground that the evidence which the plaintiff had adduced was not sufficient to justify the decree, but they were not entitled in any appeal from the decree to go into any question connected with their non-appearance at the hearing."

I have no doubt that under O. XVII, r. 2, the suit must be deemed to have been decided *ex parte*, and that the provisions of O. IX applied, and that the defendant could have applied to set aside the decree, and the question whether he should have succeeded would depend on the question when he became aware of the suit. But is he confined to this relief, or can he use his grievance as a ground of appeal in an ordinary appeal from the decree?

I must say that I prefer the reasoning of the Calcutta and Allahabad High Courts and consider that, in an appeal from a decree the only question with which the Appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject-matter not of an appeal from the decree but of the special proceeding under O. IX.

In this case, it was not contended that the evidence, as it stood, was insufficient to support the decree, and, in the view I take, we are not concerned with the question whether, but for the refusal of the learned Trial Judge to grant time, that evidence would have been subject to cross-examination and been supplemented by evidence on the other side.

I would accordingly dismiss the appeal with costs.

N. K. *Appeal dismissed.*

(2) 20 M. 54 : 1 M. L. T. 268 ; 16 M. L. J. 479.
(3) 36 Ind. Cas. 277 ; 39 A. 143 ; 14 A. L. J. 1226.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 80 OF 1921.

November 24, 1921.

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Banerji.

RAM NARAIN AND ANOTHER—DEFENDANTS —APPELLANTS

versus

MUHAMMAD AKBAR—PLAINTIFF—RESPONDENT

Landlord and tenant—Occupancy tenant—Tanks and well constructed for manufacture of indigo, whether can be sold.

RAM NARAIN *v.* MUHAMMAD AKBAR

Tanks and wells constructed by an occupancy tenant for the manufacture of indigo are not a part of his holding and he is competent to sell them.

Letters Patent Appeal from the judgment of Mr. Justice Walsh, dated the 2nd June 1921.

Mr. *M. S. Bajpai*, for the Appellants.

Mr. *S. Raza Ali*, for the Respondent.

JUDGMENT.—The question which arises in this appeal is whether the mortgage made in favour of the defendant by the predecessor-in-title of the plaintiff in 1894 included certain tanks and a well for the manufacture of indigo. The suit was brought for redemption of the mortgage, and the plaintiff claimed not only the land mortgaged but also the tanks and the well which existed on the land. The mortgagees had no objection to redemption of the land, but they contended that the well and the tanks were not included in the mortgage, that they had been sold previous to the mortgage to the defendants, and that they formed no part of the mortgaged property which could be redeemed.

The Court of first instance found against the defendants and decreed the whole claim.

Upon appeal the learned Judge found that the sale-deeds relating to the tanks and the well executed by the mortgagor were genuine sale-deeds, and that the ownership of the mortgagors had passed to the mortgagees by virtue of those sales. He was further of opinion that the well and the tanks were not included in the mortgage and could not have been included in it by the mortgagor who had already sold them to the mortgagee. He accordingly disallowed that part of the claim which related to the tanks and the well. The tanks we may mention were for the manufacture of indigo and the well has been found to have been used for the same purpose.

A learned Judge of this Court on appeal set aside the decree of the lower Appellate Court on the ground that the mortgagor was in law incompetent to sell the tanks and the well to the mortgagee.

This view of the learned Judge does not commend itself to us. It is conceded that, if there had been a building belonging to the mortgagor on the land, he could sell it. If he could sell a building he could equally sell tanks and the well constructed by him on the land. What he was incompetent to sell was his holding. The tanks and the well could not be deemed to be a part of the holding. Furthermore, it did not lie in the mortgagor, who had sold the tank and the well, and subsequently mortgaged the land, to say that he had no power to sell, and that, therefore, the purchasers had acquired no title to the tanks and the well. The plaintiff derived his title from the mortgagors and he is equally incompetent to set up such a plea. As has been stated above, what the mortgagors did was not to sell their occupancy holding but something apart from their occupancy holding. Therefore, the sales effected were valid sales and could take effect. It appears that a sale-deed was executed on the very day on which the mortgage-deed was executed. Surely, it cannot be said that the parties to the sale-deed intended to include in the mortgage the property which had shortly before been sold. It is equally clear that the property sold some years before was not intended to be mortgaged to the mortgagee.

In view of the findings of the lower Appellate Court which this Court was bound to accept, and in view of the fact that we are unable to agree with the learned Judge's opinion as to the invalidity of the sale executed by the mortgagor, we must allow the appeal. We accordingly set aside the decree of this Court and restore that of the lower Appellate Court with costs of both hearings in this Court including fees on the higher scale.

Z. K. *Decree set aside.*

NADEPENA APPAMMA *v.* SARIPILLI CHINNAVADU

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 56 OF 1921.

August 21, 1923.

Present :— Mr. Justice Ramesam (on reference by Mr. Justice Spencer and Mr. Justice Venkata Subba Rao.)

NADEPENA APPAMMA AND OTHERS —APPELLANTS—DEFENDANTS

versus

SARIPILLI CHINNAVADU AND OTHERS —RESPONDENTS—PLAINTIFFS.

Registration Act (*XVI of* 1908), *ss.* 17, 49—*Usufructuary mortgage—Suit for redemption, nature of—Unregistered mortgage-deed, whether admissible in evidence.*

Plaintiff sued to enforce the terms of an unregistered usufructuary mortgage-deed praying for a decree for redemption.

Held, Spencer, J., dissenting, (1) that the suit being for redemption of a usufructuary mortgage was in substance a suit for possession of property:

(2) that the mortgage-deed though inadmissible in evidence to prove the mortgage could be looked at for the collateral purpose of showing the nature of the defendants' possession.

Ananda Hait v. *Khudiram Hait*, 25 Ind. Cas. 558 ; 19 C. L. J. 582, relied on.

Varada Pillai v. *Jeevarathanammal*, 53 Ind. Cas. 901 ; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.), followed.

Krishna Pillai v. *Rangasami Pillai*, 18 M. 462; 5 M. L. J. 187; 6 Ind. Dec. (N. S.) 672, distinguished.

Subbayya v. *Madduletiah*, 17 M. L. J. 469; 3 M. L. T. 187; *Yuruva Venkata Reddy* v. *Maddi Veeramma*, 23 Ind. Cas. 376; 15 M. L. T. 192, not followed.

Per *Spencer J.*—A plaintiff who sues for redemption on the strength of an unregistered mortgage-deed can never succeed, because for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself.

Appeal against the order of the Subordinate Judge, Vizagapatam in Appeal Suit No. 35 of 1920 preferred against the decree of the Court of the District Munsif, Vizianagaram, in O. S. No. 607 of 1917.

ORDER.

Spencer, J.—The plaintiffs sued to enforce in this suit the terms of a usufructuary mortggage-deed praying in their plaint for a decree for redemption, and alleging that plaintiffs Nos. 1 to 5 had mortgaged the suit property to the deceased husband of 1st defendant who was the brother of defendants Nos. 5 to 8.

The defendants did not admit the existence of any mortgage. The plaintiff did not set up a title to eject the defendants otherwise.

The mortgage-deed produced, being unregistered, could not, under section 49 of the Indian Registration Act, be admitted as evidence of plaintiff's right to redeem. The Subordinate Judge was of opinion that it could be looked at for the collateral purpose of showing the nature of defendant's possession. But no question arises as to the nature of that possession until the plaintiffs first show that they have a right to recover possession. The purpose for which they wish to have the document admitted is not a collateral purpose, but the direct purpose of proving the basis of their title.

I do not for an instant wish to question the proposition that if one party to a suit sets up a title based on adverse possession, his opponent may show by means of an unregistered mortgage-deed that the nature of the possession was permissive.

There is the high authority of the Privy Council in *Varada Pillai* v. *Jeevarathnammal* (1), for holding that an unregistered document which could notbe used as evidence of a transaction requiring registration such as a gift, may yet be looked at as explaining the nature and character of a person's possession.

But a plaintiff who sues for redemption on the strength of an unregistered mortgage-deed can never succeed, because *for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the docu-*

(1) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 U. L. J. 313 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64 ; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

ment itself. This is the effect of sections 17 and 49 of the Indian Registration Act, read with section 91 of the Indian Evidence Act. If we were to allow unregistered documents to be used as evidence of title by a mere device of pleading, we should be defeating the purpose of the Act (Vide *Divithi Varada Ayyangar* v. *Krishnasami Aayyngar* (2). Even if the defendants were to admit in their written statements that the relations between themselves were those of mortgagors and mortgagees, the plaintiffs could not, on the strength of that admission, be given a decree for redemption as for redemption they must further prove what sum is due, see *Krishna Pillai* v. *Rangasami Pillai* (3), *Mutta Venkatachalapathi* v. *Pyindha Venkatachalapathi* (4), *Seetamma* v. *Krishnaswamy Rao* (5) *Kalliani Amma* v. *Narayanan Nambiar* (6) and *Somu Gurukkal* v. *Rangammal* (7). In *Ananda Hait* v. *Khudiran Hait* (8), the plaintiff proved a title paramount to the land, and the defendant, while admitting possession under a usufructuary mortgage, took the objection that being a verbal mortgage it was void. The decision was that of a single Judge. The learned Judges who heard the Letters Patent Appeal give no reasons for their decision. In the present suit the defendants deny the plaintiff's mortgage and set up an independent title and the plaintiffs have not applied to amend the plaint so as to convert the suit into one to recover possession on their title as owners. Even if they now applied to amend their plaint so as to make it a suit on a different cause of action, I do not think we could probably permit this to be done (See S. A. No. 880 of 1912).

In these circumstances, the appeal in my opinion should be allowed and the suit dismissed with costs throughout. But as my learned brother is in favour of dismissing the appeal we refer the question on which we differ to a third Judge under section 98 of the Civil Procedure Code.

(2) 6 M. 117; 7 Ind. Jur. 76; 2 Ind Dec. (N. S.) 360.
(3) 18 M. 462; 5 M. L. J. 187; 6 Ind. Dec. (N. S.) 672.
(4) 17 Ind. Cas. 987; 12 M. L. T. 579; 23 M. L. J. 652.
(5) 35 Ind. Cas. 18; 31 M. L. J. 240; (1916) 2 M. W. N. 33; 20 M. L. T. 44.
(6) 28 Ind. Cas. 69; 28 M. L. J. 266; (1915) M. W. N. 105; 17 M. L. T. 170.
(7) 7 M. H. C. R. 13.
(8) 25 Ind. Cas. 558; 19 C. L. J. 532.

Venkatasubba Rao, J.—The suit is brought for redemption. The plaintiffs allege that they were the owners of the property, that they executed about 15 years previous to the suit a usufructuary mortgage-deed in favour of the defendants' predecessor-in-title, that the latter was put in possession of the property which continues to be in possession of the defendants, that the mortgage-deed not registered, and that the defendants refused to receive the amount due and deliver possession of the property to the plaintiffs. As is usual in such a plaint, the prayer is for possession of the property, the plaintiffs offering to pay the amount due on the footing of the mortgage.

The defendants in effect claim the property as theirs and deny the existence of the mortgage. The District Munsif dismissed the suit holding, on a preliminary issue framed, that the suit does not lie on an unregistered mortgage-bond. He pronounced judgment on the 10th November 1917, and, relying on *Subbayya* v. *Madduletiah* (9) and *Yeruva Venkata Reddy* v. *Maddi Veeranna* (10), overruled the contention on behalf of the plaintiffs that the mortgage-deed may be referred to to explain the nature and character of the possession held by the defendants. The Subordinate Judge reversed the decision of the District Munsif and remanded the suit for disposal in accordance with law. His judgment is dated 26th August 1920, and as by that time the Judicial Committee of the Privy Council in *Varada Pillai* v. *Jeevarathnammal* (1) had decided that an unregistered deed of gift could be admitted in evidence for the purpose of ascertaining the character of the possession of the alleged donee, the Subordinate Judge following the decision came to the conclusion that the unregistered bond was admissible for the limited purpose stated and observed as follows :—

"When once the document proves the nature of the defendant's possession to be that of the mortgagees they cannot prescribe for an absolute title but they can prescribe for mortgagee's rights after the lapse of 12 years from the date of the deed."

The suit being for redemption of a usufructuary mortgage, it is in substance a suit for

(9) 17 M. L. J. 469; 3 M. L. T. 187.
(10) 23 Ind. Cas. 376; 15 M. L. T. 192.

possession of the property. The fact that the plaintiff, while asking for possession, has offered to pay the amount due on the mortgage to the defendant does not render it any the less a suit for the possession of the property. What the plaintiff has to do in the suit is to prove his title. Having proved it, he may rely upon the mortgage-deed itself to show that the defendants have not acquired a title by adverse possession. I may observe that the title of the plaintiff to the property has not been determined, the case having been disposed of on a preliminary point. The plaintiff may adduce evidence to prove his ownership to the property. As a piece of evidence, he may even rely upon an admission of his title, if any, made by the mortgagees in the unregistered deed in question. It is not necessary to pursue this matter further because, when the plaintiff proves his title, it will be for the defendants to make out their claim to the property. If they succeed in showing that they have been holding the property asserting the title of mortgagees for over the statutory period, they will then have shown that they have acquired by adverse possession the limited interest of mortgagees in the property in question.

It has been contended on behalf of the defendants that to take this view, will be tantamount to permitting the plaintiffs to convert their suit from one of redemption into one of possession. This argument is untenable. The precise point was raised and determined in *Ananda Hait* v. *Khudiran Hait* (8). The case was first decided by Harrington, J., and his judgment was approved in Letters Patent Appeal by Sir Lawrence Jenkins, C. J., and Mookerjee, J. The following observation in the judgment of Harrington, J., disposes of the argument advanced before us on this point on behalf of the defendant: "The argument that has been addressed to us is that if the plaintiff is given possession in this suit, it would be substantially altering the character of the suit. I do not agree with this. It appears to me that a suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land. If the plaintiff establishes his title and the only answer the defendant has is that the mortgage is void in point of law, still, nevertheless, the plaintiff would be entitled to get the land, because the defendant on his own showing has no title."

The next argument that the defendants' learned Vakil advanced before us is that the suit is to enforce the terms of the mortgage-deed which was unregistered, and that, as the mortgage cannot be proved, the suit must fail. It is perfectly true that a mortgage over immoveable property to secure a sum of Rs. 100 or upwards cannot be created by an unregistered deed. It follows that a mortgagee, to whom possession has not been transferred, suing for sale of the mortgaged property cannot establish his right by relying upon an unregistered mortgage-deed and his suit will necessarily be dismissed, but where there is a transfer of possession, the other considerations will arise. The interest which a man can acquire by adverse possession may be limited by the nature of his possession; and adverse possession of a limited interest for the statutory period is a good plea to a suit in ejectment to the extent of that interest.

In *Madhava* v. *Narayana* (11) it was held that the *kanomdars* who held the land under an invalid *kanom* for more than 12 years acquired by adverse possession the limited interest for which they prescribed.

Again, in *Sankaran* v. *Periasami* (12) it was held "that the payment of *Poruppu* did not prevent the possession of the defendants from being adverse to plaintiff, as the possession of a limited interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is the adverse possession of a complete interest in the property, to bar a suit for the whole property.

In *Budesab* v. *Hanmanta* (13) the two Madras cases referred to above were cited with approval, and it was held that a tenant may, after the statutory period, acquire the right of perpetual tenancy. It was pointed out that under Art. 144 of Act XV of 1877 a suit for possession of immoveable property or any interest therein is barred after the lapse of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff and that in a suit in ejectment it is the

(11) 9 M. 244 ; 10 Ind. Jur. 61 ; 3 Ind. Dec. (N. S.) 567.
(12) 13 M. 467 ; 4 Ind. Dec. (N. S.) 1037
(13) 21 B. 509; 11 Ind. Dec. (N. S.) 341

tenant's interest in possession of the tenant that the landlord seeks to recover.

I may also refer to *Manavikraman* v. *Ammu* (14) which, I think, has a very material bearing on the present case, In 1864, *A* mortgaged certain lands to *B* for Rs. 750. In 1881, *B* professing to act as the absolute owner mortgaged the same lands to *C* for Rs. 5, 000, and *C* enjoyed possession of the lands for a period exceeding 12 years from the date of his mortgage. *A*, then instituted a suit for redemption. It was held that *A*. was bound to redeem *C's* mortgage before he could recover his possession of the property on the ground that *C's* mortgage which, but for the law of Limitation, would have been invalid as against *A*, had become good by *C's* possession for 12 years.

From the authorities it is clear that the defendant in the present case can acquire the title of a mortgagee by adverse possession for the statutory period. The deed of mortgage being invalid, it confers upon him no right, and it cannot be relied upon as the source of the mortgagee's title. On the contrary, his right is based solely upon the fact that he has been in adverse possession of the limited interest for the statutory period under the decision of the Privy Council in *Varada Pilli* v. *Jeevarathnammal* (1) the mortgage-deed may be referred to for ascertaining the charactor of his possession. It may be referred to for determining the quantum of interest for which the defendants prescribe claiming as mortgagees. When it is said that a mortgagee's interest may be prescribed for the statement implies that the mortgagee's interest is definite and precise. If the question is, has a person prescribed for a mortgagee's interest in respect of Rs. 100 or Rs. 10,000, the document may be looked at for ascertaining the quantum of interest which the adverse possessor has been claiming or has prescribed for.

This case is the converse of *Divethi Varada Ayyangar* v. *Krishnasami Ayyangar* (2). In the latter the defendant who claimed title by adverse possession sought to reply upon the unregistered documents referred to in that case for proving the charactor and nature of his possession. In this case it is the plaintiff that desires to prove by referring to the unregistered deed, that the defendants' possession has not been adverse. Again, in the Privy Council case the defendant wanted to make out his adverse possession of and title to the property by relying upon the unregistered documents. In the present case, the plaintiff seeks to disprove the allegation of adverse possession on the part of the defendant by relying upon the deed which has not been registered. In principle, the two cases are identical.

As regards the defendants' right to be paid the amount of the mortgage no difficulty does, however, arise in the present case as the plaintiff has admitted that an amount is due to the defendant on the footing of the mortgage and offers to pay it.

I am, therefore, of the opinion that the judgment of the Subordinate Judge is correct and that the order of remand must stand.

JUDGMENT.

Ramesam, J.—The facts are stated by my learned brothers. It is sufficient to add that defendants Nos. 1 to 4 represent the original mortgagee who is dead and defendants Nos. 5 to 8 are their relations and friends who got into possession of the suit property within 12 years prior to suit.

It is true that the unregistered deed of mortgage mentioned in the plaint is inadmissible in evidence to prove the mortgage. It is also true that a mortgage of immoveable property to secure a sum of Rs. 100 or upwards cannot be created otherwise than by a registered deed. There is, therefore, no mortgage of 1902 to redeem.

But it does not follow that there was not, at the date of plaint, the relation of mortgagor and mortgagee between the plaintiff and defendants Nos. 1 to 4. It is a too narrow reading of the plaint, which is a bare narration of the facts, to construe it as seeking to redeem only a mortgage of 1902 and no other. The decision in *Krishna Pillai* .v. *Rangaswami Pillai* (3) does not apply. If the defendants who remained in possession for 15 years prescribed for and acquired the interest of a mortgagee by adverse possession, the relation between the plaintiff and the defendants is that of a mortgagor and mortgagee. The limited interest of a mortgagee may be acquired

(14) 24 M. 471 (F. B.).

by adverse possession : *Madhava* v. *Narayana* (11). To prove the extent of interest acquired by the defendants by adverse possession, the terms of the mortgage asserted by them have to be and may be proved. Such proof cannot be regarded as an attempt to prove the mortgage of 1902 or to adduce secondary evidence of the terms of the unregistered deed of mortgage ; for the asserted mortgage need not, necessarily, be (though very often it will be) identical with the mortgage attempted to be created by means of the unregistered deed of mortgage.

The case has not been tried. One cannot now know what is the evidence the plaintiffs are going to adduce to prove the mortgage acquired by the defendants by adverse possession. The unregistered deed of mortgage (which ought to be in the defendant's possession), if forthcoming, can be admitted in evidence to show the character of the defendant's possession : *Varada Pillai* v. *Jeevarathnamma* (1). It cannot be assumed at this stage that no other evidence will be forthcoming.

Even if the defendants acquired no mortgage or other limited interest by adverse possession the plaintiffs can succeed if they are able to prove their title. It cannot be said that the character of the suit is changed. In the first place, even as the suit is framed, it is a suit for possession based on title, as against defendants Nos. 5 to 8 and the suit is not a suit for mere redemption. But, apart from this, I agree with the decision in *Ananda Hait* v. *Kudiram Hait* (8) where it was held that a suit to redeem a usufructuary mortgage is substantially a suit for possession. (See also *Narayanasami Naicker* v. *Periasamy Odayar* (15.)

I agree with Venkatasubba Rao, J., that the appeal must be dismissed. Costs of the High Court to abide the result.

V. N. V. *Appeal dismissed.*
K. S. D.

(15) 68 Ind. Cas. 795; 44 M. 951 at pp. 957, 958 ; 14 L. W. 116; (1921) M. W. N. 465 ; 41 M. L. J. 163.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 83 OF 1922.

February 26, 1924.

Present :—Sir Grimwood Messrs, Kt., Chief Justice, and Mr. Justice Piggott.

BAGESHAR RAI—DEFENDANT—APPELLANT
versus
Mst. MAHADEI—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family — Partition—Agreement to take by survivorship, validity of—Rule prescribing succession to last survior, whether enforceable.

It is perfectly open to members of a Hindu joint family when partitioning certain property among themselves to come to an agreement that on the death of each one of them his share should pass to the others until the entire inheritance should devolve on the last survivor. But it is not competent to claim to lay down a rule of inheritance for the property in the hands of the last survivor, in derogation of the ordinary rules of Hindu law. [p. 516, cols. 1 and 2.].

Purna Sashi Bhattacharji v. *Kalidha Rai Choudhary*, 11 Ind. Cas. 412; 8 A. L. J. 681; 15 C. W. N. 693; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 2 M. W. N. 403; 38 C. 603 ; 10 M. L. T. 361; 21 M. L. J. 1119 (P.C.), distinguished. *Kantee Chandra Mukerji* v. *Ali Nabi*, 9 Ind. Cas. 935; 33 A. 414; 8 A. L. J. 199, followed.

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Stuart, dated the 10th April 1922.

Dr. *S. N. Sen*, for the Appellant.

Mr. *M. S. Bajpai*, for the Respondent.

JUDGMENT.—In the suit out of which this appeal arises *Mst.* Mahadei claimed certain property as the daughter of one Ram Din Rai, alleged to have died as a separated Hindu. There were a number of defendants impleaded but the suit was contested only by one defendant, *viz.*, Bageshar Rai He, we understand, was a half brother of Ram Din Rai, the two being the sons of one Jai Narain Rai, deceased, by different wives. In Bageshar Rai's written statement certain defences were set up which all the Courts up to the present stage have found to have been false defences. *Musammat* Mahadei wss put to proof of the fact that she was the daughter of

BAGESHAR RAI *v.* MAHADEI

Ram Din Rai and the finding is that she has established this fact. It was also pleaded that Bageshar Rai was joint with Ram Din Rai at the time of the latter's death. The finding in favour of the plaintiff on this point is no longer challenged. It so happened, however, that as part of her evidence on the issue of jointness or separation the plaintiff put in a certain written agreement of the 5th of March 1902. We find that this agreement was of the nature of a family settlement between a number of persons, members of the same family, who having quarrelled amongst themselves about their rights in certain property desired to settle all disputes between them and to divide the property by partition amongst all of them. There were, if we may so express it, three groups of executants. One of these groups consisted of Jai Narain Rai and his two sons, Ram Din Rai and Bageshar Rai. One effect of the agreement was to assign certain property separately to Ram Din Rai and to Bageshar Rai. It is the property seperately taken by Ram Din Rai under this agreement which is in issue in the present suit. There were three other clauses which have been set forth in the judgment now under appeal. When this document was put in evidence in the Trial Court a new contention was founded upon it by the defendant Bageshar Rai. This is dealt with in the judgment of the Trial Court, though the learned Subordinate Judge remarks that the contention was raised at a very late stage. In effect this contention was that, by one of the clauses in this agreement of the 5th of March 1902, Bageshar Rai was entitled to succeed to the seperate estate taken by Ram Din Rai under the agreement itself, to the exclusion of the plaintiff *Mst.* Mahadei. The Trial Court having repelled this contention and decreed the plaintiffs suit, Bageshar Rai, in his memorandum of appeal to the District Judge, put this contention in the forefront of his pleading, though we regret to notice that he again raised the two defences which have been found to be false. The learned District Judge came to the conclusion that Bageshar Rai's plea based upon the deed of the 5th of March 1902 must prevail. It is evident that he arrived at this decision which some reluctance. He says that the defendant Bageshar Rai had purposely endeavoured to keep back this deed of the 5th of March 1902 because it was decisive against him on the issue of jointness or separation. He marked his sense of the improper manner in which the suit had been defended by depriving Bageshar Rai of his costs in both Courts. At the same time he felt compelled to dismiss the plaintiff's suit, holding that, so far as Ram Din Rai was concerned, his execution of the agreement of the 5th of March 1902 amounted to a bequest in favour of Bageshar Rai of the property taken by himself under that deed, in the event of Bageshar Rai surviving him. The plaintiff came to this Court in second appeal and a learned Judge of this Court has allowed this appeal and has once more decreed the plaintiff's suit. As we understand the decision before us, the learned Judge of this Court holds that, although the provisions of the deed of March the 5th 1902 were correctly interpreted by the learned District Judge and would confer according to their tenor a right of inheritances upon Bageshar Rai in the property in suit to the exclusion of *Mst.* Mahadei, or any other daughter of Ram Din Rai, nevertheless the agreement was inoperative as a testamentary disposition of property because it offended against the principles laid down in the Tagore case-vide *Jotandra Mohun Tagore* v. *Ganondra Mohun Tagore* (1), and further affirmed and applied by their Lordships of the Privy Council in a later case *Purna Sashi Bhattacharji* v *Kalidhan Rai Chowdhury*, (2) The appeal before us under the Letters Patent is by the defendant There are one or two subsidiary matters which we must clear out of the way. We have taken note of the manner in which the defence based upon the agreement of the 5th of March 1902 was introduced in the Trial Court We agree with the learned District Judge that the conduct of the suit by the defendant Bageshar Rai was reprehensible and that, in any event, the Court is bound to mark its sense of the nature of his conduct when it comes to pass its order in the matter of costs. At the same time, we are bound to take account of

(1) 18 W. R. 359 ; 9 B. L. R. 377 ; I. A. Sup. Val. 47 ; 2 Suth. P. C. J. 692 ; 3 Sar. P. C. J. 82 (P. C.).

(2) 11 Ind. Cas. 412 ; 8 A. L. J. 681 ; 15 C. W. N. 693 ; 13 Bom. L. R. 451 ; 14 C. L. J. 1 ; (1911) 2 M. W. N. 408 ; 38 C. 603 ; 10 M. L. T 361 ; 21 M. L. J. 1119 (P. C.).

the defence based upon the agreement of the 5th of March 1902 and that defence must prevail if it is well-founded in law, that is to say, if the provisions of the agreement are not repugnant to some such principle of law as the learned Judge of this Court conceived to be applicable to the same. In the second place, it has been contended that the terms of the agreement itself do not amount to a bequest by Ram Din Rai in favour of Bageshar Rai, or by Bageshar Rai in favour of Ram Din Rai, whichever should be the survivor. This contention turns in part upon the interpretation of the word "*lawalad*," used in a certain paragraph of the agreement. The Courts below and also the learned Judge of this Court have held that in this particular context the expression *lawalad* can only mean "without male issue." We have been asked to reconsider that decision, but in view of the terms of the document as a whole it seems to us clearly correct. As regards the pricise terms of the clause prescribing the manner in which the property dealt with under this deed of agreement is to descend upon the death of the several executants, we are not bound to consider anything more than the application of those terms to the particular group of executants consisting of Jai Narain Rai and his two sons. So considering it, we have no doubt whatever that each of these three executants did agree, and intended to agree, that whichever of them died first the property taken by him under the deed should devolve in equal shares upon the other two, and that the last survivor of the three should inherit whatever was left in the hands of his father or brother, as the case might be. This being our interpretation of the agrement, we are left to determine only the question of law on which the learned Judge of this Court differed from the District Judge, *viz.*, whether these terms are enforcible. The principle laid down in the Tagore Will case as applied to the facts now before us was in substance this. It was perfectly open to Jai Narain Rai, Ram Din Rai and Bageshar Rai, a Hindu father and his two sons—when partitioning certain property amongst themselves, to come to an agreement that on the death of any one of them his share should pass to the other two and, after the deaths of any two of them, the right of inheritance should devolve on the last survivor. What it was not competent for them to do was to lay down a rule of inheritance for the property in the hands of this last survivor, in derogation of the ordinary rules of Hindu law. There is nothing contrary to this in the second Privy Council case relied upon by the learned Judge of this Court. Their Lardships were there dealing with a document executed by two brothers. This document purported to prescribe a rule of succession for their property after the death of either or both of them, One of the two brothers having died, the property devolved upon his son. It would no doubt have done so under the ordinary Hindu Law, but it seems to have been taken for granted that the son in question took under the terms of the Will or agreement executed by his father and his uncle. The question for determination before the Court in that case was the devolution of the property after the death of the son who had so taken under the terms of the said agreement. It was held that he had not taken the property subject to any special rule of devolution laid down in the agreement, but that, on the contrary, after his death the property descended under the ordinary rules of Hindu Law. That case would be directly in point if we were dealing with a dispute as to the succession to his property now in suit upon the death of Bageshar Rai. In our opinion it does not apply to the question actually in issue before us. On the other hand, we have been referred to a case decided by a Bench of this Court which is almost directly in point—that of *Kantee Chandra Mukerji* v. *Ali Nabi* (3). The learned Judges who decided that case enforced 'as between the signatories to the same, who were Hindu brothers, a family settlement providing for the devolution of property upon the death of any one of the signatories almost exactly similar to that embodied in the agreement of the 5th of March 1902. In our opinion, therefore, the learned Judge of this Court was in error in reversing the decision of the lower Appellate Court on the ground which he took. Atlowing this appeal, we set aside the judgment of the lesrned Judge of this Court and restore that of the lower Appellate Court dismissing the plaintiff's suit. For reasons which we have sufficiently indicated, we leave the parties to bear their own costs throughout.

K. S. D. *Appeal allowed.*

(3) 9 Ind. Cas. 935 ; 33 A. 414 ; 8 A. L. J. 199.

BOMBAY HIGH COURT.

CIVIL APPLICATION NO. 143 OF 1922.

January 19, 1923.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

MADHAVRAO VISVANATH NIMALKAR —PLAINTIFF—APPLICANT

versus

SHRIKRISHAN GOVINDRAO KIRTIKAR —DEFENDANT—OPPONENT

Presidency Small Cause Courts Act (XV of 1882), s. 19 (q)—Suit for return of ornaments given at betrothal—Jurisdiction.

A suit for the return of ornaments presented by custom by the prospective bridegroom at the time of betrothal is not after the marriage negotations have-failed, a suit for compensation for breach of promises sion of marriage within the meaning of section 19 (q) of the Presidency Small Cause Courts Act and is cognizable by the Small Cause Court.

Civil application against the decree of the Court of the Small Causes, Bombay, in Civil Suit No. 24370 of 1921.

Mr. *A. A. Adarkar*, for the Applicant.

JUDGMENT.—The plaintiff filed a suit in the Small Cause Court, Bombay, alleging that he had been betrothed to the defendant's daughter; that according to the custom he gave at the time of betrothal two *Lugadas* one *polka* and a gold ring of the aggregate value of Rs. 54, and spent Rs. 30 over and above the value of those articles. Eventually the defendant said he would not celebrate the marriage of his daughter with the plaintiff, hence the suit.

The Trial Court held that the suit was excluded from the jurisdiction of the Small Cause Court under section 19 (*q*) of the Presidency Small Cause Courts Act, treating it as a suit for compensation for breach of promise of marriage. Such a suit in England is brought against a party who has failed to perform a promise to marry. A suit for the return of ornaments persented by custom by the prospective bridegroom at the time of betrothal is a suit of an entirely different nature. We see no reason why we should hold that it is a suit for compensation for breach of promise of marriage

we think, therefore, that with regard to the claim for the return of the two *Lugadas*, the *polka* and gold ring, or the value thereof, the Small Cause Court has jurisdiction. The rule will be made absolute and the suit remanded to that Court for disposal on the merits, with costs here and in the full Court on the opponent.

K. S. D. *Application allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 718 OF 1923.

February 8, 1924.

Present :—Mr Justice Sulaiman and Mr. Justice Ryves.

MAHABIR PRASAD MISIR ALIAS CHAUKAT MISIR—DECREE-HOLDER—APPELLANT

versus

AMLA PRASAD RAI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Hindu Law—Joint Family—Manager, powers of—Mortgage by Manager of family property for business purposes—Other members, whether liable.

The Manager of a Hindu family has power to contract debts for the purposes of a family business which need not necessarily be ancestral.

When, therefore, the managing member in carrying on the family business obtains an advance necessary for the purpose of the business by pledging the joint family property, the mortgage is binding on all the members of the family.

Johurra Bibee **v.** *Sreegopal Misser*, 1 C. 470 ; 1 Ind. Dec. (N. S.) 293; *Bemola Dossee* **v.** *Mohun Dossee*, 5 C. 792; 6 C. L. R. 34; 2 Ind, Dec. (N. S.) 1112; *Baba Din.* v. *Bansraj*, 27 Ind. Cas. 567; 2 O. L. J. 55; 18 O. C. 84, relied on.

McLaran Morrison **v.** *Verschoyle*, 6 C. W. N. 429; *Ganpat Rai* **v.** *Munni Lal*, 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54, distinguished.

Appeal from the decree of the 2nd Additional District Judge, Gorakhpore, dated the 20th February 1923.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *Sankar Saran*, for the Respondent.

MAHABIR PRASAD *v.* AMLA PRASAD RAI

JUDGMENT.—This is an appeal by a decree-holder arising out of certain execution proceedings. In 1907 the objectors' father Ram Piare Rai executed a mortgage-deed in favour of the decree-holder for a sum of Rs. 1,499. A suit was brought on the basis of this deed and a preliminary decree was passed on the 23rd of August 1918. This was made absolute on the 27th of March 1919. While an application for execution of this final decree was pending, Ram Piari Rai, the mortgagor, died on the 2nd of May 1919. His sons were brought on the record as his representatives and they raised the objection that the debt incurred by Ram Piare Rai had not been incurred for any family necessity and was not binding on them. Parties adduced evidence on the question raised and the Court of first instance came to the conclusion that the debt had been contracted in connection with the business for the purchase and sale of elephants, which Ram Piare Rai had been conducting. The learned Subordinate Judge was fully satisfied that the money was borrowed for the elephant business which Ram Piare Rai did for the family benefit and not for the sake of his hobby. The objections were accordingly disallowed by him. On appeal by the judgment-debtors the lower Appellate Court has allowed the objections. On the question of fact raised, it came to the conclusion that a business for the purchase and sale of elephants had been started by the objectors' father some 7 or 8 years before the mortgage in question, and that it was in connection with that business that the father borrowed the money. It was distinctly of opinion that the family must have benefited from any resultant profits out of the elephant trade assuming that there was any such profits. It, however, held taht the business not having been an ancient family business or ancestral business the debt incurred by the agent would not be binding on the other members of the family.

The decree-holder has come up in appeal and the finding of the lower Appellate Court on the question of law raised is challenged. The learned Additional District Judge has drawn a distinction between a simple debt and a mortgage-debt and has expressed the view that if it had been a case of a simple debt it would have been binding.

The point which we have to consider is whether the amount borrowed by the manager of a Hindu family in connection with a family business is such as is binding on the other members of the family. The decree-holder is not seeking to enforce the debt against the sons on the ground of any pious obligation of theirs. It is well understood that the manager of a Hindu family has power to contract debts for the purposes of a family business, and this power is well recognised. It is not necessary that such business should necessarily be an ancestral one. So long as it is not a separate business of the manager himself and it is a family business carried on for the benefit of the family, the debts incurred for carrying it on would be binding on the whole family and it is by no means incumbent on the creditor to prove that the family actually benefited out of that transaction. On principle, it would make no differences whether it is or it is not an ancestral business. The ordinary presumption would be that the money required for the carrying on of the business is ruquired for a family necessity and the business is carried on with the consent and acquiescence of all the members of the family. If the creditors were called upon to prove legal necessity or family benefit for each such advance it would practically be impossible for a Hindu family to carry on any business, as no one would ever give it credit.

We are fortified in this view by the observations containeed in a number of cases to which we may briefly refer.

In the case of *Johurra Bibee* v. *Sreegopal Misser* (1), at page 475, the view taken in the case of *Ramlal Thakursidas* v. *Lakmichand* (2) was quoted with approval, that " persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business, and, therefore, that debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business. In other words, it seems to me that

(1) 1 C. 470 ; 1 Ind. Dec. (N. S.) 293.
(2) 1 Bom. H. C. R. App. 51 at p. 71.

those who claim to participate in the benefits must also be subject to the liabilities of the joint business."

This case was approved of by a Bench of the same Court in the case of *Bemola Dossee* v. *Mohun Dossee* (3) which was also a case of a family business and not necessarily an ancestral business. Though it was a case under the Diabhag Law it was pointed out that "adult members of an undivided Hindu family who have an interest in a family business carried on by the managing members of the family and who are maintained out of the profits of such business must, in the absence of evidence, be taken to possess the knowledge that the business might require financing and to have consented to such financing. Where, therefore, a managing member of such a family in carrying on the family business obtains an advance necessary for the purpose of the business by pledging the joint family property, the mortgage is binding on all the members of the partnership."

The same principle was laid down in the case of *Sakrabhai* v. *Maganlal* (4) which, however, was a case where a Hindu widow had contracted debts on the credit of the assets of the business to which she had succeeded as the heiress of her deceased husband.

In the case of *Raghunathji Tarachand* v. *The Bank of Bombay* (5), it was remarked that "in connection with the legal position of an ancestral firm in its dealings with the outside world of commerce, the test to be applied in such cases is rather the apparent authority of the manager than the actual necessity of the family. And that is a perfectly reasonable position, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on, may be considered necessary to the trade. If this reason is right then one passes on from the ordinary Hindu Law as to a manager's power of alienation to the law of partnership."

The case of the Oudh Court reported in *Baba Din* v. *Bansraj* (6), is clearly in point.

(3) 5 C. 792; 6 C. L. R. 31; 2 Ind. Dec. (N.S.) 1112.
(4) 26 B. 206; 3 Bom. L. R. 738.
(5) 2 Ind. Cas. 173 ; 34 B. 72 at p. 86 ; 11 Bom. L. R. 255.
(6) 27 Ind. Cas. 567 ; 2 O. L. J. 55 ; 18 O. C. 84.

The learned Additional Judicial Commissioner, following the Bombay case of *Raghanathji Tarachand* v. *The Bank of Bombay* (5), held that "where a joint Hindu family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to enquire into the finance of the business, as long as that business forms the purpose of the debts, in order to bind the whole family thereby, because the power to contract debts is incidental to the carrying on of the business, from which the family derives its means of subsistence and support." There, too, the business was not an ancestral or an ancient business but had been started only 9 or 10 years prior to the debt.

The learned Vakil for the respondents has strongly relief on two cases. The first one is the case of *McLaren Morrison* v. *Verchoyle* (7). That case, however, on the facts is clearly distinguishable. At page 437 it was remarked that "Bepin made use of the name of the firm for his own purpose after the year 1897, but the business as a business undoubtedly was determined when the mill ceased to work and from that time forward there was no necessity to borrow money for the purchase of castor seed in connection with the mill." Again at page 498 it was clearly pointed out that this business was not the ancestral business but an entirely new business and the advances made by the plaintiffs to Bepin were not made in the course of the ordinary transactions of the ancestral business and were not made for the benefit of the joint family at all.

In the same way, the case of *Ganpat Rai* v. *Munni Lal* (8) is distinguishable. The learned Judges in that case disagreed with the Trial Court and held that the debts for the payment of which the mortgage-deed had been executed were gambling debts and could not, therefore, be regarded as debts contracted by the mortgagor in his capacity of a manager of a firm or family in the course of the ordinary business of the firm or family. All that was held was that there was no presumption

(7) 6 C. W. N. 429.
(8) 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54.

that a debt contracted by the manager of a Hindu family or firm was contracted for the benefit of the family or firm. On the facts found in that case there can be no doubt that the sons were not bound by that debt.

On the findings arrived at by the learned Additional District Judge there can be no doubt that this amount had been borrowed by the father in order to carry on the family trade of purchase and sale of elephants, that this was not an isolated transaction but was in connection with the business which had been going on for some 7 or 8 years prior to the transaction and that this was the business from which the other members of the family were likely to benefit if there were any profits On these findings we are of opinion that the mortgagors cannot escape their liability.

The result, therefore, is that this appeal is allowed the decree of the Court below is set aside and that of the Court of first instance restored with costs including in this Court fees on the higher scale.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREES NOS. 191 AND 321 OF 1922.

December 31, 1923.

Present :—Justice Sir Asutosh Mookerjee, Kt., C. S. I., and Mr. Justice Suhrawardy.

IN APPEAL NO. 191.

DWIJENDRA NARAIN ROY—DEFENDANT—APPELLANT

versus

JOGESH CHANDRA DEY AND OTHERS—RESPONDENTS.

IN APPEAL NO. 321.

TARINI PROSAD DHAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

JOGESH CHANDRA DE AND OTHERS—RESPONDENTS.

Registration Act (*XVI of* 1908), *ss. of* 47, 49, 77, *scope of—Suit for compulsory registration of document—Question in issue—Claim for possession and mesne profits whether can be coupled with prayer for registration—Registrable document, when takes effect*—Res judicata—*Doctrine, applicability of—Judgment, when operates by way of estoppel—Party whether can be allowed to assume inconsistent positions—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 109—*Second suit growing out of first—Cause of action, when accrues—Test—Time when begins to run.*

In a suit instituted under section 77 of the Registration Act, the Court is concerned not with the validity but with the genuineness of the document sought to be registered that is, whether the document has been executed by the person by whom it is alleged to have been executed ; the question of its validity must be determined in a suit properly framed for that purpose. [p. 525, col. 2.]

Balambal Ammal v. *Arunachala Chetti*, 18 M. 255 ; 6 Ind. Dec. (N.S.) 527 ; *Raj Lakhi Ghose* v. *Dibendra Chundra Majumdar*, 24 C. 668 ; 1 C. W. N. 444 ; 12 Ind. Dec. (N. S) 1174 ; *Hassan Alli* v. *Ekambaram*, 5 M. L. J. 29 ; *Kanhaya Lal* v. *Sardar Singh*, 29 A. 284 ; 4 A. L J. 171 ; A. W. N. (1907) 46 ; *Prosunno Coomar Sandyal* v. *Mothoora Nath Banerjee*, 15 W. R. 487 ; 8 B. L. R. App. 26, followed.

Nawab v. *Arjan Das*, 13 P. R. 1904 ; 78 P. L. R. 1904, not followed.

Although the scope of the inquiry in a suit under section 77 may be of a restricted character it does not follow that the doctrine of *res judicata* is excluded from full operation. [p. 526, col. 1.]

Ramachandra Row v. *Ramachandra Row*, 67 Ind. Cas. 408 ; 49 I. A. 129 ; 30 M. L. T. 154 ; 26 C. W. N. 713 ; 45 M. 320; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359 ; (1922) A. I. R. (P. C.) 80 ; 20 A. L. J. 684; 43 M. L. J. 78 ; 24 Bom. L. R. 963 (P. C.) *George Henry Hook* v. *The Administrator-General of Bengal*, 60 Ind. Cas. 631 ; 48 I. A. 187 ; 19 A. L. J. 366 ; 40 M. L. J. 423 ; 29 M. L. T. 336 ; (1921) M. W. N. 313; 33 C. L. J. 405 ; 3 U. P. L. R. (P. C.) 17 ; 23 Bom. L. R. 648 ; 25 C. W. N. 915 ; 14 L. W. 221 ; 48 C. 499 (P. C.) ; *Mungal Pershad Dichit* v. *Grija Kant Lahiri*, 8 I. A. 123 ; 8 C. 51 ; 11 C. L. R. 113 ; 4 Sar. P. C. J. 249 ; 4 Ind. Dec. (N. S.) 32 (P. C.) ; *Ramkirpal Shukul* v. *Rup Kuar*, 11 I. A. 37 ; 6 A. 269 ; 4 Sar. P. C. J. 489 ; 3 Ind. Dec. (N. S.) 718 (P. C.) ; *Beni Ram* v. *Nanhu Mal*, 11 I. A. 181 ; 7 A. 102 ; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S.) 138 (P.C.)

The principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the Code of Civil Procedure in this respect. [p 526, col. 2.]

An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words a jugdment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of the decision or were in conflict therewith. [p. 526, col. 2.]

DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA DEV

Rajeswara Sethupati Avergal Raja of Ramnad v. *Velusami Tever*, 59 Ind. Cas. 880 ; 48 I. A. 45 ; 19 A. L. J. 168 ; 40 M. L. J. 197 ; 13 L. W. 210 ; (1921) M. W. N. 51 ; 33 C. L. J. 218 ; 25 C. W. N. 581 ; 23 Bom. L. R. 701 ; 29 M. L. T. 345, followed.

If both parties invoke the opinion of the Court upon a question, if it is raised by the pleadings and argued, the judgment upon it does not come *ultra vires* merely because an issue was not framed which strictly construed, embraced the whole of it. [p. 527, col. 1.]

Barrs v *Jackson*, (1842) 1 Y. & C. C. C. 401 at pp. 585, 597 ; 57 R. R. 461 at p. 465 ; 1 Phillips 582 ; 65 R. R. 457 ; 14 L. J. Ch. 433 ; 9 Jur. 609, followed.

Where a defendant is entitled to set up in the same answer as many defences as he has, if a judgment is entered in his favour which contains no provision that it shall be without prejudice or any like limitation or restriction the estoppel raised by it will extend to every matter or fact in issue found by the Court in favour of the defendant. [p. 527, cols. 1 & 2.]

Rampal Singh v. *Ram Prasad Singh*, 27 A. 37 ; 1 C. L. J. 46 ; 2 A. L. J. 287 ; 32 I. A. 17 ; 8 Sar *P.* C. J 727 (P. C) : *Peary Mohun Mukerjee* v. *Ambica Churn Bondopodhya*, 24 C. 900 ; 12 Ind. Dec. (N. S.) 1269, followed.

Rash Behary Serkar v. *Mahendra Nath Ghose*, 20 Ind. Cas. 979 ; 19 C. L. J. 34, dissented from.

A party litegant cannot be permitted to assume inconsistent positions in Court, to approbate and reprobate to the detrement of his oppenent. [p. 528, col. 2.]

Ram Nandan Dhar Dube v. *Kaniz Fatima*, 39 Ind. Cas 902 ; 39 A. 879 ; 15 A. L. J. 369 ; *Indubala Debi* v. *Atul Chandra Ghosh*, 57 Ind. Cas. 344 ; 31 C. L. J. 507 ; *Bhoja Chowdhury* v. *Chuni Lal Marwari*, 5 C. L. J. 95 ; 11 C. W. N. 284, relied on.

This doctrine applies not only to the successive stages of the same suit but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first. [p. 528, col. 2.]

A document which is compulsorily registrable does not affect any immoveable property comprised therein till it has been registered but as soon as it has been registered it takes effect not from the date of registration but retrospectively from the date of execution. [p. 529, col. 1.]

So far as suits under section 77 of the Registration Act are concerned, it is well settled that no other claim such as a claim for possession and mesne profits can be coupled with the prayer to enforce registration of the document. [p. 531, col. 1.]

Krishnammal x. *Soundararaja Aiyar*, 22 Ind. Cas. 912 ; 38 M. 698 ; 15 M. L. T. 103 ; (1914) M. W. N. 200 ; 1 L. W. 147, followed.

When the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles. [p. 531, col. 2.]

The property passes into legal custody as the Receiver is in the position of stake-holder and such custody is for the benefit of the true owner. [p. 532, col. 1.]

In a suit for recovery of possession and mesne profits on the strength of the plaintiff's title as lessee under four documents executed by the defendant in his favour on the 17th January 1913 the defendant pleaded that the suit was not maintainable as the plaintiff had fraudulently interpolated words and clauses in the leases. It was also urged that the claim for mesne profits for a period antecedent to three years prior to the institution of the suit was barred by limitation. It appeared that previous to this suit plaintiff had on the refusal of the Registrar to register the aforesaid leases instituted a suit to enforce registration under the provisions of the Registration Act and the defendant had raised the same plea in that suit. It was eventeally held that the leases were genuine and the suit was decreed :

Held, (1) that, under the circumstances, the attempt made by the defendant to circumvent the decision in the previous suit could not succeed as the matter was *res judicata* ;

(2) that the defendant could not be allowed to take up in this suit a position entirely inconsistent with that adopted in the previous suit;

(3) that time did not commence to run against the plaintiff till the date when the leases were actually registered and the prayer for mesne profits was within time ;

(4) that the liability of the defendants for mesne profits, terminated on the date when a Receiver was appointed and from that date the plaintiff, if successful, would a be entitled only to such sums as might be in the hands of the Receiver.

Ordinarily, limitation runs from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is reanimated. [p. 529, col. 2.]

Girish Chandra Bit v. *Bipin Behari Khan*, 44 Ind. Cas. 159 ; 27 C. L. J. 535 ; *Bama Charan Chakravarti* v. *Kishore Mohan Roy*, 64 Ind. Cas. 903 ; 35 C. L. J. 58, relied on.

DWJENDRA NARAIN ROY *v.* JOGESH CHANDRA DEV

Time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. [p. 530, col. 2.]

Woomesh Chunder Goopta v. *Raj Narain Roy*, 10 W. R. 15 ; *Priya Sakhi Debi* v. *Manbodh Bibi*, 37 Ind. Cas. 277 ; 41 C. 475 ; 21 C. W. N. 177 : 27 C. L. J. 212, relied on.

The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunal for relief. [p. 530, col. 2.]

Coburn v. *Colledge*, (1897) 1 Q. B. 702 ; 66 L. J. Q. B. 462 ; 76 L. T. 608 ; 45 W. R. 488, followed.

Consequently the true test to determine when a cause of action has accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result. [p. 530, col. 2.]

Appeals against the decrees of the Subordinate Judge, Murshidabad, dated the 2nd June 1922.

Babu *Mahendra Nath Roy* (with him Babus *Romesh Chandra Sen*, *Birendra Kumar De* and *Promotha Nath Banerjee*), for the Appellant in No. 191.

Babu *Dwarka Nath Chakraburty* (with him Babus *Hemendranath Sen* and *Ramaprosad Mukerji*), for the Respondent in No. 191.

Babu *Kali Kinkai Chakraburty*, for the Appellant in No. 321.

Babu *Dwarkanath Chakraburty* (with him Babus *Hemendra Chandra Sen* and *Ramaprosad Mukerji*), for the Respondents in No. 321.

JUDGMENT.—These are two appeals by the first and the second defendant respectively, a suit for recovery of possession of land and mesne profits, upon declaration of title. The facts material for the determination of the questions in controversy are beyond dispute and may be briefly recited.

On the 17th January 1913, the first defendant executed four documents in favour of the plaintiff, namely :—

(1) a *patni patta* in respect of lands described in schedule *ka* of the plaint ;

(2) a *darpatni patta* in respect of lands described in schedule *kha* of the plaint ;

(3) a *mourasi mokarari patta* of the *debuttar Lakheraj* resumed *chakran* land described in schedule *ga*, *gha* and *uma* of the plaint and,

(4) a *mourasi mokarari patta* of the *aima* and resumed *chaukidari chakran* lands described in schedule *cha* of the plaint.

The first and second documents were taken in the name of the plaintiff himself the third and fourth documents were taken by the plaintiff in the name of the third defendant. On the 19th March 1913, the four documents were tendered for registration. The executant at first admitted but subsequently denied execution. The result was that the Sub-Registrar refused registration on the 7th May 1913 ; this order was confirmed by the Registrar on the 21st October 1913. On the 19th November 1913, the plaintiff, along with the third defendant, instituted a suit against the first defendant to enforce registration of the documents under the provisions of section 77 of the Indian Registration Act. The defendant contended that the deeds had been materially altered after he had executed them, and pleaded in substance that the documents presented for registration did not represent the real agreement between the parties. The Subordinate Judge found against the plaintiff and dismissed the suit on the 3rd March 1915. On appeal to this Court, Fletcher and Newbould, JJ., on the 34th May 1917, remitted the case to the Trial Court for a finding on the issue, whether a document which purported to be a *bainanama* or deed of agreement, dated the 6th November 1912, was executed between the parties. The Subordinate Judge, after full enquiry, held on the 8th October 1917, that the document was the original *bainanama* executed between the parties. On receipt of this finding, Fletcher and New-bould, JJ., heard the appeal on the merits and on the 4th June 1818, came to the conclusion that the decree of dismissal made by the Trial Court could not be sustained. The result was that the appeal was allowed and the suit was decreed. The judgment of the High Court stated that the Court was unable to agree with the Subordinate Judge that the documents had been tampered with by the plaintiff ; on the other hand, it was explicitly found that they were in the form provided by the contract between the parties, that the *baina-*

nama was a genuine document which supported most strongly the case for the plaintiff, and that all the surrounding circumstances and the evidence suggested that the documents were executed by the defendant. The defendant thereupon appealed to His Majesty in Council. On the 10th November 1920, Lord Minto delivered judgment in the following terms: "Their Lordships accepted the judgment of the High Court and the reasons which they give for that judgment, and they will humbly advise His Majesty that the appeal should dismissed with costs." Thus terminated the previous litigation. But two incidents, which had happened during its pendency, may be conveniently mentioned here. On the 25th May 1915, after the dismissal of the suit by the primary Court, the first defendant executed four leases in favour of the second defendant who took possession of the disputed property on the basis of the title thus acquired. On the 22nd June 1918, after the suit had been decreed on appeal by the High Court, the four documents executed by the first defendant in favour of the plaintiff were duly registered.

On the 28th April 1921, the plaintiff instituted the present suit for recovery of possession and mesne profits on the strength of his title as lessee under the four documents executed in his favour on the 17th January 1913. The first defendant pleaded in substance that the suit was not maintainable, as the plaintiff had fraudulently interpolated words and clauses in the leases and the leases thus altered did not represent the terms settled between the parties. The second defendant pleaded that he had taken leases from the first defendant in good faith and was not liable for mesne profits, as he had been always ready and willing to give up possession to the plaintiff. He further urged that the claim for mesne profits for a period antecedent to three years prior to the institution of the suit was barred by limitation. On these pleadings, fifteen issues were raised on the 16th July 1921. The seventh issue was cancelled as unnecessary on the 10th March 1922. The remaining issues were in the following terms:

1. Has the plaintiff any cause of action against defendant No. 1?

2. Is the suit barred for O. II, r. 2. Civil Procedure Code and section 42 of the Specific Relief Act?

3. Is the settlement made by defendant No. 1 with defendant No. 2 not affected by the doctrine of *lis-pendens*?

4. Is the suit not maintainable for the reasons stated in paras. 3 and 8 of the written statement of defendant No. 1?

5. Were some of the findings of the previous litigation beyond the scope of that litigation? Were some of the findings without jurisdiction, *ultra vires* and self contradictory as stated in para. 3 of defendant No. 1's written statement? Is the defendant bound by all the findings of the previous litigation? Are the contentions raised by defendant No. 1 in para. 3 of his written statement maintainable in this suit?

6. Are the four *pattas* genuine and duly executed? Were there any new terms inserted in the four *pattas* of the plaintiff fraudulently and without the knowlege of the defendant No. 1? Were the *pattas* vitiated by fraud and are they void and voidable? Can the plaintiff get any relief on the basis of those documents? Are the *pattas* binding on defendant No. 1? Can defendant No. 1 raise the above contentions in this suit by reasons of the principle of *res-judicata*?

8. Is defendant No. 1 entitled to separate sets of *jamas* on a proper construction of the four *pattas*? Can defendant No. 1 raise any such contention?

9. Were *debuttar lakhiarj* lands fraudulently and illegally included within the *patni* granted by defendant No. 1 to plaintiff? Has defeedant No. 1 been prejudiced by any such inclusion? Can defendant No. 1 raise any such contention?

10. Is defendant No 1 in collusion with defendant No. 2? Is defendant No. 2 withholding payment of rents to defendant No. 1 at the plaintiff's instigation?

11. Is the plaintiff entitled to recover possession of the properties in suit?

12. Is the plaintiff entitled to any *mesne profits* and damages? If so, how much and from which of the contesting defendant?

13. Is any portion of the plaintiff's claim for *mesne profits* or damages barred by limitation?

14. Is defendant No. 1 entitled to amend his written statement for the reason stated in

para. 17 of the written statement? Are the reasons correct?

15. Is the written statement of defendant No. 1 framed according to law? If not, is it liable to be rejected?

On the 10th March 1922, the Subordinate Judge took up the question of *res judicata* as comprised in issues Nos. 5, 6, 8 and 9. He held that the decision in the previous litigation was conclusive in so far as it was held that there were no alterations in the leases, that the defendant executed them as they now stand, and that they are genuine documents. On the 20th April 1922, the defendant presented a petition in the following terms:

"1. That as the result of the previous litigation between the parties and your Honour's decision of 10th March 1922 it is now an established fact, which is not admitted by this defendant, that the documents as they now stand on which the plaintiff bases his title are genuine documents executed by the defendant in the plaintiff's favour and that the plaintiff committed no forgeries by making material alterations therein after they had been executed by this defendant, as set up by him.

"2. That in the present suit the case of this defendant now is, that the above-mentioned documents do not express the real intention of the parties and do not embody the terms settled between them, that there are new terms embodied therein to which the defendant never agreed, and that those terms were embodied in the documents fraudulently at the instance of the plaintiff with the intention of defrauding the defendant.

"3. That the said fraud was committed in this way: That by the terms originally settled the defendant reserved for himself by way of rent the sum of Rs. 300 and Rs. 900, in all Rs. 1,200; but by the deeds as they now stand, it may be a matter of doubt whether the plaintiff or this defendant is to get the said sum as rent. The plaintiff fraudulently embodied in the deeds such terms in order to secure for himself the said sum otherwise clearly recoverable by this defendant, according to the terms settled for the *Mourasi* leases.

"4. That this defendant is not aware when the new terms were embodied in the documents.

"5. That under the circumstances set forth above, this defendant prays that he may be allowed to adduce evidence to show:

"(*i*) the circumstances under which the documents came to be executed and the terms originally settled between the parties;

"(*ii*) the terms embodied in the documents are not those originally settled.

"(*iii*) the circumstances under which these new terms came to be embodied in the documents.

"4. That these terms were embodied in the documents at the instance of the plaintiff and without the knowledge of the defendant.

"5. That these terms were embodied fraudulently at the instance of the plaintiff in order to defraud the defendant in the way above stated.

"6. Such evidence as may be required for construction of the documents.

"6-A. Evidence of such other facts as may have any bearing on any of the above facts.

"6-B That upon the proper construction of the documents in spite of the apparent ambiguity brought about by the plaintiff's fraud as above stated, it is further the case of this defendant that he is entitled to the four sets of *jamas* one by each of the documents.

"7. That the second judgment of the Subordinate Judge and also the judgments of the High Court and the Privy Council are mainly based upon the *bainamæ* which this defendant asserts is a forged document and was fraudulently brought into existence by the plaintiff in collusion with the defendant's officer Hari Mohan Roy now dead and that the judgments and decrees based upon such a forged document fraudulently obtained are themselves nullities."

On the 24th April 1922, the Subordinate Judge held that the leases contained all the terms of the contract and that evidence was not adimssible to show that the terms set out therein were not those settled between the parties. The Subordinate Judge further observed that the defendant could not be allowed to shift his position and to adduce evidence to show that new terms has been inserted in the documents *before* they were executed by him, contrary to his previous allegation that new terms had been interpollated

in the documents *after* they were executed by him. The Subordinate Judge adhered to this view on the 1st May 1922, on an application for re-consideration. The case was then heard on the merits and ultimately decreed on the 2nd June 1922 in the following terms :—

"It is ordered that the suit be decreed with costs. That the plaintiff's right to the disputed proprerties as claimed in the plaint be declared and that he do get *Khas* possession of the same in those rights; he shall get mesne profits and damages in respect to those properties from defendant No. I from 4th *Magh* 1319 to 9th *Jyet*, 1322 and from defendants Nos. 1 and 2 from 10th *Jyet* 1322 to the date of the plaintiff's getting possession or till the expiration of three years from the date of the decree (whichever event occurs first); the amount of mesne profits and damages which the plaintiff is entitled to get, will be ascertained afterwards."

The defendants have preferred separate appeals to this Court against the decree of the Subordinate Judge. On behalf of the first defendant, the decree has been assailed substantially on three grounds, namely, first, that the principle of *res judicata* has been erroneously applied; secondly, that the claim for mesne profits for a period antecedent to three years prior to the date of the suit is barred by limitation; and, thirdly, that upon a true construction of the documents which contain contradictory clauses the order for possession and mesne profits is erroneous. On behalf of the second defendant, the decree of the Subordinate Judge has been assailed on two grounds, namely, first, that he is not liable for mesne profits, and secondly, that the claim for mesne profits for a period beyond three years prior to the suit is barred by laimitation.

As regards the application of the principle of *res judicata* to the matters in controversy in this litigation, the appellant has urged that the previous suit instituted under section 77 of the Indian Registration Act was strictly limited in scope, that the decision therein could be treated as conclusive in one respect alone, namely, that the four leases executed in favour of the plaintiff were genuine, and that the finding upon every other point must be deemed an expression of opinion upon a matter either beyond the jurisdiction of the Court or only incidentally in issue. It may be conceded that in a suit instituted under section 77, the Court is concerned, not with the validity but with the genuineness of the document sought to be registered, that is, whether the document has been executed by the person by whom it is alleged to have been executed; the question of its validity must be determined in a suit properly framed for that purpose. The Court will not, consequently, examine such defences as, that the document was cancelled, *Balambal Ammal* v. *Arunachala Chetti* (1), or that the document was executed by a guardian of a minor in contravention of his powers, *Raj Lakshi Ghose* v. *Debendra Chundra Majumdar* (2), or that the document is void for want of consideration, *Hassan Alli* v. *Ekambaram* (3), or that the document was executed by the donee of a voidable power-of-attorney, *Kanhaya Lal* v. *Sardar Singh* (4), or that the document was obtained by undue influence, *Prosunno Coomar Sandyal* v. *Mothoora Nath Banerjee* (5), *Remal Das* v. *Jannet* (6). To the same effect are the decisions in *Futteh Chund Sahoo* v. *Lellumber Singh Doss* (7), *In the matter of Hadjee Abdoollah* (8), *Broucke* v. *Rajah Saheb Mohan Bikram Shah* (9), *Ram Ghulam* v. *Menda* (10), *Hazuri Mal* v. *Kutab-ud-Din* (11), *Nawab* v. *Arjan Das* (12), while *Chundra Kishore Munshi* v. *Dinendra Nath Sanyal* (13), perhaps points in a different direction. This limited scope of a suit under section 77 is reflected in the Court-Fees Act, which provides in Sch. II, A. 17 (VI) that the fee payable on a plaint and memorandum of appeal from a decree in such a suit is a fixed fee of Rs. 10 (recently raised to

(1) 18 M. 255 ; 6 Ind. Dec. (N. S) 527.
(2) 24 C. 668; 1 C. W. N. 444; 12 Ind. Dec. (N. S.) 1174.
(3) 5 M. L. J. 29.
(4) 29 A. 254 ; 4 A. L. J. 171 ; A. W. N. (1907) 46.
(5) 15 W. R 487 ; 8 B. L. R. App. 26.
(6) 62 Ind Cas 789 ; 2 L. 202.
(7) 14 M I. A. 129 ; 16 W. R. P. C. 26 ; 9 B. L. R. 433 ; 2 Suth. P. C. J. 467; 2 Sar P. C. J. 709 ; 20 E R. 734.
(8) 8 I. A. 221 ; 2 C. 131 ; 26 W. R. 50 ; 1 Ind, Dec. (N. S.) 380 (P. C.)
(9) 5 Ind. Cas. 20 ; 14 C. W. N. 12.
(10) 60 Ind. Cas. 869 ; 19 A. L. J. 224.
(11) 11 P. R. 1903 ; 84 P. L. R. 1903.
(12) 13 P. R. 1904 ; 78 P. L. R. 1904.
(13) 1 C. L. J. 126.

Rs. 20) only, and not an *ad valorem* fee under section 7 (4) (c) upon the value of the properties comprised in the document; *Jantoo* v. *Radha Canto Dass* (14), *Savari Muthu Pillai* v. *Alagian Pillai* (15), *Ramu Aiyer* v. *Sankara Aiyer* (16), *Muhammad Zakaria* v. *Fatima Begam* (17). But although the scope of the enquiry in a suit uunder section 77 may be of a restricted character, it does not follow that the doctrine of *res judicata* is excluded from full operation. The decision of the Judicial Committee in *Badar Bee* v. *Habib Merican Noordin* (18), *Sheoparsan* v. *Rammanandan* (19), *Gopal Lal Seth* v. *Purna Chandra Basak* (20), to the final effect of decisions in probate and administration proceedings and in *Ramachandra Rao* v. *Ramachandra Row* (21), as to the conclusive character of decisions of Land Acquisition Courts even upon questions of title, shows that the argument of the appellant is not well founded on principle. In this connection, we must bear in mind that, as pointed out by the Judicial Committee in *George Henry Hook* v. *The Administrator General of Bengal* (22), which is in accord with *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (23), *Ram Kirpal Shukul* v. *Rupr Kuar* (24), *Beni Ram*, v *Nanhu Mal*, (25), and *Raja of Ramnad* v. *Velusami Tevar* (26), the principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the Code of Civil Procedure in this respect. Indeed, as pointed out by Sir Lawerence Jenkins in *Sheoparson* v. *Ramnandan* (19), the doctrine of finality of decisions is traceable, not merely to ancient Roman but also to archaic Indian Jurisprudence. We must, consequently, determine the effect of the decision in the previous litgation, not upon *a priori* considerations as to the scope of the suit but by reference to the terms of the adjudication istelf In this connection, we must bear in mind the well-settled rule that an estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment. though not as regards findings which did not form the basis of the decision or were in conflict therewith; *Midnapore Zemindari Company* v. *Naresh Narain Ray* (27). This principle is the basis of the decision of the Judiciai Committee in *Pahalwan Singh* v. *Maharaja Maheshar Buksh Singh Bahadur* (28), and was recognised by the Supreme Court of the United States: *United States* v. *County Court of Knox County* (29), which is referred to in *Lilabati Misrain* v. *Bishun Chobey* (30), and *Aghore Nath Mukerjee* v. *Kamini Debi* (31), see also *Narayana Chetty* v. *Kannammai Achi* (32). To the same effect is the observation of Knight Bruce, V. C., in *Barrs* v. *Jackson* (33).

"The rule against re-agitating matter adjudicated is subject generally to this restriction,

(14) 8 C. 515 ; 4 Ind. Dec. (N.S.) 332.
(15) 12 M. L. J. 88.
(16) 31 M. 89.
(17) 21 P. R. 1895.
(18) (1909) A. C. 615 ; 78 L. J. P. C. 161 ; 101 L. T. 161.
(19) 38 Ind. Cas. 914 ; 43 I. A. 91 ; 14 A. L. J. 466; 20 C. W. N. 738 ; 18 Bom L. R. 397 ; 23 C. L. J. 621; (1916) 1 M. W. N. 419 ; 20 M. L. T. 1; 3 L. W. 544; 31 M. L. J. 77 ; 43 C. 694 (P. C.).
(20) 67 Ind. Cas. 561; 49 I. A. 100; 20 A. L. J. 625; 43 M. L. J. 116; 36 C. L. J. 57; 49 C. 459 ; 21 Bom. L. R. 937; (1922) A. I. R. (P. C.) 253; 16 L. W. 963 ; 27 C. W. N. 174 (P. C.).
(21) 67 Ind. Cas. 408 ; 49 I. A. 129; 30 M. L. T. 154 ; 26 C. W. N. 713 ; 45 M. 920 ; 35 C. L. J. 545 ; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P.C.) 80; 20 A. L. J. 284; 43 M. L. J. 78 ; 24 Bom. L. R. 963 (P. C.).
(22) 60 Ind. Cas. 681 ; 48 I. A. 187 ; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M.W.N. 318; 33 C. L. J. 405 ; 3 U. P. L. R. (P.C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915, 14 L. W. 221; 48 C. 499 (P. C.).
(23) 8 I. A. 123; 8 C. 51; 11 C. L. R. 113; 4 Sar. P. C. J. 249 ; 4 Ind. Dec. (N. S) 32 (P. C.).
(24) 11 I A 37 ; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P.C.).
(25) 11 I. A. 181; 7 A. 102 ; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S) 138 (P. C.).
(26) 59 Ind. Cas. 880 ; 48 I. A. 45; 19 A. L. J. 168; 40 M. L. J. 197 ; 13 L. W. 290 ; (1921) M. W. N. 51 ; 33 C. L. J. 218 ; 25 C. W. N. 581 ; 23 Bom. L. R. 701 ; 29 M. L T. 345 (P. C.).
(27) 64 Ind Cas. 231 ; 48 I. A. 49 ; 48 C. 460 ; 14 L. W. 265 ; 30 M. L. T. 279 ; (1922) A. I. R. (P. C.) 241 (P. C.).
(28) 12 B. L. R. 391 ; 18 W. R. 182 ; 2 Suth P. C. J. 66.
(29) (1886) 122 W. S. 306 ; 30 Law. Ed. 1152.
(30) 6 C. L. J. 621.
(31) 6 Ind. Cas. 554 ; 11 C. L. J. 461.
(32) 28 M. 338.
(33) (1842) 1 Y. & C. C. C. 401 at. pp. 585, 597 ; 57 R. R. 461 at. p. 465 ; 1 Phillps 582 ; 65 R. R. 157 ; 14 L.J. Ch. 433 ; 9 Jur. 609.

that however, essential the establishment of particular facts may be to the soundness of a judical decision, however it may proceed on them as established, and, however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring o the law applicable to certain Prize and Admirality questions, which are governed by principles in some respects peculiar. On the whole, I am not at present prepared to say that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of Robert James Smith, and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicatam* between the parties on a question of distribution."

We must further remember that, as was observed by the Judicial Committee in *Surjimoney Dei* v. *Sadanaud* (34), if both parties invoked the opinion of the Court upon the question, if it was raised by the pleadings and argued, the conclusion cannot be supported that the judgment upon it was *ultra vires* merely because an issue was not framed which, strictly construed, embraced the whole of it; any other view would be scarcely consistent with the case of *Mitna* v. *Fuzul Rub* (35) or *Raja Rampal Singh* v. *Ram Prasad Singh* (36). We can not finally overlook that, as ruled in *Peary Mohan Mukerjee* v. *Ambica Churn Bandopadhya* (37) and *Rash Behary Sarkar* v. *Mahendra Nath Ghose* (38), where a defendant is entitled to set up in the same answer as many defences as he has, if a judgment is entered in his favour, which contains no provision that it shall be without prejudice or any like limitation or restriction, the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant. We are not prepared to accept the contrary view indicated in *Shib Charan Lal* v. *Raghu Nath* (39) namely, that if a decision is based upon two findings of fact, either of which would justify in law the decree actually made, that one of such findings of fact, which would, in the logical sequence of necessary issues, have been first found and the finding whereon would have rendered the other finding unnecessary to support the decree made, is the only finding which operates as *res judicata*. The practical importance of the position affirmed in *Peary Mohan Mukerjee* v. *Ambica Charn Bandopadhya* (37) and *Rash Behary Sarkar* v. *Mahendra Nath Ghose* (38) is fully realised only when we recall that the Judicial Committee have enjoined in *Tarakant Bannerjee* v. *Puddomoney Dossee* (40) and *Muhammad Sulaiman* v *Kumar Birendra Chandra Singh* (41) that in appealable cases the Trial Court should as faras may be practicable pronounce an opinion on all the important points; *Yatindra Nath Chaudhury* v. *Hari Charan Chaudhury* (42). The principles enunciated thus far cannot be disputed, though there may be room for discussion as to their applicability to the facts of a concrete case, as happened in *Ram Nandan Daar Dube* v, *Kaniz Fatima* (43), and *Indubala Debi* v. *Atul Chandra Ghosh* (44). Let us test the contention of the appellant in the light of the principles already expounded.

In the previous litigation the appellant, the defendant, pleaded that, although what purported to be his signatures on the four leases had been affixed by him thereon, the documents were not genuine, inasmuch as words and clauses had been interpolated, after execution and without his con-

(34) I. A. Sup. Vol. 212; 12 B. L. R. 304; 20 W. R. 377.
(35) 13 M. I. A. 573; 15 W. R. (P.C.) 15; 6 B. L. R. 148; 20 E. R. 665.
(36) 27 A. 37; 1 C. L. J. 46; 2 A. L. 237; 32 I. A. 17; 8 See P. C. J. 727; (P. C.)
(37) 24 C. 900; 12 Ind. Dec. (N.S.) 1269.
(38) 21 Ind. Cas. 979; 19 C. L. J. 84.
(39) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S) 487.
(40) 10 M. I. A. 477; 5 W. R. P. C. 63; 1 Suth. P. C J. 631; 2 Sar. P. C. J. 184; 19 E. R. 1052.
(41) 74 Ind. Cas. 906; 50 I.A. 1; 50 C. 243; 37 C.L. J. 561; (1922) A. I. R. (P. C.) 405; 44 M. L. J. 388; 32 M. L. T. 115; 27 C. W. N. 749 (P. C.)
(42) 26 Ind. Cas. 954; 20 C. L. J. 426.
(43) 39 Ind. Cas. 902; 39 A. 379; 15 A. L. J. 369.
(44) 57 Ind. Cas. 344; 31 C. L. J. 507.

sent. He asserted that the deeds as engrossed accurately represented the contract between the parties, that he executed them in that state, and that they were then materially altered by the plaintiff with the result that they no longer represented the real agreement. The Trial Court accepted his version- The High Court on appeal directed an enquiry into genuineness of a document which purported to be the draft agreement between the parties. On the result of the supplementary investigation by the Trial Court, the High Court pronounced the draft agreement to be genuine and held that the disputed documents were in the form provided by the contract between the parties. This was the ground work of the decision of the High Court, when it came to the conclusion that the documents had not been altered after execution and must be deemed genuine. In our opinion, the defendant is not competent to re-agitate the question of the conformity of the documents to the contract between the parties ; it is no longer open to him to contend that the documents had been materially altered after execution ; the decision of the High Court is conclusive upon these matters. It must further be born in mind that the Judicial Committee accepted not only the judgment of the High Court but also the reasons given for that judgment. But the grounds of attack formulated by the appellant in his written statement in the present litigation reiterate the grounds which were put forward by him in the former suit, and were overruled. To this extent, the matter is clearly *res judicata*. We shall next pass on to the attempt made on the 20th April, 1922 to formulate new grounds of attack. These were not only not contained in the written statement, but were directly contradictory to the position previously taken up The Subordinate Judge has, for adequate reasons, held that this bold attempt must end in failure ; and, we may add that the appellant could, not on well established priniciples, possibly succeed in his endeavour to take up inconsistent positions in Court. Assume that it might have been open to him at the proper stage, to pleadthat the contract itself was vitatedby fraud mistake undue influence of like reason, as this would not have militated against the previous decision that the disputted documents were accurate representations of the contract between the parties. No such defence, however, was attempted to be included in the written statement either in its original form or by way of amendment. On the other hand, the defendant contended at a late stage that interpolations had been made not *after* execution as pleaded in the previous suit but *before* execution. This new defence must be ruled out on two grounds. In the first place, it contradicts the prior decision that the documents as presented for registration were corrct reprentations of the contract. In the second place, the appellant cannot be allowed to take up in this suit a position entirely incomsistent with that adopted in the previous suit. It is an elementary rule that a party litigant can not be permitted to ast sume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his oppenent : *Bhaja Chowdhury* v. *Chuni Lal Marwari* (45),*Girish Chandra Bit* v. *Bipin Behari Khan* (46), *Bama Charan Chekravarti* v, *Kishore Mohan Roy* (47). This wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first. In our opinion, the attempt made by the appellant to circumvent the decision in the previous suit can not succeed and the doctrine of *res judicata* presents an insurmountable bar.

As regards the application of the rule of limitation to the claim for mesne profits, we have been pressed to held that Article 109 of the first Schedule to the Indian Limitation Act bars the claim for a period antecedent to three years prior to the institution of this. That Article provides that a suit for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendant, must be instituted within three years from the date when the profits are received. The argument is that as this suit was instituted on the 28th April 1921, the plaintiff is not entitled to mesne profits for a period prior to the 28th April 1918, whereas the Subordinate Judge has allowed the plaintiff mesne profits from the 17th Janury 1913,

(45) 5 C. L. J. 95; 11 C. W. N. 284.
(46) 44 Ind. Cas. 159; 27 C. L. J. 535.
(47) 64 Ind. Cas. 903; 35 C. L. J. 58.

the date of execution of the four leases which form the root of his title. The question thus raised is apparently one of first impression and is by no means free from difficulty. Under section 47 of the Indian Registration Act, a registered document operates from the time it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. Section 49 provides that no document required by section 17 to be registered shall (*a*) affect any immoveable property comprised therein, or (*b*) confer any power to adopt, or (*c*) be received as evidence, of any transaction affecting such property or conferring such power, unless it has been registered. The effect of these provisions is that a document, which is compulsorily registrable, does not affect any immoveable property comprised therein till it has been registered, but, as soon as it has been registered, it takes effect, not from the date of registration but retrospectively from the date of execution. In the case before us, the four disputed documents did not affect the lands comprised therein till the 22nd June 1918, when they were registered; but as soon as they were registered on the 22nd June 1918, they took effect retrospectively from the 17th January 1913, when they had been executed. The position, consequently, is that though by virtue of sections 47 and 49 of the Indian Registration Act, the title of the plaintiff related back to the 17th January 1913, that title was in suspense as it were till the 22nd June 1918, when for the first time he was placed in a position to assert and establish his right. His right was kept in a state of suspended animation from the 17th January 1913 to the 22nd June 1918 solely by reason of the unfounded opposition of the defendant. He could neither sue for recovery of possession nor for realisation of mesne profits, inasmuch as the right to mesne profits is an appendage to the right to possession. In these circumstances, the Subordinate Judge has held that the time could not be taken to run against the plaintiff prior to the 22nd June 1918. In support of this view, the Subordinate Judge has invoked the principle recognised by the Judicial Committee in *Rance Surnomoyee* v. *Shooshee Mokhee Burmania* (48). In that case, a sale under the *Patni* Regulation having been set aside and the *patnidars* restored to possession, the *zemindar* sued them to recover the arrears of rent which had accrued before and during the time they were out of possession; the contention of the tenants that the claim was barred because the suit had not been brought within three years from the date when each instalment of rent fell due, was overruled, and it was held by the Judicial Committee that the cause of action accrued upon the reversal of the auction-sale and the consequent revival of the obligation to pay the rent. The same principle was applied in *Bassu Koer* v. *Dhum Singh* (49). In that case, a debtor agreed to convey certain property to his creditor and to set off the debt against part of the consideration for the conveyance. A sale-deed was executed but a dispute arose as to whether it had been executed in accordance with the contract. Litigation was commenced by the debtor to enforce the agreement, but he was unsuccessful. The creditor then sued to recover the debt and was met by the plea of limitation. The Judicial Committee held that the time began to run only when the agreement became wholly ineffectual and that from that date a fresh obligation was imposed upon the debtor to pay his debt. These cases illustrate the proposition that, ordinarily, limitation runs from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is reanimated. This principle was applied by the Judicial Committee in *Prannath Roy Chowdhury* v. *Rookee Begum* (50), *Hem Chandra Chowdhury* v. *Kali Prosanna* (51), and *Nrityamoni Dossi* v. *Lakhan Chandra Sen* (52). On the other hand, the principle that when once time has begun to run, no subsequent disability or inability to sue stops it was strictly applied in *Huro Pershad Roy* v. *Gopal Das*

(48) 12 M. I. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 2 Sar. P. C. J. 424; 20 E. R. 931; 1 Ind. Dec. (N. S.) 489.

(49) 15 I. A. 211; 11 A. 47; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458 (P. C).

(50) 7 M I A. 323; 4 W. R. P. C. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.

(51) 20 I. A. 177; 30 C. 1038; 8 C. W. N. 1.

(52) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1; M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

Dutt (53), *Soni Ram* v. *Kanhaiya Lal* (54) and *Hukum Chand Boid* v. *Pirthichand Lal*. (55), The limits of applicability of the doctrine of suspension of right recognised in *Ranee Surnomoyee* v. *Shoosiee Mokhee Burmania* (48) may be gathered only from a long series of decisions, such as *Esha, Chander Roy* v. *Khajah Assanoollah* (56), *Deen Dyal Paramanick* v. *Radha Kishoree Debee* (57), *Manesh Chunder* v. *Gungamonee Dossee* (58), *Watson & Co.* v. *Dhonendra Chunder Mookerjee* (59), *Brojendro Coomar Roy* v. *Rakhal Chunder Roy* (60) *Surjaram Marwari* v. *Barhamdeo Persad* (61), *Nagendranath Sen* v. *Sadhu Ram Mandal* (62), *Laloo Karikar* v. *Jagat Chandra Saha* (63), *Hemendra Mohan Khashnabis* v. *Naresh Chandra Battacharjee* (64), *Janki Nath Sinha Roy* v. *Sir Bejoy Chand Mahatab Bahadur* (65), *Uma Charan Chakrabarti* v. *Nibaran Chandra* (66). But the underlying principle deducible from *Ranee Surno Moyee* v. *Shooshee Mokhee Burmania* (48), and *Baijnath Sahai* v. *Ramgut Singh* (67), was tersely and accurately enunciated by Sadasiva Aiyer, J., when he stated in *Muthu Korakki Chetty* v. *Mahamad Madar Ammal* (68), that whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit, the relief claimable wherein follows naturally on the result of such proceedings should be held to arise only on the date when those proceedings finally settle such rights and liabilities. A useful analogy is furnished by cases where it has been ruled that time can not be held to run against a person who is not in a position to sue; for such a person has no enforceable cause of action which is extinguished by lapse of time; examples are furnished by *Woomesh Chunder Goopto* v. *Raj Narain Roy* (69), where it was ruled that adverse possession against a tenant does not operate against the landlord during the continuance of the tenancy and *Priya Sakhi Debi* v. *Manbodh Bibi* (70), where it was ruled that adverse possession against a mortgagor does not operate against a simple mortgagee who is not entitled to immediate possession. The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed, *Coburn* v. *Colledge* (71), and *Gelmini* v. *Moriggia* (72). The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief; *Whalley* v. *Whalley* (73). The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently, the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result (Angell on Limitations, section 42; Storey on Equity Jurisprudence, section 1521 (*a*). In the case before us, the earliest date when the plaintiff could have sued for mesne profits for the period between 17th January 1913, and 21st June 1918 was

(53) 9 I. A. 82 ; 9 C. 255 ; 12 C. L. R. 129 ; 6 Ind. Jur. 546 ; 4 Sar. P. C. J. 363 ; 4 Ind. Dec. (N.S.) 920 (P. C.)

(54) 19 Ind. Cas. 291 ; 40 I. A. 74 ; 13 M. L. T. 437 ; 17 C. W. N. 605 ; 11 A. L. J. 389 ; (1913) ; M. W. N. 470 ; 17 C. L. J. 488 ; 15 Bom. L. R. 489 ; 35 A. 227 ; 25 M L. J. 131 (P. C.).

(55) 50 Ind. Cas. 444 ; 46 I. A. 52 ; 46 C. 670 ; 30 C. L. J. 71 ; 17 A. L. J. 514 ; 36 M. L. J. 557 ; 28 C. W. N. 721 ; 21 Bom L. R. 632; (1919) M. W. N. 258; 26 M. L. T. 181 ; 10 L. W. 416, (P. C.).

(56) 16 W. R. 79 ; 8 B. L. R. 537 *note*.

(57) 17 W. R. 415 ; 8 B. L R. 536.

(58) 18 W. R. 69.

(59) 3 C. 6 ; 2 Ind. Jur. 209 ; Ind. Dec. (N. S.) 596.

(60) 3 C. 791 ; 1 Ind. Dec (N. S.) 1087.

(61) 1 C. L. J. 337 at. p. 347.

(62) 57 Ind. Cas. 992 ; 25 C. W. N. 954 ; 48 C. 65.

(63) 62 Ind. Cas. 428 ; 33 C. L J. 256 ; 25 C. W. N. 258.

(64) 62 Ind. Cas. 418 ; 33 C. L. J. 260 ; 25 C. W. N. 376.

(65) 64 Ind. Cas. 315 ; 33 C. L. J. 366.

(66) 75 Ind. Cas. 2 ; 37 C. L. J. 452 ; (1923) A. I. R. (C) 389.

(67) 23 I. A. 45 ; 23 C. 775 ; 7 Sar. P. C. J. 1 ; 12 Ind. Dec. (N. S.) 514.

(68) 54 Ind. Cas. 66 ; 43 M. 185 ; 26 M. L. T. 459 ; 38 M. L J. 1.

(69) 10 W. R. 15.

(70) 37 Ind. Cas. 277; 44 C. 425; 21 C. W. N. 177; 27 C. L. J. 212.

(71) (1897) 1. Q. B. 702; 66 L. J. Q. B. 462; 76 L. T. 608; 45 W. R 488.

(72) (1913) 2 K. B. 549; 82 L. J. K. B. 949; 109 L. T. 77; 29 T. L. R. 486.

(73) 1 Mer. 486; 3 Bligh. 1; 35 E. R. 734.

the 22nd June 1918 ; as the present suit has been instituted on the 28th April, 1921, that is, well within three years from that date, the claim for mesne profits cannot be held to be barred by limitation. Before we leave this point, we may add that the appellant contended that the plaintiff might have included a claim for possession and mesne profits in the suit instituted under section 77 of the Indian Registration Act to compel registration of the leases. The analogy was invoked of suits for specific performance of contracts of sale of land, which it has some times been held, may include a claim for possession of the land agreed to be sold. There is a divergence of judicial opinion upon that point ; *Ranjit Singh* v. *Kaliadasi Debi* (74), *Madan Mohan Singh* v. *Gaja Prasad Singh* (75), *Fateh Chand* v. *Narsingh Das* (76), *Narayana Kavirayan* v. *Kandasami Goundan* (77), favour the view that a claim for possession may be so included, while *Krishnammal* v. *Soundararaja Aiyar* (78), supports the contrary position, on the ground that the right to possession accures only on execution of the conveyance and it may be an interesting question to consider the true bearing of the decison of the Judicial Committee in *Rangyya Goundan* v. *Nanjappa* (79), upon the point. But we may observe that in so far as suits under section 77 of the Indian Registration Act are concerned, it is well-settled that no other claim, such as a claim for possession and mesne profits, can be coupled with the prayer to enforce registration of the document : *Venkataramachandra Rao* v. *Veeramma* (80). The purpose of a suit of this description is strictly limited; a special period of limitation is prescribed for it ; the Court-fee leviable is separately provided for ; if we were to allow another claim to be included in such a suit, its scope and character would be completely altered.

As regards the contention that upon a true construction of the documents, the order for possession and mesne profits should be held erroneous, we observe that the Subordinate Judge has left open the question raised in the eighth issue, namely, whether the first defendant is entitled to separate sets of *jamas* on a proper construction of the four *pattas*. We have been pressed to hold that as this matter will be tried when the mesne profits are assessed, no decree for possession should have been made in the terms stated in the judgment. We see no substance in this argument for whatever construction may be placed on the four leases the plaintiff is entitled to possession thereunder. The exact nature of that possession, no doubt, depends upon the true interpretation of the leases ; but such interpretation is really material for the assessment of mesne profits. We shall, consequently leave it to the Subordinate Judge to determine the true construction of the four leases and their legal effect. We may add that we have been told by the appellant that not only does each document contain irreconcilable clauses, but that each document taken as a whole cannot be reconciled in all respects with the others. This is a matter which will be determined by the Subordinate Judge and the parties will be at liberty to adduce such evidence as may be legally admissible to assist the Court in the construction of the documents.

As regards the contention of the second defendant that he is not at all liable for mesne profits, we are of opinion that he is liable to the extent stated by the Subordinate Judge, namely, from the 25th May 1915, when he took leases from the first defendant and entered into possession. He never relinquished possession and the Subordinate Judge has correctly found that the first two defendants combined to keep the plaintiff out of possession. The attempt made by the second defendant to evade liability for mesne profits is bound to end in failure.

There is, however, one point in connection with the order for mesne profits which has been overlooked by the Court below. During the pendency of this litigation, a Receiver was appointed on the 12th November 1921, and the Receiver, we have been informed, is still in possession. When the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court,

(74) 5 Ind. Cas. 205 ; 37 C. 57 ; 14 C. W. N. 527.
(75) 11 Ind. Cas. 228 ; 14 C. L. J. 159.
(76) 16 Ind. Cas. 988 ; 22 C. L. J. 383.
(77) 22 M. 24 ; 8 M. L. J. 147 ; 8 Ind. Dec. (N.S.) 18.
(78) 22 Ind. Cas. 912; 38 M. 698 15 M. L. T. 103 ; (1914) M. W. N. 200 ; 1 L. W. 147.
(79) 28 I. A. 221 ; 24 M. 491 ; 3 Bom. L. R. 299 ; 6 C. W. N. 17.
(80) 9 M. L. J, 107.

and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles : *In re Butler* (81), *Bertrand* v. *Davies* (82), *Moir* v. *Blacker* (83), *In re Ind Coope & Co.*, *Fisher* v. *The Company* (84). The property passes into legal custody as the Receiver is in the position of stake-holder, and such custody is for the benefit of the true owner; *Brojendra Kishore Rai Chaudhury* v. *Abdul Razak Chaudhury* (85), *Ramasawmi Ayyar* v. *Muthuswamy Ayyar* (86) *Khadendra Narain Chowdhury* v. *Matangini Debi* (87), *Karan Singh* v. *Raja Baker Ali Khan* (88), *Jagat Tarini Dasi* v. *Naba Gopali Chaki* (89). From this it follows that the liability of the defendants for mesne profits terminated on the 12th November 1921, and from that date the plaintiff, if successful, would be entitled only to such sums as might be in the hands of the Receiver. Consequently, the decree of the Subordinate Judge must be amended by substitution of the words " to the 11th November 1921 " for the words " to the date of plaintiff's getting possession or till the expiration of three years from the date of the decree (whichever event occurs first.)"

The result is that, subject to the amendment just mentioned, the decree of the Subordinate Judge will be confirmed and each appeal will stand dismissed with costs in favour of the plaintiff-respondent. The hearing fee in appeal No. 191 of 1922 will be assessed according to scale and in appeal No. 321 of 1922 at two gold mohurs.

K. S. D. *Appeals dismissed.*

(81) (1863) 13 Ir. Ch. R. 456.
(82) (1862) 31 Bean. 429 ; 54 E. R. 1204 ; 135 R. R. 504.
(83) (1890) 26 L. R. Ir. 375.
(84) (1911) 2 Ch. 223; 80; L. J. Ch. 661 ; 105 L. T. 356; 55 S. J. 600.
(85) 31 Ind. Cas. 242; 22 C. L. J. 283 ; 20 C. W. N. 481.
(86) 30 M. 12; 16 M. L. J. 541; 1 M. L T. 397.
(87) 17 I. A. 62; 17 C. 814 ; 5 Sar. P. C. J. 523 ; 8 Ind. Dec. (N. S.) 1087 (P. C.).
(88) 9 I. A. 99 ; 5 A. 1 ; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S). 1014 (P. C.)
(89) 34 C. 305 ; 5 C. L. J. 270.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 71 OF 1923.

October 30, 1923.

Present :—Mr. Justice Sulaiman.

SATDHAR—JUDGMENT-DEBTOR—APPELLANT

versus

RAMCHANDRA AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Sale in execution—Property not saleable—Executing Court, jurisdiction of—Sale null and void—Confirmation of sale, effect of.

The Full Bench has clearly laid down the rule that where the Court has no jurisdiction to sell some property it is immaterial whether a decree for sale of that land has been previously obtained and is in execution.

Katwari v. *Sita Ram Tewari*, 63 Ind. Cas. 264; 19 A. L. J. 473; 3 U. P. L. R. (A) 99; 43 A. 547, followed.

R and others obtained a decree against *S* and in execution thereof attached a grove situated in Bundelkhand. One *M* objected to the attachment on the strength of a sale-deed from *S*. The objection having been allowed the decree-holders instituted a suit for and obtained a declaration that the sale-deed in favour of *M* was fictitious and that the property belonged to *S* and was liable to attachment and sale in execution of their decree. Subsequently, *S* put in a new set of objections urging that the property was governed by the Bundelkhand Land Alienation Act but the objections were dismissed for default and an application for restoration was also dismissed. After this the grove was sold and purchased by the decree-holders, the sale was later on confirmed. *S* then appealed from the order dismissing this application for restoration, and the case having been remanded on the acceptance of the appeal, the Court allowed the objections and set aside the sale. On appeal by the decree-holder, the Appellate Court also confirmed the finding that the grove was not saleable in execution of the decree but thought that the order of the lower Court directing the setting aside of the sale was " unnecessary." The judgment-debtor applied to the High Court in revision :

Held (1) that the former decree declaring that the land was liable to be sold in execution did not estop the judgment-debtor from raising the objection that it was not saleable.

SATDHAR *v.* RAM CHANDRA

Hanuman Prasad Narain Singh v. *Harak*, 58 Ind. Cas. 551; 18 A. L. J. 59; 1 U. P. L. R. (A.) 142; 42 A. 142, followed.

(2) that the subsequent confirmation of the sale in favour of the decree-holders did not have any adverse effect on their proceedings,

(3) that the grove in question was not at all saleable in execution of the decree and the executing Court had no jurisdiction whatsoever to sell it, and that, therefore, the sale was a mere nullity and did not in any sense pass title to the decree-holders as purchasers.

Civil revision from the order of the Judge, Small Cause Court, Allahabad, dated the 23rd December 1921.

Mr. *B. N. Vyas*, for the Applicant.

Messrs. *Jang Bahadur Lal* and *S. P. Sinha*, for the Opposite Parties.

JUDGMENT.—The decree-holders-respondents obtained a decree from the Court of Small Causes on the 20th of November 1918 against the applicant Satdhar. In execution of that decree they attached a grove situated in Bundelkhand. One Muhammad Yasin, on the strength of a sale-deed from a judgment-debtor, raised certain objections that the property did not belong to the judgment-debtor. His objections were allowed. The decree-holders then instituted a regular suit for a declaration that the sale-deed in favour of Muhammad Yasin was fictitious and that the property belonged to their judgment-debtor and was liable to attachment and sale in execution of their decree. In this suit Satdhar was also impleaded but apparently did not put in an appearance. This suit was decreed on the 16th February 1920, and an appeal from that decree was also ultimately dismissed. The decree-holders had a declaration against Muhammad Yasin and Satdhar that the property belonged to Satdhar and was liable to attachment and sale in execution of their decree.

After Muhammad Yasin had been got rid of, Satdhar put in a new set of objections on the 4th of September 1920 urging that the property was governed by the Bundelkhand Land Alienation Act (II of 1903). On the date fixed for hearing Satdhar did not appear and his objections were dismissed for default on the 4th November 1920. On the 22nd January 1921 he put in an application for restoration of his objections but that application was dismissed on the same date. After this, on the 27th of January 1921, the grove was sold and purchased by the decree-holders themselves and on the 1st of March 1921 this sale was actually confirmed. It does not appear that Satdhar put in any formal application for setting aside the sale, dated the 27th of January 1921. He, however, on the 9th of March 1921, appealed from the order dismissing his application for restoration. His appeal was allowed on the 29th March 1921 and the case was remanded. The result of all these proceedings was that the objections which Satdhar had filed on the 4th September 1920 were revived and had to be disposed of on the merits.

On the 5th July 1921 the Court of first instance allowed his objections and, holding that the property being covered by the Bundelkhand Land Alienation Act was not liable to be sold, set aside the sale. The decree-holders appealed from this order and the lower Appellate Court by an order dated the 23rd December 1921 agreed with the finding of the first Court that the grove was not saleable in execution of the decree. The learned Judge thought that that part of the Munsif's order which had directed the setting aside of the sale was "unnecessary."

The judgment-debtor has come up in revision and wants to have the modification made by the lower Appellate Court corrected.

On the findings of the Court below there can be on doubt whatsoever that the land in question is one which comes within Act II of 1903. The finding of the lower Appellate Court is that the spaces lying between the trees growing on this land are used as pasture land and are sometimes actually cultivated for raising crops or fodder. The land is not occupied by any building and is used for purposes subservient to agriculture. It is admittedly situated in Bundelkhand. It is clear, therefore, that it falls within the meaning of the definition of land as given in section 2 (2) of Act II of 1903. This finding of the lower Appellate Court has not in any way been challenged on behalf of the respondents.

I have to consider two main points in this revision.

SATDHAR *v.* RAM CHANDRA

1. The effect of the declaratory decree dated the 16th February 1920.

2. The effect of the order confirming the sale dated the 1st March 1921.

On behalf of the respondents it is strongly contended that, in face of the declaratory decree obtained against Satdhar, it is no longer open to Satdhar to say that the land is such as is not liable to be sold. It is contended that the former decree declaring that the land is liable to be sold in excution of the decree in question is final and estops the judgment-debtor from raising any objection to the same. This contention, however, has no force. The point has been the subject of previous decisions and is covered by clear authorities. In the case of *Hanuman Prasad Narain Singh* v. *Harak* (1), a Division Bench of this Court laid down that even where a mortgage-decree for the sale of land situated in Bundelkhand had been obtained, it was open to the judgment-debtor to raise the objection that the land being not saleable could not be sold. The *ratio decidendi* of that case was that it is the duty of the Execution Court to see whether it has jurisdiction to sell it and that therefore where a sale is prohibited by law the Execution Court cannot proceed with the sale even though there is a decree for its sale. It was held that in such a case no question of estoppel against the defendant really arises. There is also the Full Bench case, *viz.*, that of *Katwari* v. *Sita Ram Tewari* (2), which is analogous. A mortgage-decree for sale of occupancy holding had been obtained against the tenant, and yet the Full Bench allowed the judgment-debtor to raise the plea in the execution department that the property was not saleable in view of the provisions of section 20 of the Agra Tenancy Act (No. II of 1901).

The Full Bench has clearly laid down the rule that where the Court has no jurisdiction to sell some property it is immaterial whether a decree for sale of that land has been previously obtained and is in execution. I am, therefore, of opinion that the decree-holders cannot take advantage of the effect of the declaratory decree of the 16th February 1920. I may further point out that that decree was in substance a decree against Muhammad Yasin, and Satdhar was mere *pro forma* defendant. Apart from that, the decree-holders themselves did not raise this plea in the Courts below as there is no reference to any such plea in either of the judgments.

The next point is whether the subsequent confirmation of the sale of the 1st March 1921 has any effect on these objections. I am of opinion that that confirmation cannot have any adverse effect. In the first place, the effect of the remand by the lower Appelate Court was to revive the objections of the 4th of September 1920. The judgment-debtor is entitled to have his objections heard on the merits as they stood on that date. No sale had taken place till then. It is clear, therefore, that, in view of the findings of the Courts below that the land was not saleable, the Execution Court had no jurisdiction whatsover to sell it. The objections of Satdhar to that effect were well-founded and should have been allowed. I, therefore, accept the finding of the lower Appellate Court that the grove in question was not at all saleable in execution of the respondents' decree, and that the Execution Court had no jurisdiction whatsoever to sell it. If, therefore, any sale did take place it was a mere nullity and could in no sense pass title to the decree-holders as purchasers.

On behalf the respondents it is contended that this Court should not express any opinion as to whether the sale of the 27th January 1921 is liable to be set aside or not. I do not propose to leave things in any confusion. I have already held that the Court had no jurisdiction to sell the property and that the sale was a nullity. When the sale itself is void, and not voidable, no question of its being liable to be set aside really arises. In the case of *Khiali Ram* v. *Zahur Ali Khan* (3), the interest of *Z* was attached in execution of a decree and *Z* objected to the sale on the ground that it was his ex-proprietary tenancy. His objection was overruled and the property was sold and purchased by another person. In the meantime, *Z* preferred an appel which was decreed and the land was declared to be his ex-proprietary tenancy. It was held that the land not having been liable to sale

(1) 58 Ind. Cas 551 ; 18 A. L. J. 59 ; 1 U. P. L R. (A.) 142 ; 42 A. 142.

(2) 63 Ind. Cas. 264; 19 A. L. J. 473; 8 U. P. L. R. (A) 99 ; 48 A. 547.

(3) 2 A. L. J. 358 ; A. W. N. (1905) 158.

R. *v.* R.

the sale was a nullity and the purchaser took nothing by his purchase. I may also point out that in the case of *Hanuman Prasad Narain Singh* v. *Harakh Narain reported in* (1), the lower Appellate Court had actually, in reversing the decree of the first Court, set aside the sale and that order was upheld by the High Court. I adopt the form which the final order on appeal in this Court took in that case and I hold that the objection raised with regard to the property not being saleable was a valid objection and the property was not liable to sale in execution of the decree. As the order for sale was an invalid and an illegal order the sale which has taken place in pursuance of that order must fall to the ground and must be deemed to be a nullity. The judgment-debtor absented himself and allowed his objection to be dismissed for default, and then did not put in any formal application requesting the Court not to confirm the sale when he ultimately appealed to the Judge after the confirmation. But for these omissions the case might not possibly have been protracted. For the above reasons, I direct that the parties should bear their costs of this application. Holding that the subsequent sale is a nullity I uphold the order directing the release of the attachment.

K. S. D. *Application allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MATRIMONIAL CAUSE NO. 3 OF 1921.

July 13, 1922.

Present :—Mr. Kennedy, J. C.

G. E. G. R.—PETITIONER
versus
E. M. R.—RESPONDENT.

Majority Act (*IX of* 1875), s. 2 (*a*)—*Indian Christians—Minority, period of—Suit for divorce—Plaintiff what must prove.*

The effect of section 2 (*a*) of the Indian Majority Act is to extend the period of minority till the age of 21 in the case of Indian Christians, in the case of suits for divorce. [p. 536, col. 1.]

Where a person is attempting to set aside a contract of marriage, it is not, sufficient for him to prove that he was eccentric or deficient to a certain extent merely in his mental capability, but it must be shown that the whole mental being was so affected that he was incapable of appreciating not necessarily the nature of the act, but its validity. [p. 536, col. 2.]

Hancock and Hancock v. *Peaty*, 1867 1 P. and D. 335 ; 36 L. J. Mat. 57 ; 16 L. T. 182 ; 16 W. R. 719, followed.

Mr. *Dalrymple*, for the Petitioner.

JUDGMENT.—This is a petition by G. E. G. R. for declaration of nullity of marriage with respondent E. M. R.

It appears that the respondent is a member of the domiciled community of Christians and has not completed her 21st year. It does not appear that she has been married before. The question, therefore, is whether the case can proceed without the appointment of a guardian *ad litem*.

Under the Indian Majority Act, it will appear her personal law clearly confers on her majority at the conclusion of 18. So far, then, as the power of suing or being sued in general goes, she is a major. But an exception is introduced in section 2, paragraph (*a*), by which the personal law does not affect the capacity of any person to act in the following matters :—

Marriage, dower, divorce and adoption.

It is not quite clear to me that this was intended to make an appointment of a guardian *ad litem* necessary in a case like the present. But it is very difficult to distinguish this case from the case quoted in *Sorabji Cawasji* v. *Buchoobai* (1). It is true that this was a case under the Parsi Marriage Act, but it was there held, the fact that, under the Parsi Marriage Act, it is necessary for a Parsi who is under the age of 21 and wishes to contract a marriage to get the consent of his or her parent or guardian, has the effect of extending the minority of such a Parsi in matrimonial cases to 21. It is true that the Parsi Marriage Act is a Code and contains in itself not only the provisions of marriage, but also the provisions of divorce. While as regards Indian Christians the Marriage Act and the Divorce Act are separate. Still the *ratio decidendi* of the case does apply

(1) 18 B. 366 ; 9 Ind. Dec. (N. S.) 751.

R. *v.* R.

to the case of Indian Christians, for it is provided in the Indian Christian Marriage Act that any person who wishes to contract a marriage, if under the age of 21, should first obtain the consent of the parent or the guardian. Therefore, it would appear, it must be held the effect of section 2 (*a*) of the Indian Majority Act is to extend the period of minority till the age of 21 in the case of Indian Christians, in the case of suits for divorce. Nor can we draw a distinction between a suit for divorce and a suit for nullity of marriage. Both of them are provided for in the Indian Divorce Act and both must be held to be matters of divorce.

A further consideration arises and that is that at present the respondent has been through a form of marriage with the petitioner and the petitioner is a person who by his personal law is domiciled in England, therefore, if the marriage is valid, the respondent has acquired an English domicile, and in that case her personal law is the personal law of the husband in which case also her minority would extend to twenty one.

It, seems to me, therefore, it is necessary that a guardian *ad litem* now be appointed on behalf of the respondent. I suspend further proceedings in this case until a proper application has been made and granted.

[*The learned J. C. then passed the following final order.*]

This is a petition by G. E. G. R. for declaration of nullity of marriage under sections 18 and 19, clause (3) of the Indian Divorce Act, against E. M. R. wrongly called R. The petitioner is a Captain in His Majesty's Indian Army, Signals Corps, Company 'C.' Both parties (though not living together) are now residing in Karachi. On the 12th of May 1921, he went through a form of marriage with the respondent (at the time a spinster) at the Roman Catholic Church, Srinagar, in Kashmir. He now applies for a declaration of nullity of the said marriage on the ground that at the time of the ceremony he was incapable owing to lunacy of entering into a contract of marriage and, therefore, the said marriage is nullity. A guardian *ad litem* has been appointed for the respondent by the order of this Court, dated 23rd of July 1921. Neither before this appointment nor subsequently has the respondent or her guardian taken any steps to oppose the petition. The Court, therefore, is to decide without any assistance of any contesting party whether, at the time when Captain R. went through this form of marriage, he was suffering from such mental derangement, as to incapacitate him from contracting, whether there is any collusion between the parties and what order should be passed.

There is great lack of authorities on the question of insanity as a ground for declaration of nullity of marriage. The case principally referred to is that of *Hancock* v. *Peaty* (2). There is, of course, a considerable volume of authorities on the somewhat cognate matter as to criminal liability in the case of insanity and it would seem that the question of insanity can be regarded in three different ways. In the first place, the person contracting may be in such a state of mania that he is totally unaware of the nature of the act he is performing. In this case, there can be no doubt his act would be in no way binding. In the next place, although he may know the nature of the act yet that act may be so intimately connected with his delusion, that it cannot be separated from it, as in the well known criminal case of Hadfield where the criminal was aware that he was attempting to commit murder, but supposed it was necessary that he should commit murder in order that he might be executed and thus become an expiatory sacrifice to save the world. In this case also there is no doubt the person performing the act is not bound by it. Then, there is the third possibility, where the performer of the act is aware of the nature of the act and the act is not intimately connected with the delusion. This seems to be the case in the present instance. The question in such cases, as it seems to me, is whether there is evidence which indicates that there was a general overthrow of all rational faculties of which the actual delusion is merely a symptom. That is to say, where a person is attempting to set aside a contract of marriage, it is not sufficient for him to prove that he was eccentric or deficient to a certain extent merely in his mental capability, but it must be shown that the whole mental being was so

(2) (1867) 1 P. & D. 335 ; 36 L . J. Mat. 57 ; 16 L. T. 182 ; 16 W. R. 719.

R. *v.* R.

affected that he was incapable of appreciating not necessarily the nature of the act but its validity. This, I think, in the present case is well established. There seems no doubt that this position is established by the evidence of the two medical witnesses both of whom occupy an eminent position in Karachi and one of whom, Lieut.-Col. Croly, had the advantage of seeing Captain R. before he went through this form of marriage. The evidence is to the effect that Captain R. had undergone great hardships in the War and had during that time and afterwards shown symptoms that the strain of War had produced a marked effect on his mind making him subject to attacks of melancholia which became more and more acute and occurred at shorter and shorter intervals. Just before his marriage Captain R. was suffering from an acute attack of melancholia. He had the considerable additional shock of having lost a considerable amount owing to the disqualification of his horse and from that time he was obsessed by the idea that he should commit suicide, and he did make one attempt to commit suicide in Karachi. That having failed he left the station without obtaining leave and became, with a view to committing himself to the rash act, a deserter, although apparently a keen soldier.

On his way to Kashmir he passed through Pindi where the respondent lived (whom he had known before). He communicated his intentions to her and she (who seems to have been attached to him before) agreed to accompany him to Srinagar and commit suicide with him.

They lived together for some days in conjugal relations but thereafter went through this ceremony of marriage in order to regulate matters from a religious point of view in consideration of their impending death. The result, however, was that, shortly after the petitioner had gone through this form of marriage, he came to his senses. They immediately left Srinagar and from that time they have not cohabited.

The conduct of the petitioner before going to Srinagar and while there seems to have been so wholly irrational that I think it is an indication that his mind was so upset that he was mentally incapable of entering into a valid contact

It seems to me the principles quoted above in *Hancock* v. *Peaty* (2), apply to the present case. It is there very definitely stated as a *dictum* by Lord Stowell : "It rests upon the simple proposition that marriage is a contract as well as a religious vow, and, like other contracts, will be invalidated by the want of consent of capable persons." The judgment goes on to say: "The question here is one of health or disease of mind; and if the proof shows the mind was diseased the Court has no means of judging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power."

In fact, *Hancock* v. *Peaty* (2) seems to lay down the law in a manner which might lead to startling consequences, were it not for the question of estoppel, for I think it is probable that in a contested case a question of estoppel might arise. There seems very little doubt under the English law that if *A* knowing *B* to be a lunatic goes through a form of marriage with *B A* will not be allowed to plead in a suit for nullity of marriage that *B* was a lunatic at the time of the marriage. It is arguable that under section 115 of an Evidence Act which perhaps extends the law of estoppel beyond the English limits, it might not be open to a lunatic who had married while apparently sane to plead his lunacy in a nullity suit. But this question cannot arise in the present case. Estoppel is not to be set up by the Court, but by the parties and it is here not pleaded. In any case, it appears to me that the present respondent had sufficient notice of the mental state of the petitioner (Captain R.) to make it incumbent on her to make further enquiries as to his contractual abilities.

There is no question of collusion in this case. I think the respondent was well advised in not fighting out this case because it is clearly to her interest that the marriage should be dissolved in view of the mental condition of Captain R. It is very right that Captain R. should provide for the support of the respondent. But that is no proof of collusion. That would have been a duty incumbent on Captain R. in honour even if there had been no marriage and there can be no doubt that, ill-advised as the respondent's conduct was, it was her society and affection which

prevented captain R. from carrying out his intention of suicide.

There appears to be no possibility of any issue arising from this marriage. Therefore, it is unnecessary to pass an order under section 21. If it appears afterwards that there is any possibility of issue, a further application can be made and appropriate order passed.

On the whole, therefore, I pass a decree declaring the marriage contracted between G. E. G. R. and E. M. R., wrongly called R, on the 12th of May 1921, at the Roman Catholic Church, Srinagar, Kashmir, null and void, owing to the insanity of the petitioner at the time when it was contracted.

The case now should be submited to the High Court, Bombay, and the parties are hereby warned that this is preliminary decree merely and that the relations of the parties remain as they were before this suit, until the High Court, Bombay, has pronounced its final decree.

Costs of both the parties to be paid by the petitioner.

K. S. D. *Decree nisi granted.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 160 OF 1922.

April 2, 1924.

Present :—Mr. Justice Walsh, K. C., Acting Chief Justice, and Mr. Justice Piggott.

LACHMAN PANDE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TRIBANI SAHU—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 201 (3)—Usufructuary mortgagee in possession—Suit for profits, when maintainable—Non-payment by lambardar of profits to co-sharer, effect of.

The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the lambardar for profits.

Mere non-payment by a lambardar to any co-sharer of the said co-sharer's proper *quota* of the annual divisible profits of the *mahal*, does not, in the absence of evidence to the contrary, constitute an ouster of the said co-sharer from possession.

There is no reason why a different principle should be applied to the case of a usufructuary mortgagee who happens to have taken his mortgage from the particular co-sharer who is filling at the time the office of the lambardar.

Appeal, under section 10 of the Letters Patent, from the judgment of the Hon'ble Mr. Justice Gokul Prasad, dated the 19th July 1922.

Mr. *N. Upadhiya*, for the Appellants.

Mr. *Kumuda Prasad*, for the Respondent.

JUDGMENT.

Walsh, A.C.J.—We find ourselves unable to agree with the view taken by the learned Judge of this Court who heard this appeal. I desire merely to say this. The whole of his judgment is based upon the legal hypothesis that the mortgagee, the plaintiff, is a dispossessed mortgagee. The facts to which this expression is applied are that the mortgagee, having been unable or unwilling—it really does not matter which to—obtain possession by occupation, himself leased the mortgaged property to the mortgagor for a term of seven years and during those seven years remained in possession by the receipt of the rents. Since those seven years expired the mortgagor has continued to remain in possession. The mortgagee has taken no active steps to turn him out. The ordinary presumption is that the mortgagor has remained in possession with the mortgagee's consent without an express agreement. All I can say, is I find myself entirely unable to accept the description of "dispossessed mortgagee" applied to a mortgagee who is in the position which I have just described. He has not been dispossessed in any shape or form. The possession of the mortgagor under the lease was certainly lawful and with the consent of the mortgagee. It has continued and nothing appears to the contrary. If it were put as a finding of fact I should hold that there was no evidence on which anybody could find that the mortgagee had been dispossessed. The whole of the judgment appears to me be to based upon this fallacy and it is sufficient for my purpose, though there are other reasons

for disagreeing with it, to compel us to allow the appeal and restore the decree of the lower Appellate Court with the usual consequences, that is to say, the defendant must pay the costs of this appeal and of the appeal to the learned Judge of this Court and the decree of the lower Appellate Court will be restored.

Pigott, J.—I agree for the reasons given and also because of the provisions of section 201 (3) of the Tenancy Act. The usufructuary mortgage of a co-sharer in possession of the share is entitled to maintain a suit against the *lambardar* for profits. The plaintiffs in this case are recorded in the village papers as being mortgagees in possession of a certain share. The defendant is the *lambardar* of the *mahal* to which that share appertains. The fact that he happens also to be the mortgagor of the plaintiffs does not in my opinion in any way affect the maintainability of the present suit. The Court was bound to presume that the plaintiffs had the right recorded in their favour in the village papers on the strength of which they instituted the present suit, namely, the right to recover from the *lambardar* the rateable share due on account of profits of a share of 3 annas 1 pie of which they stood recorded as the mortgagees in possession. In the case quoted to the learned Judge of this Court and relied upon by him, a case which has never for obvious reasons found its way into the regular Law Reports, we find on going further into the matter that the question of the unrebuttable presumption raised by section 201 (3) aforesaid was not only not raised before this Court but was expressly excluded from consideration when the matter was carried further by an appeal under the Letters Patent. I may add also in connection with what has been said by the learned Acting Chief Justice that it being well settled law that mere non-payment by a *lambardar* to any co-sharer of the said co-sharer's proper *quota* of the annual divisible profits of the *mahal*, does not in the absence of evidence to the contrary, constitute an ouster of the said co-sharer from possession. I do not see why a different principle should be applied to the case of a usufructuary mortgagee who happens to have taken his mortgage from the particular co-sharer who is filling at the time the office of the *lambardar*. I agree with the order proposed.

By the Court.—The order of the Court is that the appeal is allowed and the decree of the lower Appellate Court restored. The defendant must pay the costs of this appeal and of the appeal to the Judge of this Court.

K. S. D. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT NO. 398 OF 1917.

March 23, 1922.

Present:—Raymond, A. J. C.

Sayed BACHAL SHAH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
JUMA SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908,) s. 92—Suit for declaration of waqf and injunction against those interested—Subsequent addition of co-defendants—Fresh sanction whether necessary.

After obtaining the necessary sanction under section 92 of the Civil Procedure Code, plaintiffs sued for a declaration that certain property was *waqf* and for the framing of a scheme for the better management of the property. The two defendants contended that the property originally belonged to their father and on his death it became the absolute property of themselves and other heirs, thereupon the plaintiff applied for amendment of the plaint and the names of eight more defendants were added. No fresh sanction of the Collector was obtained prior to the amendment:

Held that inasmuch as the sanction already given by the Collector substantially authorised the plaintiffs to sue for a declaration that certain immoveable property was *wakf* and for an injunction against all that claimed an interest therein the mere absence of some of those interested in the property did not invalidate the sanction already given or necessitate a fresh sanction for bringing the interested parties on the record as co-defendants.

Abdul Rahman v. *Cassum Ebrahim*, 11 Ind. Cas. 726; 36 B. 168; 13 Bom. L. R. 583; *Sayad Husein Miza* v. *Collector of Kaira*, 21 B. 257; 11 Ind. Dec (N. S.) 174, distinguished.

BACHAL SHAH *v.* JUMA SHAH

Mr. *Fatehchand Assudamal*, for the Appellants.

Mr. *Kalumal Pahlumal*, for the Respondents.

JUDGMENT.—A preliminary legal objection has been taken to the entertainment of this suit and, in order to appreciate it, it is necessary to set out the following facts.

The suit is one under section 92, Civil Procedure Code, for declaration and injunction and settlement of a scheme in relation to certain immoveable property situated in the Napier Quarter of Karachi which is alleged to be *wakf* and dedicated to the Imams of Islam, and has been used for sacred and religious proposes for very many years. With the previous sanction of the Collector of Karachi, the suit was filed in the names of two persons as plaintiffs, Syed Bachal Shah and Ibrahim Adam, who described themselves in the plaint as interested in the maintenance of the trust property and its use for sacred and religious purposes, and the defendants were Juman Shah and Agedino Shah, sons of Syed Mohamed Shah, who were referred to as the heirs and legal representatives of Syed Mohamed Shah in whose name the property stands registered in the Government Revenue Records. The prayers in the plaint are for a declaration that the said property is *Wakf* and thus inalienable and uninheritable and for an injunction directing defendants to concur in mutation of names and having the preperty entered as *Wakf* in the Government Revenue Records, and for the framing of a scheme for the better management of the property. The plaint has been endorsed by the Collector of Karachi authorizing institution of the suit. By their written statement defendants alleged that the property in question originally belonged to Syed Mohammed Shah and that on his death it became the absolute property not only of his sons, the two defendants, but of his other heirs, who were not specifically named in the written statement but their names were supplied later to the plaintiffs' pleader who consented to their being brought on the record as co-defendants and applied for amendment of his plaint which was granted. There were thus eight defendants added to the two already sued, but it is essential to observe that beyond their addition the plaint underwent no alteration in any shape or form. The sanction of the Collector was, however, not obtained prior to the application for this amendment and as no objection was raised on this head, summonses were issued to the newly added defendants and they have been represented by the same pleader who appears for defendants Nos. 1 and 2 and adopt the written statement filed by the latter. Before the suit could come on for a hearing the second plaintiff Ibrahim Adam, died, and an application was made to the Collector to sanction the joinder of Amoo, the brother of the deceased, as a co-plaintiff, and on this application being granted, a further application was made to this Court for amendment of the plaint by the substitution of Amoo *alias* Ismail in place of the deceased Ibrahim to which no objection was raised and Amoo was placed on the record as a co-plaintiff.

When the suit came on for hearing Mr. Kalumal for the defendants contended that, as the sanction of the Collector had not been obtained prior to the amendment of the plaint by the addition of the eight defendants referred to above, the suit should stand dismissed, as not being a suit sanctioned by the Collector. As the plaintiffs' pleader expressed his inability to argue the point raised on the ground of its being taken at a late stage and without any previous notice to him, I allowed him an adjournment to consider his position, but by the time the suit came on for hearing again, plaintiffs' pleader had armed himself with a sanction from the Collector respecting the prosecution of his suit against the defendants subscquently added with those already on the record. Mr. Kalumal, however, presses his objection as he contends that a subsequent sanction is of no avail, and that the sanction to be valid should be antecedent to the institution of the suit.

Pleaders on either side have relied on the case of *Abdul Rahman* v. *Cassum Ebrahim* (1). In this case, when the suit was called on for hearing, two of the defendants were sturck off and the plaintiffs asked for and obtained leave to add another person as defendant and they amended the plaint and prayed for certain relief against the added defendant. No sanction of the Advocate-General was obtained previuos to the amendment of the plaint and

(1) 11 Ind. Cas. 726; 36 B. 168 ; 13 Bom. L.R. 583.

the addition of the new defendant. It was held that the plaintiffs were not entitled to maintain the suit against added defendants on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint. This case, in my opinion, affords very little help to the contention of the defendants raised before me. The Advocate General's sanction had been obtained to the institution of the suit as originally filed but as stated in the judgment at page 173: "The amendment refers to a cause of action which arose after the institution of the suit and the reliefs claimed against third defendant are quite distinct from the relief claimed originally against the other defendants. The Advocate-General had no opportunity of considering the case against the third defendant. He has sanctioned no suit against him." The facts of the present case differ in essential particulars from the case cited. The amendment in the present case introduced no substantial alteration in the plaint and the cause of action remained where it stood in the original plaint. This is abundantly evident from the fact that the new defendants filed no additional written statement but were content to abide by the written statement filed by defendants Nos. 1 and 2, nor do the plaintiffs seek any additional or alternate relief against them. Both the prayers for a declaration and injunction as they stood in the original plaint do still remain the subject-matter for decision subsequent to the amended plaint and the reliefs claimed against the eight added defendants are precisely the same as those against the first two defendants. The sanction that was originally given by the Collector was to the institution of a suit that certain immoveable property was *wakf* and the nature of this suit is, in no wise, altered by the addition of certain defendants who claim to be interested in the property with those originally on the record as the persons against whom the relief is sought. It may be that the defendants subsequently added have some interest in the property in suit, if so, it is a wise precaution to have all the interested parties on the record so as to avoid multiplicity of suits, but this addition of parties does not alter the character of the sanction granted by the Collector as it could not reasonably be argued that this official would withhold the sanction if, in the first instance, he had been informed that there were ten parties that were interested in the property in suit and not only two. If the addition of the co-defendants involved in a material alteration in the frame of the suit for the relief sought against them differed from that originally claimed or travelled beyond the scope of the sanction granted by the Collector, the objection raised, I deem, would have been fatal to the suit. But the amendment of the nature applied for in this suit does not, in my opinion, require the previous sanction of the Collector. The case of *Sayad Husein Miya* v. *Collector of Kaira* (2), was also referred to by Mr. Kalumal, but all that it lays down is that when sanction is given to the institution of a suit under section 539 of the Code of 1882, corresponding with section 92 of the present Code, the suit must be limited to matters included in the sanction. It will be observed on a perusal of the judgment in this case that the suit actually decided was not the same for which sanction was accorded. In the present case there is no attempt to alter the character of the suit in respect of which sanction has been granted or to seek any relief not contemplated by the sanction.

No case has been cited to me covering the point raised in the present case, nor have I been able to find any, but it appears to me that it would be most unreasonable to hold that the amendment of the character sought in the present case required the previous sanction of the Collector, and that in its absence the suit must be dismissed. I am, therefore, of the opinion that it was unnecessary for the plaintiffs to obtain the consent of the Collector to the amendment of the plaint by the addition of other persons as co-defendants. Mr. Kalumal's objection was mainly based on the argument that, though the property in respect of which the relief was sought was identical even after the amended plaint, yet the parties were different to those mentioned in the original plaint, and they could not be impleaded without the consent of the Collector. But the sanction given by the Collector to the institution of the suit substantially authorised the plaintiffs to sue for a declaration that certain immoveable property

(2) 21 B. 257 ; 11 Ind. Dec. (N. S.) 174.

was *wakf* and for an injunction against all that claimed an interest therein, and the mere absence of some of those interested in the property does not, in my opinion, invalidate sanction already granted or necessitate a fresh sanction before the interested parties could be brought on the record.

This finding renders it superfluous to discuss the other question argued before me as to the effect of the sanction obtained from the Collector subsequent to the amendment of the plaint.

K. S. D. *Objection overruled.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 117 OF 1921.

July 6, 1922.

Present :— Mr. Justice Stuart.

HAR DAYAL SINGH—DEFENDANT—APPELLANT

versus

GAR DAYAL SINGH—PLAINTIFF—RESPONDENT.

Landlord and tenant—Trees, right to transfer—Custom—Wajib-ul-arz, *entry in, construction of.*

A *wajib-ul-arz* declared that such trees as were in possession of the persons who had planted them on the fields or on the ridges could be cut and sold by the tenants of the fields :

Held, that this included the right to transfer standing trees which a tenant had planted on his holding with the consent of the *Zemindar*.

Second appeal against the decree of the District Judge, Shahjahanpur, dated the 12th January 1920.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *M. L. Sandal*, for the Respondent.

JUDGMENT.—The facts of the suit out of which this appeal has arisen are these. Dammer Singh planted certain trees upon his occupancy holding forty years before the date of the suit with the consent of the *zemindars*. He mortgaged the trees to Hardial Singh in 1908. Hardial Singh obtained a decree on his mortgage in 1918. In 1919 Dammer Singh was ejected. When Hardial Singh endeavoured to execute his decree by bringing the trees to sale the *zemindars* instituted the suit for a declaration that the trees could not be brought to sale. The suit has been decreed by both the Courts below. A copy of the *wajib-ul-arz* of the village was put in evidence. This *wajib-ul-arz* declared what the custom was in the village with regard to trees that were not a portion of groves. It declared that such trees as are in possession of the persons who have planted them on the fields or on the ridges may be out and sold by the tenants of the fields. I understand the Courts below to have agreed that the *wajib-ul-arz* contained a record of the custom on the subject but that they have interpreted the *wajib-ul-arz* to show that tenants have no right to transfer the trees standing upon their occupancy holdings, even if such trees had been planted by the consent of the *zemindars*. In other words, if the interpretation of the *wajib-ul-arz* favours the tenants, the custom is established that they can transfer,and the point is one of law. The learned District Judge has said: " The custom in respect of the tenant's groves recorded in the *wajib ul-arz* of the old Settlement is also relied on by the appellant. I have read the provision which is to the effect that tenants are owners of trees planted by them with the consent of the *zemindars* and 'can cut down trees and sell timber of their own accord. It nowhere provides that tenants can transfer trees growing on their holding. The *wajib-ul-arz* relied on by the appellants is, in my opinion, of no help to him as I think the hypothecation of the trees on the holding by the tenant ceases to be enforceable after his ejectment in spite of the fact that a decree has been obtained before such ejectment."

I do not accept this interpretation. It appears to me clear that, whatever may be the law with respect to trees planted by tenants without the consent of the *zemindars* in this village, trees planted upon holdings (whether they are or are not occupancy holdings would be of no consequence) with the consent of the *zemindars* are transferable by the tenants and, in these circumstances, the suit must fail. The decision quoted by the learned Counsel for the respondents and by the Courts below are against the success of the suit and not in favour of it. I

shall take these decisions more less in order. In *Ajudhia Nath* v. *Sital* (1), it was laid down by a Bench that a tenant with a right of occupancy can only make a valid hypothecation of the trees on the land he holds for the term of his tenancy; with his ejectment from such land and cessation of his tenancy such a hypothecation ceases to be enforceable. That of course is the law in the absence of a custom. In the decision in *Deoki Nandan* v. *Dhian Singh* (2), the law was laid down in much the same way with regard to proprietary holdings.

The law as laid down in these two decisions does not really touch the point as to what will be the effect of a custom. But in the next decision *Imdad Khatun* v. *Bhagirath* (3), the Bench while laying down that the trees upon an occupancy holding whether planted by the tenant himself or not are not susceptible of transfer by the tenant, made a clear exception to that general rule in a case in which by a local custom the occupancy tenant had a transferable interest in the timber, and in *Kausalia* v. *Gulab Kuar* (4), the same rule as to custom was laid down. There has been no contrary view taken in any of the subsequent cases. I need only quote the most recent case that I have been able to find *Dya Kishan* v. *Muhammad Wazir Ahmed* (5). There the point was decided against the tenant because although he set up a custom of transfer he was unable to prove it. In this case under the special custom of the village a tenant, whether he is or is not an occupancy tenant, has a right of transfer in trees which he has planted on his holding with the consent of the *zemindar*. This decision concludes the matter. Such being the case the suit must fail. I allow the appeal accordingly and direct that the suit stand dismissed and that the plaintiffs pay their own costs throughout and those of Hardial Singh, appellant. These costs will include fees in this Court on the higher scale.

K. S. D. *Appeal allowed.*

(1) 3 A. 567 ; A. W. N. (1881) 30 ; 2 Ind. Dec. (N. S.) 310.
(2) 8 A. 467 ; A. W. N. (1882) 192 ; 5 Ind. Dec. (N.S.) 181.
(3) 10 A. 159 ; A. W. N. (1888) 32 ; 6 Ind. Dec. (N.S.) 107.
(4) 21 A. 297 ; A. W. N. (1899) 72 ; 9 Ind. Dec. (N.S.) 898.
(5) 80 Ind. Cas. 565 ; 13 A. L. J 833.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2472 OF 1922.

March 17, 1923.

Present :—Mr. Justice Moti Sagar.

BALBIR SINGH—DEFENDANT—APPELLANT
versus
GOBIND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Alienation by male proprietor—Necessity—Anticedent debt—Alience, duty of—Decree against minor, effect of—Consideration, small portion of, found without necessity, effect of—Appeal, second—Ancestral property—Finding of fact.

A finding as to the character of property, arrived at after a full consideration of the evidence, is a pure finding of fact and cannot be impugned in second appeal.

Sher Singh v. *Ram Singh*, 42 P. L. R. 1919; *Biru* v. *Samanda*, 67 Ind. Cas. 276 ; 2 L. L. J. 669 ; *Kartar Singh* v. *Kirpa Singh*, 30 P. L. R. 1922 ; 3 P. W. R. 1922, followed.

It is not the duty of an alienee from a male proprietor who advances money for the payment of first antecedent debts of the alienor to see to the application of the money or to find out whether the whole of the money due to the antecedent creditor was actually paid.

Where a decree is in existence against an alienor the payment of that decree constitutes valid necessity for the alienation of ancestral property.

Devi Ditta v. *Saudagar Singh*, 65 P. R. 1900 ; P. L. R. 1900, p 322 (F. B.) followed.

Where the amount of consideration for an alienation by a male proprietor which is found to be without necessity represents only a small portion of the entire consideration, it is not necessary to convert the sale into a mortgage.

Appeal from the decree of the District Judge, Hoshiarpur and Kangra District at Dharmsala, dated the 18th July 1922.

Messrs. *Mehr Chand Mahajan* and *Tek Chand*, for the Appellant.

Mr. *Sohan Lal*, for the Respondents.

JUDGMENT.—The facts of the case giving rise to this second appeal are few and simple and may shortly be stated as follows : On the 1st of October, 1918, one Sangam,

BALBIR SINGH *v.* GOBIND

a Rathi of the Hamirpur *tahsil* in the Kangra District, sold 81 *kanals* 11 *marlas* of land in the same *tahsil* to one Balbir Singh for Rs. 1,300. The plaintiff, who is a collateral of Sangam, brought the present suit for a declaration that the sale was without consideration and legal necessity and that it would not affect his reversionary rights. Both the Courts below have concurrently found that the land in suit was ancestral *qua* the plaintiff, and that necessity to the extent of Rs 1,072, was fully established. A decree has accordingly been passed in favour of the plaintiff that if he succeeds Sangam by inheritance he would be entitled to obtain possession of the land in dispute on payment of Rs. 1,072 to the vendee-defendant Against this decision the defendant has preferred a second appeal to this Court through *Bakhshi* Tek Chand, and I have heard *Bakhshi* Sohan Lal for the respondent.

The first contention raised by Mr. Mehr Chand, Mahajan, who has argued the appeal for the appellants, is that the finding of the learned District Judge as to the ancestral nature of the land is erroneous and that there is not sufficient evidence on the record in support of this finding. It appears that in the Settlement of 1868 Hira, the father of the plaintiff, and Sangam, his uncle, were entered as joint *malguzars* and that in 1892-93 they were entered as joint owners in equal shares. From these entries in the Revenue Records the learned District Judge has raised a presumption that the land was ancestral and that it must have been occupied by their common ancestor Bogul. It is argued that there is no warrant for such a presumption, and that the learned District Judge was not justified in holding upon the basis of this evidence that the land was ancestral. On the other hand, it has been pointed out by *Bakhshi* Sohan Lal that the learned District Judge has not based his finding upon this presumption alone, and has drawn my attention to the evidence of some witnesses on the record who have also deposed to the land being ancestral. There is abundant authority for holding that a finding as to the character of property arrived at after a full consideration of the evidence is a pure finding of fact and that it cannot be impugned in second appeal, *vide* *Sher Singh* v. *Ram Singh*, (1) *Biru* v. *Samanda* (2) and *Kartar Singh* v. *Kirpa Singh* (3). I am unable to distinguish the present case from these authorities, and must accordingly overrule the contention.

The next point urged is that necessity for the full amount paid had been established and that the sale should not have been converted into a mortgage. The items forming the consideration for the sale-deed were as follows :—

		Rs.
1.	Paid to Ram Singh, prior mortgagee	700
2.	Paid to another mortgagee Banu	80
3.	Paid to a third mortgagee Ram Bhaj	99
4.	Paid before the Registrar for payment to creditors ...	408
5.	Deed expenses	32
	Total ...	1,319

The learned District Judge finds that the first three items were debts due to antecedent creditors and are not, therefore, liable to objections. As to the fourth item it has been found that out of Rs. 408, a sum of Rs. 180 was paid to one Darshan, a decree-holder, but that necessity for the balance of Rs. 228 has not been established. It is, however, pointed out by Mr. Mehr Chand Mahajan, that Darshen's decree carried future interest and that at the time when the sale-deed was executed, a sum of about Rs. 300 was due to him under the decree. It was not the duty of the alienee to see to the application of the money or to find out if the whole of the money due to the antecedent creditor was actually paid. A decree was in existence and the payment of that decree constituted a valid necessity within the meaning of the Full Bench ruling reported as *Devi Ditta v. Saudagar Singh*, (4). The fact that the decree-holder subsequently accepted a sum of Rs. 180 only and gave up the rest of his claim is of no consequence and does not in any way affect the validity of the debt or of the alienation. If the existence of the decree which at the time of the sale amounted to about Rs. 300,

(1) 42 P. L. R. 1919.
(2) 67 Ind. Cas. 276 ; 2 L. L. J. 669.
(3) 80 P. L. R. 1922 ; 3 P. W. R. 1922.
(4) 65 P. R. 1900 ; P. L. R. 1900, P. 322 (F. B.).

constituted valid necessity a sum of Rs. 100 only remains unaccounted for, which for the purposes of this case may very well be ignored. In any case, even if the finding of the learned District Judge as to the sum of Rs. 228 not being for legal necessity is considered final and not open to second appeal, I am clearly of opinion that when the amount of consideration for a sale of this kind which is found to be without necessity represents only a small portion of the entire consideration it is not necessary to convert the sale into a mortgage. Rs. 228 is, roughly, one-sixth of the entire price paid. In the case reported as *Ali Gauhar* v. *Mahanda*, (5). Rs. 210 out of Rs. 1,200 were found to have been without necessity and the sale was allowed to stand. Similar cases are those reported as *Ram Karan* v. *Hukman* (6), *Badri Mal* v. *Gopal* (7), and *Sheoambar Khan* v. *Balkaran Singh* (8). It is, therefore, clear that, even if the item of Rs. 228 was not taken for legal necessity, the bulk of the consideration being for legal necessity the sale in question should have been allowed to stand, especially when no extravagance or reckless waste on the part of the vendor was alleged. I, therefore, accept the appeal and, setting aside the decree of of the lower Appellate Court, dismiss the plaintiff's suit with costs throughout.

Z. K. *Appeal allowed.*

(5) 6 Ind. Cas. 984 ; 55 P. L. R. 1910 ; 64 P. W.R. 1910.

(6) 22 Ind. Cas. 544 ; 79 P. L. R 1919 ; 51 P. W. R. 1914.

(7) 130 P. R. 1906 ; 100 P. L. R. 1907 ; 155 P. W.R. 1906.

(8) 65 Ind. Cas. 360 at p. 362 ; 8 O. L. J. 619 ; (1922) A. I. R. (O.) 112.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 246 OF 1922.

March 14, 1923.

Present :—Mr. Simpson, A. J. C.

BHAGWAN AND ANOTHER—DEFENDANTS —APPELLANTS
versus
GANGA BAKSH AND ANOTHER— PLAINTIFFS—RESPONDENTS.

Possession and ownership—Trees on land—Land belonging to one person—Trees in possession of another—Ownership in trees—Presumption—Burden of proof.

A person who is the owner of a certain land may be presumed to be the owner of the trees standing on the land, but this presumption is not very strong in India where the ownership of the trees is very frequently divorced from the ownership of the land they stand on. On the other hand, the presumption that a person in possession has title is always strong and is of universal application.

Therefore, in a case where the ownership of certain land is in one person but the trees standing on it are in the possession of another, the stronger presumption is that the latter is the owner of the trees, and the burden of proof is on the former to prove, his title to them.

Appeal against the decree of the Subordinate Judge, Bara Banki, dated the 29th April 1922, upholding the decree, dated the 6th December 1921, of the Munsif, Ram Sanehighat, Bara Banki.

Mr. *M. P. Asthana*, for the Appellants.

Messrs. *Ram Bharose Lal* and *Raj Narayan Shukla*, for the Respondents.

JUDGMENT.—The point of law in this second appeal is one of burden of proof. The plaintiffs are admittedly owners of the land, and the Courts have very properly raised the presumption that they are owners of the trees standing on the land. But they have omitted to note that the plaint itself admits that the defendants are in possession of the trees and that possession also raises a presumption of title. There are thus two conflicting presumptions one in favour of the plaintiffs and the other in favour of the defendants.

HARDITTA *v.* NIGAHIA MAL

The presumption that the owner of the land is the owner of trees is not a strong one in India, where the ownership of trees is very frequently divorced from the ownership of the land they stand on. The presumption that the person in possession has title, on the contrary, is of universal application and is always strong. No authority has been cited on either side. I have, therefore, to decide the point myself. I have no hesitation in holding that the presumption arising from possession is stronger in the case of trees than the presumption arising from the ownership of the land. It follows that the burden of proof was wrongly thrown in the Court of Trial. I was prepared to decide the suit myself, but the respondents' Counsel said that his clients might have produced better evidence if the burden had been thrown on them. The appellant's Counsel said that he had no objection to a remand, if fresh evidence was admitted on one side it ought also to be admitted on the other. To this respondents made no objection. I, therefore, remand the case, through the lower Appellate Court, to the Court of Trial, in order that fresh issues may be struck, the burden of proof being thrown upon the plaintiffs. Fresh evidence will be admitted and the case decided *de novo*. Costs hitherto will abide the result.

N. H. C. *Case remanded.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 2212 OF 1919.

June 14, 1920.

Present :—Sir Shadi Lal, Kt., Chief Justice.

HARDITTA—OBJECTOR—APPELLANT
versus
NIGAHIA MAL—DECREE-HOLDER, AND THAMAN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 16—Execution application—Dismissal—Appeal—Assignment of decree—Application for execution not made—Determination of question of assignment suo motu—*Absence of formal application, effect of.*

An order dismissing an application for execution of a decree adversely affects the rights of the decree-holder against the judgment-debtor and consequently comes within the purview of section 47, Civil Procedure Code, and is appealable.

If an assignee of a decree does not make an application for the execution of the decree, it is not the duty of a Court *suo motu* to determine the validity of the assignment and to make the assignee a party to the decree.

Where an assignee intends to make an application under O. XXI, r. 16, Civil Procedure Code, and avail himself of the rights conferred by the deed of assignment, the omission of a formal application is a mere irregularity and need not prevent a Court from determining a question which arises between the assignee and the decree-holder and which the former wants to be determined in execution proceedings.

Miscellaneous second appeal from the order of the District Judge, Ludhiana, dated the 29th July 1919, reversing that of the Munsif, 1st Class, Ludhiana, dated the 19th March 1919.

Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Chuni Lal Mathur*, for the Respondents.

JUDGMENT.—The respondent Nigahia obtained a decree against Thamman, Sawan and Kakar for a certain sum of money to be realised by the sale of a house belonging to Thamman. In execution of that decree the decree-holder attached the house of Thamman to which the appellant Harditta raised an objection. The application raising objection to attachment was still pending when Harditta and the decree-holder came to terms by which the latter assigned his rights under the decree to the former and agreed to take in lieu a sum of Rs. 827. Accordingly, a deed was written on the 24th February 1919 by which Harditta promised to pay Rs. 827 to the decree-holder Nigahia.

The decree-holder consequently made an application to the Court of Execution that he had assigned his rights in favour of Harditta, but the latter, while accepting the assignment of the decree pleaded fraud in order to avoid his liability for the payment of the money. In view of the attitude adopted by the assignee, the decree-holder made a statement on the 19th March 1919 to the effect that his application for execution might be dismissed if the Court held the deed of assignment to be a valid

transaction. The Munsif, who was dealing with the application for execution, without expressing any opinion on the question of the validity or invalidity of the transaction, dismissed the application for execution with the result that the decree-holder preferred an appeal to the District Judge, who has remitted the case to the Court of first instance for the trial of the issue as to the validity of the assignment.

Harditta has preferred a second appeal to this Court, and Mr. Jai Gopal Sethi on his behalf has raised two points before me (1) that the order of the Munsif dismissing the application for execution did not come within the purview of section 47, Civil Procedure Code, and that consequently no appeal lay to the District Judge; and (2) that the assignee of the decree has not so far made any application for execution as required by O. XXI, r. 16, Civil Procedure Code, and that it is, therefore, unnecessary to determine the question whether there was an assignment by the decree-holder in favour of his client.

Upon the first question it is sufficient to say that the order dismissing the application for execution adversely affected the rights of the decree-holder against the judgment-debtor and consequently determined a question relating to the execution or satisfaction of the decree arising between the parties to the suit. As stated above, the decree-holder wanted his application to be dismissed only if the assignment was considered to be binding upon the assignee so that the latter could be made liable for the money mentioned in the deed of assignment. It would be perfectly absurd to contend that, while the assignment should be considered as binding upon the assignor so far as his rights under the decree are concerned, the assignee should be able to wriggle out of his liability for the price of the assignment by relying upon fraud. The transaction is an indivisible one and must be viewed as a whole. It seems to me clear that if the assignee does not want to pay the money the decree-holder is entitled to say that he does not want to part with his rights under the decree. I consider that the order passed by the Munsif fulfils the requirements of section 47, Civil Procedure Code, and that the District Judge was competent to entertain the appeal.

As regards the second question, I am prepared to accede to the contention that if the assignee does not make an application for the execution of the decree it is not the duty of the Court *suo motu* to determine the question of assignment and to make the assignee a party to the decree. I would, therefore, be prepared to give effect to this objection and to set aside the order of the lower Appellate Court, remanding the case for the decision of the question as to the validity or otherwise of the assignment, and to direct the Munsif to execute the decree as if there was no assignment at all. The learned Counsel for the appellant, however, says that his client intends to make an application under O. XXI, r. 16, Civil Procedure Code, and that he wants to avail himself of the rights conferred upon him by the deed of assignment. It is, therefore, clear that the question of assignment will have to be gone into and, in these circumstances, the omission of a mere formal application under O. XXI, r. 16, is a mere irregularity and need not prevent the Court from determining a question which arises between the appellant and the decree-holder and which the appellant wants to be determined in execution proceedings.

For the aforesaid reasons I see no valid reason to interefere wiih the order of the District Judge and dismiss the appeal with costs.

N. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 32 OF 1923.

April 19, 1923.

Present :—Mr. Dalal, J. C.

BHUDHAR SINGH—DEFENDANT—APPELLANT

versus

SHEIKH SAHAMAT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 4—Judgment of Small Cause Court, contents of.

LACHHMAN DAS *v.* JAI SINGH

The judgment of a Court of Smalf Causes should contain the points for determination and the decision thereon. Where, therefore, a judgment contains nothing except the words: "The claim is decreed with costs," it does not indicate that the points in dispute between the parties were at all considered and the suit must be remanded for a trial and judgment according to law.

Revision against the order of the Subordinate Judge, Kheri, exercising Small Cause Court powers, dated the 30th January 1923.

Mr. *S. N. Roy*, for the Applicant.

Mr. *S. M. Ahmad*, for the Opposite Party.

JUDGMENT.—The plaintiff sued in the Court of Small Causes at Kheri for recovery of money due on an alleged pro-note. The alleged pro-note was not stamped and various defences were raised by the defendant in answer to the claim. The judgment of the learned Judge of the Small Cause Court consists of six-words "The claim is decreed with costs." The rest of the judgment which consists of eight more words, relates to the time of the execution of the decree. Order XX, r. 4, lays down that a judgment of a Court of Small Causes need not contain more than the points for determination and decisions thereon. To put an ordinary interpretation on these words, they presumably mean that the judgment must contain the ponts for determination and the decision thereon. The judgment of the lower Court does not indicate that the learned Judge has considered the points in dispute between the parties.

I set aside the decree of the lower Court and remand the suit to it for a trial and judgment according to law. Costs here and heretofore shall abide the result.

N. K. *Case remanded.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 151 OF 1920.

April 22, 1922.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

LACHHMAN DAS—DECREE-HOLDER—APPELLANT
versus
JAI SINGH AND OTHERS—INSOLVENTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 28—Adjudication of insolvency—Vesting of property—Death of insolvent whether divests Receiver—Right of son to take by survivorship.

Where property has vested in a Receiver after an order of adjudication, the death of the insolvent does not divest the Receiver of the property and his son is not entitled to take it by survivorship.

Faqirchand Motichand **v.** *Motichand Hurruchchand*, 7 B. 438 ; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, **followed.**

The death of a debtor does not put an end to an insolvency proceeding initiated on an application by the debtor.

Appeal under section 10 of the Letters Patent from the order of Mr. Justice Wilberforce, dated the 13th July 1920, passed in Civil Appeal No. 2622 of 1919.

Lala *Narinjan Das*, *R. B.*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—The following facts will explain the nature of the proceedings out of which the present appeal has arisen. On the 17th October 1913 Mastan Singh, father of the present appellant, applied to be adjudicated an insolvent. On the 16th October 1914 he was so adjudicated. Under the provisions of section 16 of the Insolvency Act the whole of the property of the debtor vested in the Court or the Receiver. Fifty *bighas* of the lands in possession of the debtor were reserved for his maintenance and support. The remaining lands were leased out on

ERRATA.

VOL. 79, INDIAN CASES.

Please make the following corrections as given in the schedule below :—

Page.	Col.	Line from top.	In place of	Read	
170	1	39	lands ...	hands ..	
179	1	29	waiting ...	writing ..	
188	2	26	he restored ..	be restored ..	
197	1	24	can really one ...	can really be one ..	
218	1	13	both ..	liable ...	
226	2	43	Leeks ...	Laches ...	
227	1	8	be was ..	he was ...	
245	1	26	not a ...	.....	*omit.*
,,	1	32	nominal sum ..	not a nominal sum ..	
249	2	16	vendors lid ..	vendors had ...	
250	2	29	s. 107 ..	s. 107 G ..	
334	2	11	(VI of 1888) ..	(VI of 1898) ..	
343	1	40	s. 7 cl. I, (e), XIV (f) ...	s. 7, cl. iv (e), xi_(f) ..	
,,	2	16	s. 7 cl. 11 ...	s. 7 cl. xi ...	
,,	,,	18	s. 7 cl. 4 (n) ..	s. 7 cl. iv (e) ..	
,,	,,	20	s. 7 cl. 1 ..	s. 7 cl. xi ..	
361	1	9	must the considered ...	must be considered ..	
420	1	22	(V of 1881) ...	(XXVI of 1881) ...	
462	2	28	might has maintained ...	might have maintained ...	
482	2	22	section 451 ..	section 151 ..	
486	2	30	executor ...	execution ...	
517	1	18	sion ..	.....	*omit.*
521	1	8	does not come ...	does not become ..	
596	1	37	Cut ..	but ..	
906	1	20	(VII of 1887) ..	(VII of 1870) ..	
995	2	17	the meaning ..	within the meaning ..	
1024	1	31	O. 43, r. (a) ...	O. XLIII, r. 1 (a) ..	
1038	1	38	being ...	bring ...	

NOTE TO BINDER.

Please put pages 549-550 Indian Cases Volume 79 in their proper order by tearing out the leaf and inverting it.

Borrower's No.	Issue Date	Borrower's No.	Issue Date

father according to the Customary law also has the power to deal with the interest of his son under recognised circumstances, such as the payment of necessary antecedent debt, etc. The decision of Mr. Justice Latham is based on the decision of their Lordships of the Privy Council in *Suraj Bansi Koer* v. *Sheo Parshad Singh* (3), and fully applies to this case.

In our opinion the view taken by the Court of first instance was correct and the petitioners were not entitled to get the relief they asked by making a petition under section 22 of the Insolvency Act. We, therefore, accept the appeal and restore the order of the Court of first instance with costs.

N. K. *Appeal accepted.*

(3) 6 I. A. 88 ; 5 C. 148 ; 4 Sar. P. C. J. 1 ; 3 Suth. P. C. J. 589 ; 4 C. L. R. 226 ; 2 Shome L. R. 242 ; 2 Ind. Dec. (N. S.) 705 P. C.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 12 OF 1923.

March 13, 1923.

Present :—Mr. Dalal, A. J. C.

SRI MAHANT BABA HARI DAS FAQIR—PLAINTIFF—APPELLANT

versus

PRADUMAN NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 19—Appeal, dismissal of, in default—Appellant's Counsel engaged in another Court—Appellant, absence of—Re-hearing, whether justified.

When a pleader is engaged in another Court at a distance, it is due by way of courtesy to the Court before which he is to appear, that some one may be left behind to inform the Court of the fact, so that if it likes, it can take up some other business. The disappearance of every person connected with the party, in hopes that the Court will be compelled to wait for the pleader, is a wrong method and if the appeal is dismissed in default, the appellant is not entitled to a re-hearing.

Appeal against the order of the District Judge, Lucknow, dated the 8th November 1922.

Mr . *Harish Chandra*, for Mr. *Har Dhian Chandra*, for the Appellant.

Mr. *K. N. Chak*, for the Respondents.

JUDGMENT:—On 24th August 1922 the learned District Judge of Lucknow dismissed an appeal in default in the absence of the appellant and in the presence of the respondents' pleader. An application for re-hearing was filed the next day and was dismissed. The appellant has come here in appeal from that order.

It appears that the appellant's pleader was engaged in another Court when the appeal was taken up for hearing by the District Judge. There is some inaccuracy as to time in the application filed for re-hearing, because the District Judge says in his order of 8th November that he took up the appeal for hearing at about 1 p.m. and waited for a quarter of an hour, while in ground No. 6 of the application for re-hearing of the 25th August it is alleged by the applicant that the appellant's pleader arrived in Court at 12-45 p. m. The statement in the application does not agree with the Judge's note and cannot be correct.

I give due weight to the fact that some Courts subordinate to the District Judge are situated at a distance from the Judge's Court, and on account of large administrative work, there is no fixed time at which the Judge can arrive in Court. These facts would have induced me to grant a re-hearing if the appellant had acted in a straight-forward manner. When the pleader was away, Prag Das Chela, and general attorney of the appellant, onght to have waited in Court to inform the presiding officer how his pleader was engaged in another Court. Instead of doing this, he seems to have waited about outside the Court and appeared as soon as the order of dismissal was recorded.

The appellant's pleader on reaching the Court of the District Judge did not draw the attention of the Judge to the fact that he had hurried from the other Court as fast as he could. When a pleader is engaged in another Court at a distance, it is due, by way of court-

chakota. It is admitted that the lands in dispute came within the definition of an agricultural land belonging to an agricultural tribe. Mastan Singh having died his minor sons applied to the Insolvency Court to have the land restored to him on the ground that the father had only a limited interest and after his death the lands must revert to the sons under the rule of survivorship. An alternative prayer was made by the petitioners to the effect that if the lands could not be released the rent realised from the *chakotadars* should be handed over to the petitioners. The presiding officer of tho Insolvency Court, finding no authority for such a proposition, dismissed the application. Against the order of the District Judge an appeal was preferred to this Court. It came up for disposal before a learned Judge of this Court, who, relying upon *Jagdip Singh* v. *Narain Singh* (1), accepted the appeal and setting aside the order of the District Judge allowed the application of the sons and ordered that the lands should be released in favour of the petitioners.

The appellant, Lachhman Das, a creditor and a *chakotadar*, has appealed under section 10 of the Letters Patent. It is contended on his behalf that the property having vested in the Receiver cn the order of adjudication the death of the debtor could and did not divest the Receiver of it, and, therefore, the application of the son for the release of the lands was not entertainable. The Counsel for the applicant has relied upon the provisions of section 22 of the Provincial Insolvency Act, III of 1907, and has argued that his client, being aggrieved by the act and the decision of the Receiver, was entitled to apply to the Court for the relief claimed. No act or decision of the Receiver, however, is specified, nor is it shown that the application was made within 21 days from the date of the order or decision complained of. To our mind section 22 could not help the petitioner. No other section or provision of the Act has been pointed out according to which such an application could be made or entertained. According to section 16 of the Act the whole of the property of the debtor vested in the Court or the Receiver. The death of a debtor does not put an end to an insolvency proceeding initiated on an application by the debtor. There is nothing in the Act to show that after an order of adjudication has been made and the property has vested in the Receiver the death of the debtor would divest the Receiver of the property. The only ground upon which the Counsel for the petitioner had tried to support the decision of the learned Judge of this Court is that the poroperty being ancestral the insolvent father had only a limited interest in the property which alone had vested in the Receiver, and now that the father is dead the son is entitled to take the property by right of survivorship. This proposition is opposed to decided cases. In the case of *Faqir Chand Moti Chand* v. *Moti Chand Hurruch Chand* (2). Mr. Justice Latham held that "under the Mitakshara law a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes; and vesting order, made under section 7 of the Indian Insolvent Act, vests that right in the Official Assignee, who can, therefore, give a good and complete title to such ancestral immoveable estate to a purchaser. The death of the insolvent has no effect on the proceedings in his insolvency or on the power of the Official Assignee. The ancestral estate previously vested in the Official Assignee is not thereby divested from him and vested in the son by right of survivorship. In the legal aspect of the matter the natural existence of the insolvent is for the purpose of dealing with his estate, artificially continued in the Official Assignee, who can after the insolvent's death deal with the estate as he could have dealt with it had the insolvent been still alive."

The provisions of the Provincial Insolvency Act as to this matter are practically the same as those of the Indian Insolvency Act. Therefore, the rule laid down in the above case will equally apply to the case coming under the Provincial Insolvency Act. We are aware that the parties to the suit are governed by the customary law applicable to this Province, but in this matter the rule applicable to ancestral immoveable property under the *Mitakshara* law equally applies to the cases governed by the Customary law, for a

(1) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. 1912; 173 P. L. R. 1912 F. B.

(2) 7 B. 438; 8 Ind. Jur. 98; 4 Ind. Dec. (N. S.) 294.

esy to the Court, that some one may be left behind to inform the Court of the fact, so that if it likes it can take up some other business, The disappearance of every person connected with the party, in hopes that the Court will be compelled to wait for the pleader, is certainly a wrong method and I shall not countenance it. Under the circumstances of this particular case I am not prepared to interfere. I dismiss the application but make no order as to costs.

N. K. *Application dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 200 OF 1920.

March 22, 1920.

Present :—Mr. Justice Martineau.

LALA DAS—JUDGMENT-DEBTOR—APPELLANT
versus
MINA MAL AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Order rejecting application for arrest of judgment-debtor whether appealable—Judgment-debtor unable to pay decretal amount—Imprisonment—Order, propriety of.

An order rejecting an application for the arrest of a judgment-debtor is one under section 47, Civil Procedure Code and is appealable.

Where a judgment-debtor has no attachable property and is unable to pay off the decretal amount or any portion of it, it would not be proper to order his imprisonment.

Appeal from the order of the District Judge, Ambala, dated the 13th January 1920, reversing that of the Senior Subordinate Judge, Ambala, dated the 27th November 1919, dismissing the decree-holders' application for the arrest of the Judgment-debtor.

Lala *Faqir Chand*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—The respondents obtained a decree for Rs. 4,651 and costs, on the 11th December 1915 against the appellant Lala Das, his son Raja Lal, and his brother and nephew. He has applied to have Lala Das arrested in execution of the decree. The first Court rejected the application, finding that Lala Das had no property, but the District Judge accepted the decree-holders' appeal and ordered a warrant to issue for Lala Das' arrest. The latter has appealed to this Court.

The first ground, that the District Judge had no jurisdiction to entertain the appeal against the first Court's order, is wrong, as Mr. Fakir Chand admits. The order was one under section 47 of the Civil Procedure Code and was appealable. The question for consideration is, whether the appellant is able to pay off the decretal amount or any portion of it, for if he is unable to pay it would not be proper to order his imprisonment. The learned District Judge has referred to the evidence of the decree-holders' witnesses, who say that Lala Das is well-to-do and that he works with his son and owns a piggery, and has accepted it as correct, no evidence having been produced in rebuttal. There would be no ground for second appeal if the evidence of the decree-holders' witnesses were the only material for forming a conclusion, but the District Judge appears to have left out of consideration the important admissions of the decree-holder Chhajju Mal and his Counsel. Lala Das stated that his business had been ruined, and that all his property, including moveables, had been sold by auction, and his pleader made a statement to the same effect. The statement as to the whole of Lala Das' property having been sold was not contradicted by the decree-holders or their Counsel, and in fact the latter said that the statement of Lala Das' pleader showed that Lala Das had no attachable property, and he made a definite admission as to the immoveable property having been sold in execution of decrees and purchased by Lala Das' son Raja Lal. The decree-holder Chhajju Mal himself, though he said that Lala Das had property, went on to admit that Lala Das had no house, shop, ornaments, or money which he could get attached. He made out that there was property which Lala Das owned jointly with his son, but it is

difficult to see how this can be the case when all the property that Lala Das had was auctioned. If there in any such property, why do not the decree-holders get it attached ? It was admitted by their pleader that the piggeries at Ambala and Kasauli were carried on by Raja Lal in his own name. If Lala Das had any share in the shop or in the goods the decree-holders could get them attached. It is, however, admitted before me that the decree-holders have never had any attachment effected. They once had a warrant for the attachment of the moveable property issued, but when the Nazir went to the house to execute the warrant nothing was found in it but ordinary clothes and utensils, so no attachment took place.

The decree-holders' admission that Lala Das' property has been sold in execution of decrees obtained by other persons, and their conduct in never having any of the property which they allege that he owns jointly with his son attached, though more than four years have elapsed since they got their decree, are strongly in the appellant's favour. The fact appears to be that the appellant has no means of his own, and that the decree-holders, instead of seeking to realize their money by attaching the property of his son, brother and nephew, who are also judgment-debtors, want to put pressure on Raja Lal and induce him to pay by having his father arrested.

I accept the appeal, set aside the order of the District Judge, and restore the order of the Subordinate Judge dismissing the application for the arrest of Lala Das The respondents will pay the appellant's costs in this Court and the lower Appellate Court.

N. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL
No. 8 OF 1923.

April 19, 1923.

Present :—Mr. Dalal, J. C.

SURJA—OBJECTOR—APPELLANT

versus

B. GIRINDRO NATH CHATTERJEE, RECEIVER AND ANOTHER—OPPOSITE PARTIES—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 4 (1)—Insolvency Court, jurisdiction of—Determination of questions of title to insolvents' property—Civil Court, reference to, whether necessary.

Where, in the course of insolvency proceedings, the question arises whether the mortgagee rights in certain properties belong to the insolvent or to his wife, it need not be referred to a Civil Court as the Insolvency Court has jurisdiction, under section 4 (1) of the Provincial Insolvency Act, to decide it finally after framing issues and recording evidence.

Appeal against the order of the District Judge, Fyzabad, dated the 16th December 1922.

Mr. *Rudra Datt Sinha*, for the Appellant.

Mr. *J. K. Banerji*, for the Respondents.

JUDGMENT.—I do not think that the learned Judge of the Insolvency Court was correct in the procedure adopted by him. He has summarily decided, under section 53 of the Provincial Insolvency Act No. V of 1920, that a certain lease was voidable and he cancelled it without any enquiry. The question at issue is whether the mortgagee rights in certain properties belong to the insolvent or to the objector, who is the wife of the insolvent. This question ought to have been tried by the lower Court finally under section 4 (1) of the Act after framing issues and recording evidence. The learned Judge appears to think that the matter should be decided by a Civil Court. This opinion is not correct, because the Insolvency Court has jurisdiction to finally settle all such questions.

I set aside the order of the lower Court and remand the case to it for a proper trial and decision on the merits. Costs here, and heretofore shall abide the result.

N. K. *Case remanded.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 62 OF 1919.

June 30, 1921.

Present :—Mr. Kennedy, J.C., and Mr. Madgowkar, A. J. C.

SANGATMAL LILARAM—APPLICANT
versus
JAN MAHOMED GULAM KHAN—OPPONENT.

Dekhan Agriculturist's Relief Act (XVII of 1879), s. 15 B—Consent decree—Executing Court, powers of—Instalments whether can be allowed.

Section 15 B of the Dekhan Agriculturist's Relief Act does not make any exception in the case of consent decrees. The fact that a decree is a consent decree does not limit the powers of the Court, which can in proper cases substitute system of instalments to direct sale. [p. 554, col. 2.]

It is not open to an Executing Court to reduce the actual amount payable under the decree or the rate of interest, if such is awarded in the decree. It can direct that the decretal amount be paid by instalments instead of being recovered immediately by sale. Instalments must be calculated at such a rate that they would enable the capital and interest payable under the decree to be paid off in full during the period settled for the payment of instalments. [p. 554, col. 2.]

In the case of suits falling under clauses (*y*) and (*z*) of section 3 of the Dekhan Agriculturist's Relief Act, an agriculturist, if the decree is a consent decree, can apply to the Court for an order under section 15 B to grant instalments in execution not provided for in the decree. [p. 556, col. 1.]

Revision against the order of the District Judge, Sukkur.

Mr. *Tolasing Khushalsing*, for the Applicant.

Mr. *Fatehchand Assudomal*, for the Opponent.

JUDGMENT.

Kennedy, J. C.—In this case one Jan Mahomed, an agriculturist, was a defendant in an action on a mortgage-bond to the extent of Rs. 600. The matter came up for trial before the Shikarpur Judge and at the trial the parties entered into a consent decree which provided the payment of a less sum than the amount specified in the bond within six months providing also (if the defendant failed to pay that sum at the time fixed) interest should run at the rate of 8 as. per cent. per month for the period of three years after which the plaintiff was to be entitled to realise all the money, principal and interest, by sale of the mortgaged property.

It does not appear whether the Trial Court took any steps to see whether this was a valid and binding compromise and whether it was enteredinto advisedly on the part of the defendant with full knowledge of its consequences. It would appear, as a matter of fact, that the defendant was represented by a pleader at the time. Defendant defaulted and the plaintiff came in execution to recover the decretal amount by sale of the mortgaged property. The point whether this decree was executable at the time the execution application was put in was not raised. The Executing Court gave orders that the amount of the decree to be paid by the defendant by way of instalments of Rs. 50 in default of any of which instalment, sufficient property was to be sold. Plaintiff was dissatisfied with this order and appealed to the District Court of Sukkur, who then passed the order under appeal.

It is difficult to understand the precise effect of this order. But apparently the District Judge conceived that he had jurisdiction to quash the entire proceedings including the decree which had already been passed, and remand the whole case to the Original Court directing it to pass a fresh decree. If this was merely an interlocutory order, this Court could not deal with it in appeal or revision. But the effect of the order of the District Judge seems more than an interlocutory order. It seems to be an order quashing, in so far as it could, plaintiff's decree, thereby entirely depriving the appellant of the rights which the appellant had already got under the decree. It is, as I say, difficult to classify this order, but it is I think an order which finally disposed of the matters then at issue between the parties. Against such an order an appeal lies. We think, therefore, this ought to be treated as an appeal and not as a revisional application.

However correct the views of the District Judge may have been as to the necessity of

protecting the rights of agriculturists who are sued by money-lenders, of course it was not open to him on appeal by the plaintiff, in which no cross-objections had been filed by the defendants, to pass an order damnifying the plaintiff, still less it was open to him on an appeal by the plaintiff to pass orders contemplating the entire setting aside of the decree against which no appeal had been filed. The order, therefore, of the Distict Judge remanding the case to the lower Court to record a finding as what was the nature of the original transaction between the parties and what the sum actually lent to the judgment-debtor was, is a wrong order.

It is strenuously urged that the second order of the District Judge is also wrong and the order of the Trial Court originally appealed against was wrong. It is said that the decree under execution was a consent decree and the Court in excuting that decree has no power under section 15B to substitute instalments. This, no doubt, is the view taken by the Bombay High Court. The matter has never been judicially decided in Sind. Speaking with the utmost deference, I am very reluctant to accept the view of the Bombay High Court. It is not the case that section 15B makes any exception in case of consent decrees. I cannot see why the fact that the decree is a consent decree should be held to limit the powers of the Court. It must be remembered that this Act is dealing with persons who *ex hypothesi* are not considered to be in possession of contractual powers, they are in a position which some legislations assign to minors, sailors, expectant heirs and the like. A consent decree is merely a ratification by the Court of the contract formed between the parties and if the Court under the Dekhan Act is not bound to uphold a contract entered into by an agriculturist, I cannot see why it should be bound by a consent decree. Moreover, the whole policy of the Act is to provide a means by which an agriculturist should be enabled to clear himself of debts (without undue damage to the creditors no doubt) without being put to the necessity of selling his land. It is surely clear that in a profession like an agriculturist, which is full of fluctuations, conditions may alter considerably in the interval between the filing of the consent decree and the time when it comes to be executed. It would seem, therefore, the Court ought to have the power to provide for such a contingency and to make a concession to the agriculturist which would enable him to satisfy the decretal debt wihtout undue prejudice to the money-lender, but without depriving him of his lands. This being so, I think, it is open to the Court in proper cases even when the decree is a consent decree to substitute system of instalments under section 15B to direct sale. So far, no doubt, the Trial Court and the District Judge might pass an order for instalments. But it is not open to the District Judge to throw the whole matter open on an appeal by the plaintiff (the money-lender) against the defendant, it is not open to him to pass an order absolutely more favourable to the respondent than that the appellant already had obtained. It is not open to the Executing Court to reduce the actual amount payable under the decree or the rate of interest, if such is awarded in the decree. What is open to him to do is to direct that the decretal amount to be paid by instalments instead of being recovered immediately by sale. Those instalments must be calculaletd at such a rate that they would enable the capital and interest payable under the decree to be paid off in full during the period settled for the payment of instalments. The parties wish us now to pass a final decree instead of remanding the case to the District Judge for disposal on correct lines.

The correct decree, therefore, will be that defendant do pay to the plaintiff in twelve equal instalments of such an amount that will pay off the capital debt of Rs. 515 with 6% interest during the period and also the costs awarded to be divided in twelve equal instalments to be without interest. The plaintiff must have the costs in this Court to be divided in twelve equal instalments payable as abovesaid and on failure to pay any one instalment the decre-holder has the right to bring to sale so much of property as may be sufficient to pay off the amount of instalments in arrears. I would amend the order of the lower Court accordingly.

Madgowkar, A. J. C.—The plaintiff-appellant sued the defendant-respondent, an agriculturist, and the Court passed a consent decre at which the parties had arrived. The judgment-debtor made default, the decree-holder applied in execution. The Court of first

instance awarded instalments which were not part of the original decree. On appeal to the District Court by the decree-holder that Court remanded the case to the lower Court for evidence and finding on the following issues :—

1. What was the nature of the original transaction between the parties and what was the sum actually lent to the judgment-debtor ?

2. What is the financial status of the judgment-debtor and what sum can he afford to pay annually by way of instalments, if instalments are to be granted ?

The decree-holder applies in revision. Meanwhile, the Court of first instance has apparently recorded findings on the issues.

On the question of jurisdiction, the order of the District Court is evidently an order under O. XLI, r. 25 of the Code of Civil Procedure against which no appeal lies. It is doubtful if the case can be said to have been decided by the District Court. But it is certain that the first issue remanded reopens the whole decree and is meant to modify it, if necessary. This, in our opinion, no executing Court can do even in suits under the Dekhan Agriculturists' Relief Act and it is, therefore, a material irregularity. Reading section 115, together with section 151, Civil Procedure Code and in view of the application of the latter to remand, I am of opinion, on the whole, that we have jurisdiction.

As to the question of modification of the decree, it has doubtlessly been held by the Bombay High Court in *Lachiram* v. *Jana Yesu* (1) that a decree by consent can only be varied by consent even in suits under the Dekhan Agriculturists' Relief Act, section 15B notwithstanding. There is, however, even in Bombay, a contrary current of decisions. Thus, it was held in *Piraji* v. *Ganapati* (2) that any party might compromise in spite of section 12 of Dekhan Agriculturists' Relief Act. On the other hand, it was held that a penal clause to sell in default was opposed to the provisions of section 15 and it was not competent for the Court to pass a decree by consent with such provisions : *Kishindas Shivram Marwadi* v. *Nama Rama Vir* (3). It is true that the force of this decision was considerably weakened by the Full Bench decision in *Shivayagappa* v. *Govindappa* (4). In the latest case on the point, however, *Supdu Dhodu* v. *Madhavrao Jivram* (5), the Court extended the time for compliance even of the decree by consent. And it was observed by Macleod, C. J., that " in each case the terms of the consent decree must be considered. The Court cannot lay down a general principle that in no case can the terms of the consent decree be varied."

Turning to the provisions of section 15B itself, the Court has power to decree instalments in any suit of the description of section 3, clauses (*y*) and (*z*). Decrees by consent are not expressly excluded, so long as they fall in this category. As the learned Judicial Commissioner has observed, the whole policy of the Act is against the sanctity of contracts and in favour of equitable interference with them in order to allow lands to remain with the agriculturist. In the case of contracts not falling under the Dekhan Agriculturists' Relief Act, it may be true that Courts will give effect to contracts and will not interfere with contracts judicially crystallized into decrees, least of all drcrees passed by consent ; and, therefore, that a decree by consent can only be varied by consent. But this conclusion is based on an assumption of ordinary contracts, and not of contracts in suits to which the Dekhan Agriculturists' Relief Act applies and cannot well be allowed to over-ride the express provisions of section 15B which interferes to a definite extent with the rule of finality of decrees. For, in such a case, an agriculturist judgment-debtor who through the vicissitudes of the Indian rains and no fault of his own finds himself unable to make the payment to which he may have in the consent decree agreed, would be debarred from applying to the Court to grant instalments, in themselves just, and which, on the natural interpretation of section 15B, were within the power of the

(1) 27 Ind. Cas. 830 ; 16 Bom. L. R. 668.
(2) 6 Ind. Cas. 527 ; 34 B. 502 ; 12 Bom. L. R 378.
(3) 8 Ind. Cas. 651 ; 35 B. 190 ; 12 Bom. L. R. 1024.
(4) 20 Ind. Cas. 969 ; 37 B. 614 ; 15 Bom. L. R. 768.
(5) 57 Ind. Cas. 534 ; 44 B. 544 ; 22 Bom. L. R. 780.

executing Court, and would see the passing away of his land to the creditor against which the Act is mainly directed merely because the decree was passed by consent and not after contest. With all respect, therefore, to the Bombay decision *Lachiram* v. *Jana Yesu* (1), I conclude that in the case of suits falling under clauses (*y*) and (*z*) of section 3 of the Deccan Agriculturists' Relief Act, an agriculturist, if the decree is a consent decree, can apply to the Court for an order under section 15B to grant instalments in execution not provided for in the decree.

On the other hand, section 15B itself does not empower the Court to go directly behind the decree and to re-open, under sections 12 and 13, the question of the principal or the interest already awarded under the decree *Gokaldas* v. *Govind* (6).

I agree, therefore, that the executing Court had power to award instalments not provided in the decree. But the Court of first appeal had not the power to re-open the original transaction and to act under section 12. It should also be observed that in an appeal by the decree-holder and without cross-appeal by the judgment-debtor it is difficult to see how the Court of First Appeal could make any order directed apparently to reducing the amount awarded under the decree. The first issue remanded was, therefore, irregular.

The same cannot be said of the second issue. But the proper course for the judgment-debtor would have been to have in the first instance adduced evidence before the executing Court to show his financial status and the instalments he could afford. To that extent the order of remand was, in my opinion, correct and to that extent the Court of First Appeal may review in favour of the decree-holder, the amount of instalments, leaving the principal amount and interest in the decree unaffected.

K. S. D. *Appeal allowed.*

(6) 32 B. 98 ; 9 Bom. L. R. 1334.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 925 OF 1922.

March 27, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Dalal.

CHIRANJI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SYED ILIAS ALI AND OTHERS—PLAINTIFFS AND SYED INTIZAM ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VII of 1890), s. 30—Mortgage by guardian, where voidable by minors—Guardian ad litem with adverse interest—Minor, whether properly represented.

A mortgage executed by the guardians of minors in contravention of the Guardians and Wards Act is voidable at the option of the minors.

Where a guardian *ad litem* has an interest adverse to the minors they are to be considered as not having been properly represented in the suit and the decree is not binding on them.

Second appeal from the decree of the Officiating District Judge, Agra, dated the 4th April 1922.

Messrs. *S. K. Dhar* and *N. P. Asthana*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought for a declaration that a mortgage-decree of 12th May 1919 is not binding on the plaintiffs who are minors. The facts are not in dispute. The plaintiffs' father died in 1903 leaving seven sons. Most of these sons were minors and their eldest brother, the defendant Niaz Ali, was appointed their guardian by the District Judge. On 8th April 1911 Niaz Ali as guardian made an application to the District Judge for permission to mortgage certain property belonging to the minors for a sum of Rs. 200 for payment of debts. The District Judge gave sanction for the execution of a usufructuary mortgage for a sum of Rs. 200. In contravention of this permission the guardian proceeded to execute a simple mortgage, carrying interest for a sum of Rs. 400. The mortgagees subsequently brought a suit on this mortgage impleading

the minors under the guardianship of Niaz Ali and obtained a decree. The plaintiffs have filed this suit for a declaration that the mortgage is not binding on them on the ground that it was executed in contravention of the provisions of the Guardians and Wards Act and is consequently voidable at their instance. Section 30 of the Guardians and Wards Act is clear on the point, and there can be no question that the mortgage was voidable at the option of the minors under that section. The controversy before us has turned on the question whether the position is affected by the fact that a decree against the minors has been passed on the mortgage. This depends on the further question whether the minors were properly represented in the suit. On behalf of the appellants reliance is placed on O. XXXII r. 4 of the Code of Civil Procedure, and it is urged that the Court in the suit brought on the mortgage was bound to appoint Niaz Ali as guardian *ad litem* of the minors unless, for special reasons to be recorded, it considered that this would be contrary to the minors' welfare. The answer to this contention is that in this particular case the mortgagees must have been aware of the facts which rendered it improper that Niaz Ali should act as guardian *ad litem*. The mortgage having been executed by Niaz Ali it was difficult for him to take the plea on behalf of the minors that the mortgage was invalid as having been executed contrary to the permission given by the District Judge. Even if he could take such a plea the effect of taking it would be to cast the whole burden of the mortgage of the share of Niaz Ali himself and of those of his brothers who had come of age. Niaz Ali had, therefore, under the circumstances, an interest adverse to that of the minors and this was a fact of which the mortgagees, who were parties to the transaction, must have been aware. It is now settled law that where a guardian *ad litem* has an interest adverse to the minors they are to be considered as not having been properly represented in the suit and the decree is not binding on them.

One further argument has been urged. It is said that even if the decree of the Court below is otherwise upheld the plaintiffs should be required to refund the mortgage-money to the extent of Rs. 200, either on the equitable principle of restoring a benefit received or on the ground that to that extent the mortgage was in accordiance with the permission granted. The first alternative is excluded by the finding of fact of both the Courts below that there is no evidence that the minors benefited in any way by the mortgage-money. The second is excluded by the fact that, even to the extent of Rs. 200, the mortgage was not executed in accordance with the sanction given. The sanction was for a usufructuary mortgage. The mortgage actually executed was a simple mortgage. The difference is of great importance. If the guardian had executed a usufructuary mortgage as directed by the District Judge the liability on the estate would be limited to the principal money advanced. Under a simple mortgage there is the additional liability that interest may not be paid punctually and the mortgage-money may mount up to such an extent as to lead to the sale of the entire property. We are, therefore, unable to accept this plea.

The result is that the appeal fails and we accordingly dismiss it with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
NO. 2263 OF 1921.

February 8, 1924.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Chotzner.

SHEBAITS OF IDOL SRIDHAR JIN
THAKUR MANMATHA NATH
CHOWDHURY AND OTHERS—PLAINTIFFS—
APPELLANTS
versus
NALINAKSHA RAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch II, Art. 8—Suit for rent of homestead land—Small Cause Courts, jurisdiction of—Lease, transfer of—Liability to pay rent whether extinguishable—Agricultural land—Transfer of Property Act (IV of 1882), s. 108 (J).

SHEBAITS OF IDOL SRIDHAR JIN *v.* NALINAKSHA RAI

A suit for rent of homestead land is excluded from the jurisdiction of the Small Cause Court and, therefore, a second appeal in such a suit is maintainable even though it is valued at less than Rs. 500.

Soundaram Ayyar v. *Sennia Naicken*, 23 M. 547 ; 10 M. L. J. 329 (F. B.) ; 8 Ind. Dec. (N. S.) 785, distinguished.

Sahadarim Mudali v. *Sarbosobha Dasi*, 27 Ind. Cas. 258 ; 42 C. 638 ; 20 C. L. J. 494 ; 19 C. W. N. 1030, followed.

Where a lessee transfers the lease, whether permanent or temporary, the claim to pay rent to the lessor is not extinguished by assignment under section 108 (*j*) of the Transfer of Property Act.

This principle does not extend to agricultural land, nor does it apply to the Bengal Tenancy Act.

Monica Kitheria v. *Subraya Hebborn*, 30 M 410 ; 17 M. L. J. 258 ; 20 M. L. T. 363; dissented from.

Suragati Roy v. *Ram Narayan Mukerji*, 73 Ind. Cas. 193 ; 39 C. L. J. 26 ; (1923) A. I. R. (P. C.) 88; 45 M. L. J. 219 ; 50 C. 680 ; 18 L. W. 681 ; 33 M. L. T. 314 ; 28 C. W. N. 517 followed.

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 28th July 1921, reversing the decree of the Munsif, 1st Court, at that place, dated the 30th March 1920.

Babu *Baranashibasi Mukerji*, for the Appellants.

Babu *Mahesh Chandra Banerji*, for the Respondents.

JUDGMENT.—The plaintiff brought a suit for rent against the defendants in respect of a piece of homestead land in the town of Burdwan in which the defendant had a permanent transferable right. The defence was that the relationship of landlord and tenant between the plaintiffs and defendants was extinguished by the defendants transferring the leasehold interest to one Jnandayini before the rent sued for had accrued. The Court of first instance found that it was a heritable and transferable lease and that the defendant had transferred it to Jnandayini before the period in suit; but it being of opinion that in spite of the transfer the defendants were liable for rent to the plaintiffs, decreed the suit. On appeal, the learned Subordinate Judge reversed the decision of the first Court on the ground that under the lease the plaintiffs were bound to recognise the transferee of the defendants and hence they could not claim rent from them after the transfer of the lease to Jnandayini. The present appeal is by the plaintiffs.

A preliminary objection is taken to the competency of the appeal, on the ground that the suit, from which the appeal arises, is of the nature cognizable by a Court of Small Causes and is valued at less than Rs. 500. This objection is based on the Full Bench decision of the Madras High Court in the case of *Soundaram Ayyar* v. *Sennia Naiikan* (1). A suit for rent in respect of homestead land is excepted under Article 8 of Schedule II to the Provincial Small Cause Courts Act. But it is argued that as that Article empowers a Court of Small Causes to try suits for rent in general, a suit for rent of homestead land, though excluded, is of the nature cognizable by a Court of Small Causes. The Madras High Court has no doubt taken this view under the special conditions obtaining there. There the local Government had by Notification extended the powers of the Small Cause Courts to take cognizance of all suits for rent ; but it is not so in this Province. This point came up for consideration in the case of *Sahadaram Mudiali* v. *Sarbosobha Dasi* and it was there ruled that a suit for rent of homestead land is excluded from the jurisdiction of the Small Cause Court. We therefore hold that this appeal is competent.

The substantial point raised in this appeal is whether the lease on the basis of which the suit is brought absolves the lessee from all liability to payment of rent to the lessor. It may be conceded that where a lessee transfers the lease, whether permanent or temporary, the claim to pay rent to the lessor is not extinguished by assignment under section 108 (*j*) of the Transfer of Property Act. This position may now be treated as accepted by a series of decisions in all the High Courts and it is in accordance with the English law. The principle that is deducible from the reported cases and the text-books is that the lessee's liability to pay rent to the lessor is founded upon a dual right. It is based, first, on the contractual relation between the lessor and the lessee, and secondly, on privity of estate. By assignment the lessee no doubt

(1) 23 M. 547; 10 M. L. J. 329 (F. B.) 8 Ind. Dec; (N. S.) 785.

(2) 27 Ind. Cas. 258 ; 42 C. 638 ; 20 C. L. J. 494 ; 19 C. W. N. 1030.

divests himself of the latter but the personal covenant by which he undertook to pay rent for the leasehold is not affected by the assignment. This consideration arises equally in the case of permanent and transferable leases as also in other kinds of leases. The result is that the lessor may avail himself of the relation that has come into existence between him and the assignee as well as of the contractual relation as existing between him and the lessee. He has, therefore a remedy for realization of rent against both the lesssee and the assignee emanating from privity of contract and privity of estate but he can take out only one execution. The principle of English law upon which section 108 (*J*), Transfer of Property Act, is based is thus enunciated in Foa on Landlord and Tenant, 5th edition, at page 163: "If the lessee assigns his interest in the premises, the questions whether he continues liable for the rent would appear not altogether an easy one to determine. That he does so continue where, as happens in most leases, he has entered into what is usually called an 'express covenant" (that is, a formally express personal undertaking by the lessee to pay rent) to pay it, may be said to be well-established. Such covenant is not (after assignment) as between lessor and lessee, one merely of suretyship, nor is it even any defence to the lessee in an action upon it that the assignee may have tendered the rent. Upon such a covenant, therefore, as upon any express covenant running with the land, the lessor may sue either the lessee or the assignee though he can only have execution against one of them." This principle of law has been followed in this Court in the case of *Sasi Bhushan Raha* v. *Tara Lal Singh* (3), and has been endorsed in *Bhola Nath Das* v. *Raja Durga Prosad Singh* (4) and *Akrurmani* v. *Madhab Chandra* (5), (S. A. 2728 of 1916 decided on the 5th June 1918). The same view has been adopted in the Madras High Court in *Kunhanujan* v. *Anjelu* (6), and *Monica Kitheria* v. *Subraya Hebborn* (7), and by the Bombay High Court in *Vithal Narayan* v. *Shriram Savant* (8). This question arises before us in connection wlth non-agricultural land. It is not necessary, therefore, to extend this principle of law to agricuitural lands as has been done in the case of *Monica* v. *Subraya* (7). It does not apply to the Bengal Tenancy Act. *Surapati Roy* v. *Ram Narayan Mukerji*. (9)

It being undisputed that under the law the defendants are liable to pay rent unless they can get rid of the claim under the terms of the contract, the question, therefore, that arises for consideration is whether the contract can be construed in such a way as to make it obligatory upon the lessor to recognise the assignee and thus extinguish his right to proceed against the lessee. The term of the lease upon which reliance is placed by the respondent runs thus: "I shall enjoy and possess the land according to my wishes with my sons, grandsons and other heirs, by erecting *katcha* and *pucca* houses thereon and by planting and cutting down trees, etc., and by exercising the right of sale, gift to which you or your heirs and legal representatives will not be able to object in any way." The learned Subordinate Judge, after quoting this passage, remarks that "in plain words it indicates that the lessor was bound to recognise the transferee." In our judgment these words neither plainly nor impliedly indicate that the lessor under the contract binds himself to recognise the transferree in lieu of the lessee. The learned Vakil for the respondent has drawn our attention to the words "to which you or your heirs and legal representatives will not be able to object in any way." He argues that these words indicate that the lessor not only will not object to the transfer but should also recognise the transferree as his tenant. In our opinion, it would, be straining the language too much to make it convey what it does not ordinarily convey. This view finds strength from the latter portion of the *Kabuliyat* in which the tenant says: "I shall pay annually Re. 1-8 as rent and shall not be able to make any objection on the ground of the land lying *patit*. This condition is binding upon successors of both parties." On the construc-

(3) 22 C. 494; 11 Ind. Dec. (N. S.) 330.
(4) 12 C. W. N. 754.
(5) 47 Ind. Cas. 800; 22 C. W. N. C. XXXII *S. N.*
(6) 7 M. 296; 6 Ind. Dec. (N. S.) 205.
(7) 30 M. 410; 17 M. L. J. 258; 2 M. L. T. 363.
(8) 29 B. 391; 7 Bom. L. R. 313.
(9) 73 Ind. Cas. 193; 39 C. L. J. 26; 1923 A. I. R. (P. C.) 88; 45 M. L. J. 219; 50 C. 680; 18 L. W. 681; 33 M. L. T. 314; 28 C. W. N. 517.

tion of the lease, therefore, we hold that the lessor does not absolve the original lessee on assignment from the liability to pay rent under the contract.

In the view that we take of this case we are of opinion that this appeal should succeed. The decree of the Court below will be set aside and that of the Court of first instance restored with costs in all the Courts.

K. S. D. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 193 OF 1922.

March 17, 1924.

Present :—Mr. Justice Mukerji.

HIRA LAL—PLAINTIFF—APPELLANT
versus
HOTI LAL—DEFENDANT—RESPONDENT.

Landlord and Tenant—Suit for rent in respect of different holdings—Seperate causes of action, joinder of—Civil Procedure Code (Act V of 1908), O. II, r. 6, applicability of.

It is not open to a landholder to sue a tenant in the same suit in respect of different holdings.

Jagganath Prasad v. *Tori*, 3 A. L. J. 611 ; A. W. N. (1906) 253 ; 29 A. 18, followed.

Order II, r. 6 of the Civil Procedure Code does not apply to suits for a rent under the Tenancy Act.

Second appeal from the decree of the District Judge, Aligarh, dated the 17th November 1921.

Messrs. *Sankar Saran* and *Panna Lal*, for the Appellant.

JUDGMENT.—In this appeal the respondent is not represented. The appellant was the plaintiff in the Court of first instance. He brought a suit for the recovery of arrears of rent against the respondent for a period of three years, namely, *Rabi* of 1324 *Fasli*, complete 1325 and 1326 *Faslis* and *Kharif* 1327 *Fasli*. He showed in his claim that his claim in respect of 1324 *Fasli* was for a holding of 17 *bighas*, 17 *biswas*. In 1325 *Fasli* it was for a holding of 33 *bighas*, 12 *biswas*. In 1326 *Fasli* it was for a holding of 33 *bighas* 12 *biswas* and in 1327 *Fasli* it was for a holding of 17 *bighas*, 17 *biswas*. The rent alleged varied in different years. The defendant contended in his written statement that it was not open to the plaintiff to join a claim for occupancy and non-occupancy holdings, that is to say, he could not combine suits in respect of different engagements. This plea found favour with both the Courts below.

The Court of first instance dismissed the suit *in toto* but the learned Judge gave a decree for the *Rabi* of 1324 *Fasli* after deduction of what had been admittedly paid by the defendant for that period.

In second appeal it was contended before a learned Judge of this Court that the view taken by the Courts below was erroneous. The learned Judge before whom the appeal came on for hearing remitted three issues enquiring whether the areas of 17 *bighas*, 17 *biswas* and the larger area were hold under the same engagement or different engagements. The findings returned were that there was a holding of 17 *bighas* and 17 *biswas* and there was another holding for some additional land in the years 1325 and 1326 *Faslis*.

In the case of *Jagganath Prasad* v. *Tori* (1), a Division Bench of this Court consisting of two Judges held that it was not open to a land-holder to sue a tenant in the same suit in respect of different holdings. It was laid down in that case very distinctly that the Tenancy Act contemplated that there should be different suits in respect of different holdings. That ruling still holds good and has not been dissented from so far as I am aware. It is quite clear that, in view of that ruling, this suit of the plaintiffs was not maintainable.

I am now asked to permit the plaintiff to amend the plaint and thereby to withdraw the claim which related to the additional lands in two years, namely, 1325 and 1326 *Faslis*. The ruling quoted above was quoted in the judgment of the learned Assistant Collector, but in the teeth of this ruling the

(1) 3 A. L. J. 611; A. W. N. (1906) 253; 29 A. 18.

appellant filed this appeal in the lower Court and in this Court, without even asking for permission to amend his plaint. It has been argued before me that it was the duty of the Court to order a separate trial in causes where different causes of action had been joined and O. II, r. 6 of the Civil Procedure Code has been relied upon. That rule of law applies only when it is open to a plaintiff to combine several causes of action in one suit. In the ruling quoted, it has been distinctly laid down that the rule of the Civil Procedure Code as to the joinder of causes of action does not apply to suits for rent under the Tenancy Act.

It follows that it was not open to the plaintiff to combine separate causes of action in one suit and as it was not permitted to the plaintiff, no question of an order by a Court for separate trials of different causes of action could arise.

The result is that the appeal fails and is hereby dismissed. There is no order as to costs as the respondent is not represented.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL NO. 153 OF 1922.

August 29, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

MELA VITTIL KUNHAN MENON—
DEFENDANT—APPELLANT
versus

MELE VITTIL KANNAN MENON
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r 1—Receiver, appointment of—Prima facie *case—Waste, absence of.*

To justify the appointment of a Receiver, there must be some substantial ground for interfering with existing rights of possession.

Sivagnanathammal v. *Arunachelam Pillai.* 11 Ind. Cas. 870; 10 M. L. T. 490; (1911) 2 M. W. N. 75; 21 M. L. J. 821, followed.

I C—71

Where a plaintiff has not a *prima facie* right to the relief asked by him and there is no danger of waste, it is not proper to appoint a Receiver on the mere ground that no harm will be done thereby.

Appeal against the order of the Court of the Subordinate Judge, Palghat, dated the 3rd April 1922, in M. P. No. 1500 of 1921 in O. S. No. 39 of 1921.

The *Advocate-General* and Mr. *K. Sankunni Nair*, for the Appellant.

Messrs. *K. P. M. Menon* and *P. Govinda Menon*, for the Respondents.

JUDGMENT.—The parties are Nair subjects of the Cochin State. The suit has been brought in a British Court to obtain partition of properties in British India. The Subordinate Judge of Palghat has appointed a Receiver to manage these properties *pendente lite.*

When a member of a *Mitakshara* joint Hindu family sues for partition, his right to become divided is self-evident and it may be taken for granted that, unless he makes default he will get a decree, the form that the partition will take being alone left in issue. There is no such certainty about the present case. The theory that the plaintiff can take his newly acquired right to partition under the Cochin Regulation, carry it with him as his personal law into a foreign country and impress immoveable property lying in that country, where partition among Nairs is not the law of the land, with the character of partibility is a novel one and will need to be established at the trial. Meanwhile, the plaintiff has not a *prima facie* right to ask for a Receiver. Moreover, the Judge has not found that there is any danger of waste. He says, that "no harm will be done" by the appointment of a Receiver, and that if the plaintiff has first to prove his right to partition it will be "too late" to appoint a Receiver. This is not enough. There must be some substantial ground for interfering with existing rights of possession (Vide *Sivagnanathammal* v. *Arunachelam Pillai.* (1) We, therefore, set aside the lower Court's order with costs of this appeal.

V. N. V. *Order set aside.*

Z. K.

(1) 11 Ind. Cas. 870; 10 M. L. T. 490; (1911) 2 M. W. N. 75; 21 M. L. J. 821.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 88 OF 1923.

July 18, 1923.

Present :—Mr. Justice Sulaiman.

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY—DEFENDANT—APPLICANT

versus

FIRM BUDH SEN PUSP CHAND—PLAINTIFF—OPPOSITE-PARTY.

Railway Company—Consignment of goods—Maund rate charged—Reservation of power of re-calculation of freight—Waggon rate, if can be charged.

Where a Railway Company has agreed to carry goods at maund rate, the fact that under the note of consignment the Company have reserved a right of re-weighment, re-measurement and re-calculation of freight, etc., does not entitle it to alter the maund-rate into waggon rate, if the goods turn out in bulk beyond the capacity of one waggon and have to be carried in two or more waggons.

Chuni Lal v. *The Nizam's Guaranteed State Railway Company, Ltd.*, 23 A. 228; 4 A L. J. 80; 2 M. L. T. 42 : A. W. N. (1907) 21 ; *Alla-Uddin* v *The G. I. P. Railway Company*, 34 Ind. Cas. 104 ; 14 A. L. J. 494.

Civil revision from an order of the Judge, Small Cause Court, Agra, dated the 24th November 1922.

Mr. *S. S. Sastry*, for the Applicant.

Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—This is a revision from an order of the Court of Small Causes.

The plaintiff firm despatched 57 bundles of cotton weighing 63 maunds and 2 seers from Balrampur station, which is on the B. N.-W. Railway, to the Agra Fort, on the B., B. and C. I. Railway. According to the allegations in the plaint the staff of the defendant Company when asked, gave out the rate of freight on cotton to be Rs. 1-8-0 per maund and it was on this understanding that the plaintiff despatched the goods from Balrampur to Agra Fort under the Railway Receipt No. 9937, dated the 19th of September 1921. The plaintiff goes on to allege that, though the actual weight of the goods despatched was 63 maunds, the staff of the Railway Company illegally and unjustifiably charged Rs. 223-2-0 for 108 maunds, and that the extra amount was paid by the plaintiff under protest which he is entitled to recover from the defendant. The written statement which was filed by the defendant Company was very vague and somewhat evasive. Referring to the allegation of the plaintiff that the staff of the defendant Company when asked had given out that the rate of freight on cotton would be Rs. 1-8-0 per maund and that it was on this understanding that the plaintiff despatched the goods, the written statement merely stated "not admitted." The defendant Company, however, went on to plead that out of the consignment, 57 bundles were loaded in one wagon, which left no room for the remaining commodity to be loaded in, that under paragraph 6 of the instructions printed as notice to the consignors on the back of the Railway Receipt and Forwarding Note form, the Company reserved the right of re-weighment, re-measurement and re-calculation of freight and that the charges were correctly recovered. The learned Judge of the Court below in his judgment appears to have accepted the plaintiff's case that the Railway Authorities realised the extra amount at the destination. The learned Judge accepted the statement of the Loading Clerk to the effect that after loading 52 bundles of cotton no place was left for loading any more goods. It was the defendant's case as disclosed by the Loading Clerk's evidence that as these articles were bulky they could not be loaded in one four-wheeled waggon and that these bundles were despatched in a bogie carriage, *i.e.*, an eight-wheeler. The learned Judge, however, overruled the defence on the ground that it had not been shown on behalf of the defendant that the 52 bundles in question could not be loaded in a four-wheeled waggon. This is not quite consistent with the remark previously made as to the statement of the Loading Clerk. The facts as alleged by the defendant Company seem to be that the bundles of cotton were so bulky that they could not all be loaded in one small waggon.

There can be no doubt that under rule 59 of the General Rules when goods tendered for conveyance are of such description that owing to their bulk, measurement, or other cause, it is found impossible to load each broad-guage waggon to the extent of 120 maunds and metre or narrow-guage waggons 18

maunds, such goods will be subject to a minimum charge of 120 and 81 maunds respectively, per waggon, unless any special exception is noted. The above charges are based on four-wheeled waggons. Should the conditions of the consignment involve the use of larger vehicles, the charges will be increased in the proportion of one bogie carriage for two vehicles.

Fifty-seven bundles of cotton weighed about 52 maunds. If it is a fact that all the 57 bundles could not be loaded in one four-wheeled waggon it is patent that owing to their bulk it is impossible to load 81 maunds of goods in a narrow-gauge waggon. Under r. 58, therefore, it is clear that the defendant Company was entitled to charge at the minimum rate of 81 maunds per waggon. If the goods were carried in two small four-wheelers or in one bogie carriage then the Company was entitled to charge for 162 maunds.

The learned Judge seems to have drawn a distinction between 'bulky goods' and 'goods in bulk.' The expression 'goods in bulk' does not find place in r. 59 at all and its true meaning is altogether irrelevant. There can be no doubt that the bundles of cotton were bulky and it was in consequence of their bulk that 81 maunds of the goods could not be loaded in one small waggon. The Railway Company was certainly entitled to charge at the minimum rate of 81 maunds per waggon. In this view of the matter the decree of the learned Judge of the Court of Small Causes would not be quite correct.

The learned Vakil for the plaintiff-respondent, however, supports the decree of the Court below on a different ground. His case is that according to the allegations in the plaint which were not expressly denied by the defendant and which have been assumed to be correct by the learned Judge of the Court below there was an express agreement between the plaintiff and the Railway Company to carry the goods at the maund rate, and, therefore, it is not now open to the Company to alter the terms of the contract and demand a charge on the basis of waggon rate. The Railway Company in their written statement themselves referred to paragraph No. 6 printed on the back of the Railway Receipt which was to the effect that they had reserved a right of re-weighment, re-measurement and re-calculation of freight, etc. This clearly implies that there was a re-calculation and the extra charge was found recoverable on the re-calculation. As I have alreary noted, there was no express denial of the plaintiff's allegation that an assurance had originally been given by the Railway authorities that the goods would be carried at the maund rate.

If there was an original contract to carry the goods according to the maund rate then it is clear that the defendant Company would not be entitled to alter that agreement. The rule on which the defendant relied is quite similar to the rule which was under consideration in the Full Bench case of *Chunni Lal* v. *The Nizam's Guaranteed State Railway Company Ld.* (1). A similar point arose in the case of *Alla-ud-din* v. *The G. I. P. Railway Company* (2). At page 232 of the Full Bench case cited above, it was pointed out that a rule of this kind reserving the Railway Company's right of re-measurement, re-weighment, re-calculation and re-classification of rates, terminal and other charges at the place of destination did not give the Railway Company power to alter the contract between the parties and charge maund rate in lieu of waggon rate. The second case mentioned by me was a case where the Railway Company wanted to alter the maund rate into waggon rate and their right to do so under the General rules was negatived. In view of these pronouncements it is clear that if the original contract between the parties was that the goods should be carried according to the maund rate it would not be open to the defendant Company to alter that contract and charge according to the waggon rate.

The learned Vakil for the applicants in rejoinder has urged that the defendant Company did not admit that there was any such original contract, not did they admit that the extra amount charged at the destination was based on an alteration of the rates.

The plaintiff did not go into the witness-box nor did he produce any evidence. The Railway Company, which presumably is in possession of the railway receipt and the forwarding note,

(1) 29 A. 228; 4 A. L. J. 80 ; 2 M. L. T. 42 ; A. W. N. (1907) 21.

(2) 34 Ind. Cas. 104 ; 14 A. L. J. 494.

has also withheld them. The evidence on the point, therefore, is very meagre.

It is contended on behalf of the respondent that under O. VIII, r. 5, if a matter is not denied specifically or denied by necessary implication or if it is merely stated to be 'not admitted' in the written statement it should be taken to have been admitted. Reference is made to certain old English cases where pleadings were strictly construed, as the rules of pleading in England are very stringent. One would have thought that where a matter is expressly stated to be "not admitted," it cannot be deemed to be admitted, for it is at least denied by implication. The punctuations in r. 5, however, do appear to support the contention of the learned Vakil for the respondent, but I do not purpose to go into this matter in any further detail, because there is a proviso to that rule which says that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. Under this proviso, therefore, even if there be an implied admission by the defendant the Court can require evidence to prove it.

Having read the pleadings I am of opinion that the question of there having been an express contract to carry the goods according to the maund rate has not been properly tried by the Court below. If there really was such a contract then on the rulings referred to by me the defendant cannot charge waggon rate in lieu of maund rate. On the other hand, if there was no such contract at all and the Railway Company had originally charged at the waggon rate but there was a miscalculation in the amount charged then certainly it would be open to the Railway Company to recover the balance.

I, therefore, allow the application and, setting aside the decree of the Court below, remand the case to that Court for disposal according to law. The parties will be at liberty to produce fresh relevant evidence if they think necessary. As the whole trouble has been caused by the vagueness in the defendant's pleading I direct that the parties should bear their own costs in this Court. The costs in the Trial Court should abide the event.

N. H. *Application allowed.*

Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

MISCELLANEOUS APPLICATION NO. 77 OF 1919.

November 17, 1919.

Present:—Mr. Kincaid, J. C., Mr. Kemp, Dr. DeSouza and Mr. Raymond, A. J. Cs.

In re MIRZA JALALUDIN.

Legal practitioner—Professional misconduct—Disbarment—Re-admission.

When a legal practitioner, who has been disbarred on account of professional misconduct, applies to be restored to his former position, the test to be applied is whether the sentence of exclusion, however right, has had the salutary effect of awakening in him a higher sense of honour and duty and whether in the interval his conduct has been so irreproachable that notwithstanding a delinquency in early life, he might be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation. An application to strike off the rolls or re-admit to them ought not to be looked at with respect to punishment of the individual himself.

Abiruddin Ahmed, In re, 8 Ind. Cas. 1108 ; 38 C. 309 ; 12 C. L. J. 625 ; 15 C. W. N. 357 ; 12 Cr. L. J. 22, relied on.

Mr. *F. J. de Verteuil*, for the Applicant.

JUDGMENT.—On the 13th of July 1917 the Full Bench of this Court ordered that Mirza Jalaludin should be removed from the office of pleader of this Court and directed him to return his *sanad* to the Registrar for cancellation. The grounds which led the learned Judges to this decision were that on the 9th of February 1916 Mirza Jalaludin disappeared suddenly from Karachi. Subsequent to his disappearance, three of his clients Jan Mahomed, Devkaran and Karimbux had complained to the Court of the Judicial Commissioner that they had paid the said Mirza Jalaludin various sums as fees or expenses with instructions to file suits on their behalf and that the said Mirza Jalaludin had not filed the suits and retained the money. On the 5th of February 1918 Mirza Jalaludin made an application to the Court of the Judicial Commissioner asking for the restoration of his *sanad*. The Full Bench of this

In re MIRZA JALAL UD DIN

Court after observing that the order of revocation had only been passed six months previously and that there was no evidence before them that in the interval a higher sense of duty had been awakened in him, rejected his application. A second application was summarily rejected. Mirza Jalaludin has now made a third application to this Court.

Mr. de Verteuil the learned Counsel who has argued the applicant's case has put it to us that his client has suffered greatly through the sentence imposed upon him, that he has re-paid what he wrongfully took from his clients, and that if this Court is merciful to restore him his *sanad* he would be able therewith to resume the practice of his honourable profession in the Punjab High Court.

It is not for us to dictate to their Lordships of the Punjab High Court whether they would be justified on consideration of Mirza Jalal-ud-din's conduct in the interval between the revocation of his *sanad* and the present time in permitting him to practise before them. It is for us to decide merely whether, on the materials placed before us, we consider that Mirza Jalal-ud-din is a fit person tobe entrusted with the high duties of the profession of the Bar. The question when and how a legal practitioner who has been disbarred should be restored to his former position was examined with great care in the judgment given by Mr. Justice Mookerji and Mr. Justice Sharfuddin *In re Abiruddin Ahmed*, (1). Their Lordships therein observed: "The test to be applied is, in the words of the learned Chief Justice, whether the sentence of exclusion, however right, has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, and whether, in the interval, his conduct had been so irreproachable that, notwithstanding a delinquency in early life, he might be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation. An application to strike off the rolls or re-admit to them, ought not to be looked at with respect to the punishment of the individual himself. The Court has a duty to perform to the suitors and to the profession of the law, and is bound to see that the persons admitted to it are persons on whose integrity and honour, reliance may be placed, persons whose conduct has been such as to inspire confidence in their character." We must, therefore, consider how far the applicant has satisfied the test laid down by their Lordships. It is true that Mirza Jalal-ud-din has re-paid the money which he took wrongfully from his clients. That, however, was an absolutely necessary step, before he could make an application of this kind. It can hardly be set to prove conclusively that this sentence of exclusion has had the salutary effect of awakening in him of a higher sense of honour and duty. The next question is whether in the interval his conduct has been so irreproachable that he may be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation. The only evidence which the learned Counsel has put before us on his client's behalf is a letter from Mr. Justice Kensington written before the applicant was struck off the rolls, two letters from persons in Lahore who state that Mirza Jalal-ud-din took no part in the recent riot and a document partly a certificate and partly a letter from the Hon'ble Sardar Sunder Sing in which the said gentleman has given his opinion that the applicant is extremely sorry for what happened in Karachi. Now, it is clear that Mr. Justice Kensington's certificate given before this Court's order of July 1917 and apparently made to support Mirza Jalal-ud din's application to obtain a *sanad* from this Court is of no value whatever. Nor can it be said that the mere abstention of the applicant from the recent Punjab riots is really valuable evidence in support of his application. To abstain from riots is the duty of every subject of His Majesty the King Emperor. The letter of the Hon'ble Sardar Sundel-sing, although it emanates from a gentleman of a high character, also cannot weigh with us much. It is possible that the applicant is sorry for what he has done. People generally are who have had the misfortune to be found out. There is nothing, however, in the Hon'ble gentleman's letter which shows that in the interval the applicant's conduct has been irreproachable. Lastly, when we enquired from the learned Counsel how Mirza Jalal-ud-din had been living between 1917 and the present date, he was only able to inform us that he has been living partly

(1) 8 Ind. Cas. 1108 ; 38 C. 809 ; 12 C. L. J. 625 ; 15 C. W. N. 857 ; 12 Cr. L. J. 22.

on charity and partly as Mukhtiar of a lady who was apparently engaged in litigation of a speculative character There is, therefore, nothing before us to show that the applicant can be admitted to the honourable profession of the Bar without that profession suffering degradation. The argument that he has suffered greatly must be considered in the light of other cases disposed of by the Judges of England. In an anonymous case a Solicitor was restored only after 10 years. There, too, his application was supported by a memorial signed by a large body of Solicitors who gave their testimony to the great privation and suffering he had undergone during that period. The other case was of *In re Brandreth*. There the petitioner had been for 12 years off the rolls and had produced a very strong body of evidence that during the whole time his conduct had been irreproachable. It is thus clear that the applicant has suffered by no means an excessive punishment for what he has done and we regret that we are unable to allow his application.

N. K. *Application rejected.*

ALLAHABAD HIGH GOURT.

SECOND APPEAL NO. 369 OF 1924.

April 8, 1924.

Present :—Mr. Justice Dalal.

BIDIYA MISIR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat DARYAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 79, applicability of—Construction—Ejectment—Tenant remedy of.

The provisions of section 79 of the Tenancy Act apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy.

Where a person claiming to have succeeded to a tenancy by right of inheritance, finds that on endeavouring to take possession of the same his right is denied and his possession ousted by the *zemindar*, he has suffered an ejectment at the hands of the landlord within the meaning of section 79 and his appropriate remedy is by a suit under the Tenancy Act.

Second appeal against the decree of the Additional Subordinate Judge, Azamgarh, dated the 18th December 1923.

Mr. *G. Agarwala*, for the Appellants.

JUDGMENT.—I agree with the view of law taken by the lower Appellate Court. One Achhaibar, died and the *zemindars* put his daughter-in-law in possession as an occupancy tenant. The plaintiffs went to the Civil Court to dispossess the daughter-in-law of Achhaibar on the ground that they were entitled to succeed Achhaibar in the occupancy holding and not the daughter-in-law. The plaintiffs cannot be permitted to choose jurisdiction of Court by the nature of their allegations. The Court has to see the remedy which the plaintiffs really desire. As pointed out by a Bench of this Court in *Badri Kasodhan* v. *Sarju Misir* (1), the provisions of section 79 of the Tenancy Act apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy. It is explained there that the principle seems to be that where a person, claiming to have succeeded to a tenancy by right of inheritance, finds that on endeavouring to take possession of the same his right is denied and his possession ousted by the *zemindar*, he has suffered an ejectment at the hands of the landlord within the meaning of section 79, and his appropriate remedy is by a suit under the Tenancy Act. In the present case the *zemindars* put Achhaibar's daughter-in-law in possession, so there was constructive ouster of the piaintiffs from the occupancy holding by the *zemindars*. The remedy of the plaintiffs lay in going to the Revenue Court to obtain possession. The period of limitation of six months cannot be extended to one of 12 years by the plaintiffs seeking remedy in the Civil Court instead of the appropriate Court of Revenue.

I dismiss this appeal under O. XLI, r. 11.

K. S. D. *Appeal dismissed.*

(1) 22 Ind. Cas. 668; 36 A. 65; 12 A. L J. 29.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 23 AND 24 OF 1921.

March 5, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

HON'BLE RAJA RESHEE CASE LAW —PLAINTIFF—APPELLANT

versus

AMBIKA DASSI AND OTHERS— DEFENDANTS —RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 30 (b)—Enhancement of rent—Land yielding no crop.

The fact that a certain holding consists of homesteads or *patit* lands or lands which yield no crop, is no ground for disallowing enhancement of the rent of the tenancy.

Raja Reshee Case Law v. *Chintamani Dalai*, 70 Ind. Cas. 595 ; 36 C. L. J. 305 ; (1922) A. I. R (C) 510; 27 C. W. N. 962, relied on.

Appeals against the decrees of the first Additional Special Judge, Midnapore, dated the 27th July 1920, modifying the decree of the Revenue Officer, dated the 18th April 1918.

Babu *Narendra Chandra Bose* (with him Babus *Satyendranath Mitter* and *Nalin Chandra Pal*), for the Appellants.

JUDGMENT.—In these appeals the question raised is whether the appellant is entitled to enhancement of rent under section 304 (*b*), Bengal Tenancy Act. He applied under section. 105, Bengal Tenancy Act, for settlement of fair and equitable rent and claimed enhancement of the rent of the holdings to which these appeals relate on the ground of rise in the price of staple food crops. The Revenue Officer, as well as the Special Judge on appeal, have dismissed the plaintiff's claim. The Revenue Officer records his reason in these words "Serials 2, 14 and 28 consist of *bastus*, *dobas*, *nalas*, *patits*, &c., growing no agricultural crop. So in these cases no enhancement under section 30 (*b*) is allowed at all." The learned Special Judge on appeal observes, it appears, that all the above serials except 48 are homesteads, ditches, and *nalas*, *patit*, growing no agricultural crop. I think that he lower Court was right in disallowing tenhancement under section 30 (*b*)." It has been decided in many cases in this Court that the fact that a certain holding consists of homesteads, or *patit* lands or lands which yield no crop is no ground for disallowing enhancement of the rent of the tenancy. The authority for this view is to be found in the case of *Raja Reshee-Case Law* v. *Chintamoni Dalai* (1). This case has been followed in several subsequent cases. As the case-law stands at present, it must be taken that the grounds assigned by the Court below for refusing enhancement is not justified in law.

The result is that these appeals are allowed, the judgments and decrees of the Court below are set aside and the cases remitted to the Court of first instance for decision on the merits.

We are informed that in Sec. 23 of 1921, respondent No. 6 who is said to be interested in serial No. 28, respondent No. 7 Thakur Das who is interested in serial No. 32, and respondents Nos. 17 and 18 Swarnamayee Bewa and Golak Sen who are interested in serial No. 67, died during the pendency of this appeal and their heirs have not been brought on the record The appeal, in so far as it relates to those respondents, is therefore dismissed. We make no order as to the costs of these appeals.

M. B. *Appeal allowed.*

(1) 70 Ind. Cas. 595 ; 36 C. L. J. 305 ; (1922) A. I. R. (C) 510 ; 27 C. W. N. 962.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 44 OF 1924.

March 14, 1924.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

THE MUNICIPAL BOARD OF BAREILLY—APPLICANT

versus

HAFIZ ALA BAKSH—OPPOSITE-PARTY.

U. P. Municipalities Act (II of 1916), ss. 162 (1)—Professional Tax—Residence, meaning of.

MUNICIPAL BOARD OF BAREILLY *v.* ALA BAKSH

In cases of persons who carry on business at places other than their native home their place of residence is the place where they earn a living and do their daily work, nor does that place cease to be their residence because for purposes of rest or re-creation of family ties they occasionally return to the family home where they and their families have been brought up.

Reference unders ection 162 (1), Municipalities Act, from the District Magistrate, Bareilly.

JUDGMENT.—This is a reference under section 162 (1) of the Municipalities Act from the District Magistrate of Bareilly, who seeks guidance as to the principle upon which certain named gentlemen should be taxed in the notified area of Aonla. In that area there is the following rule governing it: "A tax on all persons residing or carrying on any trade, calling or vocation, or owning property within the notified area of Aonla will be levied according to their circumstances and property, provided that in case of non-residents the tax will be levied with regard only to the value of their property and trade within the notified area." The question upon which decision is sought has arisen in this way. There are certain gentlemen whose native town is Aonla. They have gone out into the world, principally Calcutta, where they have established business and where they have established house-holds; but they return to their native district and to their ancestral family houses either for rest or an occasions of family ceremonies, and it may be taken generally that two months is the outside period during which any one of these would be expected to be found in the town of Aonla. The taxation as will be seen from the rule falls under two heads; that is to say, there is a tax upon all persons who reside or carry on any trade or calling or vocation or owning property within the notified area; and that tax is levied upon these resident persons or those persons carrying on trade according to their circumstances and their property. But with regard to the class of cases of people who are non-residents they pay a tax which is calculated upon the value of their property and trade within the notified area. If these gentlemen are held to be persons residing within the area they will be subject to a very much greater tax than if they are held to be non-residents. They do not object to taxation as non-residents upon the value of their property within the notified area. In passing, one may remark that there is no evidence that they carry on any trade within the notified area. We are of opinion that, on the facts as laid before us, with regard to (1) Hafiz Ala Baksh, (2) Tanbir Ahmad and Khairunnissa, (3) Zainuddin, (4) Muhammad Ibrahim (5) Abdul Shakur, (6) Abdul Qayum, and (7) Ahmad Murtaza and Muhammad Murtaza, with regard to all of these, the facts as stated do not bring them within the description of persons residing within the notified area of Aonla. In every case residence is a question of fact, and it must depend upon the particular ciucumstances. The general practice is to accept as the person's residence the place where throughout the year you would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of gentlemen such as these, who are traders carrying on business either at Calcutta or elsewhere, their place of residence is manifesty their place where they earn a living and do their daily work—nor does that place cease to be their residence because for purposes of rest or re-creation of family ties, they occasionally return to the family home where they and their families have been brought up. We are, therefore, of opinion that these gentlemen should not be taxed as residents but merely in respect of property owned by them within the notified area.

K. S. D. *Reference answered.*

HAMID ALI *v.* RAM CHARAN GOLDAR

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 276 AND 277 OF 1922.

March 12, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

IN APPEAL NO. 276.—

HAMID ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHARAN GOLDAR AND OTHERS—RESPONDENTS.

IN APPEAL NO. 277.—

ABDUL MAZID MIR AND OTHERS—DEFENDANTS—APPELLANTS.

versus

GOSHAI DAS BACHAR AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art 3—Special limitation, plea of—Landlord originally party but given up in appeal—Question whether can be agitated—Limitation, question of, when may be taken.

The question relating to special limitation may be enquired into even if the landlords were not parties to the suit, or if the landlords being made parties did not appear and contest the suit, or if the landlords did appear and contest the suit but were satisfied with the order passed by the Court below and did not challenge it on appeal.

Appeals against the orders of the 2nd Additional District Judge, Tipperah, dated the 18th May 1922, reversing the orders of the Subordinate Judge, 3rd Court, dated the 20th December 1920.

Babu *Mahendra Nath Raj* (with him Babus *Paresh Nath Mukerjee* and *Radhika Ranjan Guha*), for the Appellants.

Dr. *Sarat Chandra Basak* (with him Babu *Probodh Chandra Kar*), for the Respondents.

JUDGMENT.—These appeals are directed against the orders of the Court of Appeal below remanding the cases to the Court of first instance for the trial of issues other than the issue of limitation. The facts are that the plaintiffs brought two suits for recovery of possession of certain *Char* lands against the Muhammadan tenants who were in actual occupation of the lands as principal defendants and the landlords as *pro forma* defendants. The Court of first instance held that the suit was barred by special limitation under the Bengal Tenancy Act. On appeal by the plaintiffs the learned Additional District Judge, disagreeing with the finding of the first Court, allowed the appeal and remanded the cases to be tried on the merits. The present appeals are against the orders of remand. In these appeals the principal defendants as well as the *pro forma* defendants have all been made party respondents—the respondents who were *pro forma* defendants being 101 in the one case and 84 in the other. Some of them (about three in one case and two in the other) died during the pendency of the appeals and their legal representatives were not brought on the record.

Dr. Basak on behalf of the principal defendants-respondents has raised a preliminary objection that as some of the landlords in whose presence the decree of the lower Appellate Court was passed have not been made parties to the appeals, these appeals cannot be decided in their absence. The point is elaborated and it is urged that the plea of special limitation is available by the landlord and the decision of the Court of Appeal below holding that the suit was not barred by two years' limitation was passed in the presence of the landlords who are not on the record of these appeals, and, therefore, the decree of the Court below should still remain binding on them. The contesting appellants claiming through these landlords and others must be held to be bound by the decision which is binding on these landlords. If that be not so, there will be two decisions if these appeals succeed, one binding on the landlords, namely, that the suit is not barred by the special rule of limitation and the other that it is in favour of their tenants, the defendants. We do not think that, in the circumstances of this case, we should give effect to this objection. It has been held in a number of cases that the plea of special limitation under Article 3, Schedule III, Bengal Tenancy Act, is available not only to the landlord but also to persons claiming under the landlord. Reference in this connection may be made to the cases of *Bheka Singh* v. *Nakchhed Singh* (1) and *Sekunder*

(1) 24 C. 40 ; 12 Ind. Dec. (N. S.) 692.

HAMID ALI *v.* RAM CHARAN GOLDAR

Sheik v. *Arun Sarkar* (2). That being so, the question relating to special limitation may be enquired into even if the landlords were not parties to the suit, or if the landlords being made parties did not appear and contest the suit, or if the landlords did appear and contest the suit but were satisfied with the order passed by the Court below and did not challenge it on appeal. But it is argued that though the landlords may not be necessary parties in this suit, they were necessary parties in all subsequent stages of the suit where they were made parties. There is no force in this contention. The facts of the case in *Bheka Singh* v. *Nakchhed Singh* (1), are not quite similar to the facts of the present case; but the principle which that case lays down may very well apply to the present case. In that case the suit was brought against the Secretary of State as landlord and his tenants who had taken settlement from him. The Secretary of State did not contest the suit and it was stated on his behalf that he had no objection to the registration of the plaintiff's name and that the Court might award possession to the plaintiffs if it thought proper. The first Court found that the plaintiff was an occupancy *raiyat* and, therefore, the suit was barred by two years limitation, under Article 3, Schedule III, Bengal Tenancy Act. The plaintiff appealed and the appeal was dismissed by the Court of First Appeal on the ground that the Secretary of State who was defendant in the first Court was not made a party to the appeal. On appeal to this Court it was held that the Secretary of State was not a necessary party to the appeal. Though it was observed in course of the judgment that the Secretary of State has disclaimed all interests in the subject-matter of the suit and was perfectly indifferent to the result of it. The decision did not rest on this circumstance alone. The real question between the parties to this litigation is whether the plaintiffs are entitled to recover possession from the defendants who are in actual possession of the land. The defend ants took advantage of the plea of special limitation wnich is also available to the landlord on the ground that they had dispossessed the plaintiffs, if they did so after taking settlement from the landlords. This question, in our opinion, may be agitated between the parties without the landlord and the fact that the landlord was originally a party to the suit and was subsequently given up on appeal does not affect this question as between the necessary parties to the appeal. We may further add that the landlords have ceased to take any interest in this case, since no one has appeared on their behalf in these appeals. On these grounds, we are of opinion, that the preliminary objection ought not to prevail.

We now come to consider the judgment of the lower Appellate Court. It is contended by the appellants that the learned Judge has not considered the whole evidence in the case and that he has to a certain extent misread the judgment of the Subordinate Judge. We think that the judgment of the learned District Judge is not what it should be. The learned Subordinate Judge has referred to various pieces of evidence on the record. He has referred to para. 6 of the plaint which does to a certain extent admit some of the facts which go to support the defendants' case. The learned Subordinate Judge has also referred to the evidence of these witnesses where there is an admission that the plaintiffs were dispossessed 4 or 5 years ago. The Subordinate Judge, no doubt, laid great stress upon the Assistant Settlement Officer, dated the 13th April 1917, in which that officer stated that he found on that day that the defendants were in possession of the property; but on this and other materials on the record he came to the conclusion that the plaintiffs were out of possession for more than two years before the institution of the suits. Having found that, that Court proceeded to consider whether the dispossession was by the landlords. Relying upon some of the evidence for the plaintiffs and certain other evidence as well he came to the finding that the dispossession was by the landlords. The District Judge has proceeded upon the assumption that the judgment of the first Court was based solely upon the report of the Assistant Settlement Officer and that it should now consider the other issues. He thinks that the plea of special limitation was not specifically taken and, therefore, should not be enquired into. He has not given any reason why he differed from the judgment of the Court of first instance as to the inference drawn by that Court from the facts stated by

(2) 38 Ind. Cas. 69.

it; but he ends his judgment with the observation that the onus of having special limitation was surely on the defendants and this onus they had not discharged. We do not think that this is the proper way in which such questions should be decided. The question of limitation may be taken at any time if it can be maintained on the materials on the record and we find that there is evidence on the record to support the judgment of the Court of first instance which has not been considered by the learned Judge. He has not decided the question whether the dispossession was by the landlord and he has not considered it as a question apart from the other questions, *viz.*, possession of the land within the period of limitation. On the whole, we are not satisfied that the judgment of the lower Appellate Court gives any indication that the learned Judge has considered the whole evdence in the case and has come to a finding upon it.

We are, therefore, of opinion that this eaappl should be re-heard.

The result is that these appeals are allowed, the orders of the Courts below are set aside and the appeals sent back to the lower Appellate Court for re-hearing according to law. Costs will abide the result. We assess the hearing fee at three gold mohurs in each case.

K. S. D. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 212 OF 1922.

December 4, 1922.

Present :—Mr. Justice Adami.

BADRI DAS—PLAINTIFF—PETITIONER

versus

EAST INDIAN RAILWAY CO.—DEFENDANT—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 72—Goods consigned under Risk Note, Form B—Suit for compensation for loss of goods—Burden of proof—Authority to sign Risk Note, whether can be questioned.

In a suit to recover compensation for the loss of goods consigned to a Railway Company for carriage under Risk Note, Form B, the burden is on the consignor to prove that the loss was due to the wilful neglect of the Company or theft by or wilful neglect of its servants. The *onus* is not discharged by proving that the loss must have occurred while the goods were in the custody of the Company.

It is not necessary for a Railway Company when a person comes to consign goods to enquire whether he has been authorised to make the consignment.

If a person comes foward and delivers goods for carriage and signs a Risk Note, the owner of the goods cannot afterwards be heard to complain that that person had no authority to sign the Risk Note and that the Railway Company must be held liable for any loss in spite of the terms of the Risk Note.

Application against the decision of the Additional Sub-Judge of the Court of Small Causes, dated the 12th May 1922.

Mr. *Ragho Prashad*, for the Petitioner.

Mr. *Naresh Chandra Sinha*, for the Opposite party.

JUDGMENT.—The petitioner sued the opposite party, the East Indian Railway Co., in the Court of Small Causes to recover compensation for the loss of three bags of sugar and portion of another bag which had been consigned from Howrah to Patna to the address of the petitioner.

It appears that 125 bags of sugar were delivered to the Railway Co., at Howrah and a Risk Note in form B was signed to cover the consignment. It is admitted that the bags were delivered to the Railway Co., and it is also admitted that on arrival of the consignment at Patna three bags were found to be missing and one bag had been cut and some of the contents abstracted.

In the Trial Court the suit was dismissed as the Court found that, under the terms of the Risk Note the Railway Co., were not liable. The learned Vakil for the petitioner argues that as three complete bags were lost, the Railway Co., would be responsible for the loss and would be bound to pay compensation. The terms of the Risk Note form B are well known; they excuse the Railway Co., from all responsibility for any loss, destruction or deterioration of, or damage to a consignment from any cause whatever, except for the loss of

a complete consignment or one or more complete packages forming part of a consignment due either to wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers.

Now, in the present case it is quite true that there were three complete packages missing, but even so, the Railway Co., under the terms of the Risk Note, would not be responsible for the loss, unless the Court were satisfied that such loss was due to the wilful neglect of the servants of the Company, or to theft by its servants, or to wilful neglect of the Railway Administration. It fell, as has been settled by may decisions, on the petitioner to prove that the loss was due to wilful neglect or to theft by the servants of the Railway Administration, or wilful neglect of the Railway Administration. It is argued that the petitioner produced all the evidence that was possible for him to produce to show that the loss must have occurred during the time which the Railway Co. had the consignment in its custody, and it is not denied by the Railway Co. that the loss must have occurred while the bags were in its custody. But this was not sufficient, the petitioner had to prove either wilful neglect or theft by the Railway servants. It is true that it is almost impossible in a case like this for a plaintiff to prove wilful neglect, but while the terms of the Risk Note are such as they are, the Railway Co. will be absolved unless wilful neglect or theft by its servants is proved, and in this case the petitioner failed to prove wilful neglect. It has to be remembered that the goods were consigned at a cheaper rate in consideration of the terms of the Risk Note, so that the petitioner must be held to have entered into the bargain with his eyes open.

It is then contended that the terms of the Risk Note cannot apply because there is no satisfactory evidence that the man who signed the Risk Note form was authorised by the petitioner to sign it. I do not think that this argument can affect the matter at all. It is not necessary for a Railway Co. when a person comes to consign goods, to enquire whether that person has been authorised to make the consignment. If a man comes forward and delivers goods for carriage and signs a Risk Note, it cannot afterwards be complained by the owner of the goods that the man had no authority to sign the Risk Note, and that the Railway Co. must be, therefore, held liable for any loss in spite of the terms of the Risk Note. If it was not one of the pettioners who consigned the goods under the Risk Note, then it seems difficult to understand how the petitioners can claim that the goods were theirs and that the liability of the Railway Co. was to them. Such cases as these are hard on the consignee, but while the Risk Notes remain in their present form, the hardship must still endure. The application must be rejected. Hearing fee two gold *mohurs*.

Z. K. *Rule discharged.*

LAHORE HIGH COURT.

CIVIL APPEAL NO. 2022 OF 1922.

May 30, 1923.

Present :—Mr. Justice Moti Sagar.

JAWAHAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SEWA SINGH AND OTHERS—PLAINTIFFS RESPONDENTS.

Specific Relief Act (I of 1877), s. 54—Injunction—Light and air, free access of—Obstruction, whether serious injury—Compensation or damages—Appeal, second—Injunction, grant of—Discretion, judicial, exercise of—Interference, when feasible—Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3)—Guardian, appointment of—Consent, whether can be implied—Minor's interests, protection of—Guardian irregular appointment of, whether material.

Any act by the defendant which results in obstructing the free access of light and air, to which the plaintiff is entitled is *prima facie* an injury of a serious character for which compensation in money would hardly be an adequate relief. In cases of this nature, injunction is the rule and damages the exception, inasmuch as the plaintiff is entitled to insist that he should be maintained in his enjoyment of the easement. [p. 574, col. 2.]

Ramanujulu Naidu v. *Apparanji Ammal*, 9 Ind. Cas. 417; (1911) M. W. N. 261; 9 M. L. T. 383; 21 M. L. J. 319, relied on.

The grant of injunction is purely a discretionary matter and so long as it is not shown that the dis-

JAWAHAR SINGH *v.* SEWA SINGH

oretion was not exercised by the lower Court in a judicial manner, it should not be interfered with second appeal. [p. 574, col. 2.]

Under O. XXXII, r. 4 (3) of the Civil Procedure Code, it is not necessary that the consent of the person to be appointed guardian should be expressed; it may be implied from conduct, as where a notice is served on a person to show cause why he should not be appointed guardian and he does not appear in answer to the notice appointing him guardian. [p. 574, col. 1.]

An irregularity in the appointment of a guardian is not a sufficient ground for setting aside the proceedings at the instance of a minor, if there is nothing to suggest that the interests of the minor have not been duly protected in a suit and that he has been prejudiced by the appointment of the guardian. [p. 574, col. 1.]

Chhatter Singh v. *Tej Singh*, 59 Ind. Cas. 671; 18 A. L. J. 956; 2 U. P. L. R. (A.) 384; 43 A. 104, followed.

Appeal from the decree of the District Judge, Rawalpindi, dated the 6th June 1922, affirming that of the Junior Subordinate Judge, Rawalpindi, dated the 9th March 1922.

Pandit *Sheo Narain*, R. B., and Mr. *Shamair Chand*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The facts of the case out of which this second appeal has arisen are few and simple and may shortly be stated as follows :—

The plaintiff owns certain property which adjoins the property owned by the defendants. In the northern wall of the plaintiff's house there were certain ventilators and windows which opened into the courtyard of the defendants. Shortly before the institution of this suit, the defendants erected certain buildings in this courtyard which inclosed these windows and ventilators, and had the effect of obstructing the free access of light and air which it is alleged had been enjoyed by the plaintiff as of right without interruption and as an easement for more than 20 years. Thereupon, the plaintiff instituted a suit for a mandatory injunction praying that the defendants be ordered to remove these buildings and restrained from obstructing the uninterrupted access of light and air. It was further alleged that the defendants had constructed two kitchens in the first and second storeys respectively and that they were allowing the smoke of the kitchens to pass into the plaintiff's house through the ventilators and the windows which had been inclosed by these constructions. It was prayed that an injunction be issued to the defendants restraining them from doing so. Another allegation made in the plaint was that, in making these constructions, the defendants had built right up to the northern wall of the plaintiff and that they were using this wall as a lateral support to their house. The plaintiff feared that by using the wall in this manner the defendants would acquire a right of easement after the lapse of 20 years to which they had no right whatever. It was accordingly prayed that the defendants be ordered to push back their wall so as not to touch the plaintiff's wall. The defendants denied the claim and contended that the plaintiff had not acquired a right of easement *qua* the ventilators and the windows. They further alleged that the intervening wall did not belong exclusively to the plaintiff and that it was the joint property of the plaintiff and the defendants. The plaintiff's right to maintain a suit for injunction was also denied, and it was alleged that the plaintiff had been guilty of inordinate delay in instituting the suit.

The Trial Court found that the windows and the ventilators had existed for more than 20 years prior to the institution of the suit, that the intervening wall belonged exclusively to the plaintiff, and that he was entitled to maintain a suit for injunction. A decree was accordingly granted to the plaintiff in the terms prayed for. The defendants preferred an appeal to the District Judge which was dismissed.

They have now come up to this Court in second appeal through *Pandit* Sheo Narain, and the following contentions have been raised by him before me on their behalf. Firstly, it is contended that there were certain minor defendants in the case who were not properly represented, and that the decree is, therefore, not binding on them. It is pointed out that Surjan Singh, defendant, was appointed guardian *ad litem* of Dyal Singh and Autar Singh, minors, but that no notice of the appointment was served upon him as required by O. XXXII, r. 3 (4) of the Civil Procedure Code that the guardian never gave his consent to

the appointment, and that the appointment under these circumstances must be considered to be invalid. As regards Jawahar Singh who was appointed guardian *ad litem* of Narain Singh, minor, it is urged that a formal order of his appointment was never made, that he never expressed his willingness to act as guardian and that the interests of the minor were left entirely unprotected. This contention, in my view, is wholly untenable. The consent may be implied and is not necessarily to be expressed in any document on record. The fact of the matter appears to be that in one case notice was not issued because the guardian happened to be present in Court when his appointment was made, while in the other case notice did really issue, though the guardian did not give any express 'consent. None of the two guardians, however, refused to accept the appointment, but remained silent. They were appointed guardians and were themselves parties to the suit as defendants. They were members of the same family and their interest in the suit was identical with that of the minors. The suit was hotly contested and though a formal order of appointment was not made in one case, there is no reason to suppose that the interests of the minors were not properly looked after. In *Chatter Singh* v. *Tej Singh* (1), it has been held by the Allahabad High Court that "it is not necessary that the consent of the person to be appointed guardian, under O. XXXII, r. 4 (3) of the Civil Procedure Code, should be expressed ; it may be implied from conduct, as, where notice is served on a person to show cause why he should not be appointed guardian, and he does not appear in answer to the notice appointing him guardian." It has further been held in that case that "in the absence of anything to suggest that the interests of a minor have not been duly protected in a suit, and that he has been prejudiced by the appointment of a guardian, an irregularity in the appointment is not a sufficient ground for setting aside the proceedings at the instance of the minor." Following this decision and having regard to the fact that no prejudice was caused to the defendant minors, I hold that there was no defect in the appointment of the guardians and that the minors are bound by the latter's actions. I overrule the contention.

Next, it is contended that, on the facts of this particular case, the plaintiff is not entitled to a decree for a mandatory injunction and to have the buildings constructed by the defendants pulled down. It is urged that though the buildings were being constructed to the knowledge of the plaintiff, he kept silent and did not object, and instituted the suit long after the building had been completed. The argument is that though the plaintiff may have been entitled to an injunction in the first instance, he has lost the right to obtain that relief by his laches and that he should be given a decree for damages only if he is at all held entitled to a decree. With this contention I am unable to agree. It appears from the record that on the 29th of November 1919 the plaintiff applied to the Health Officer that the defendants were threatening to obliterate his windows and ventilators and that this action on their part would render the plaintiff's house altogether uninhabitable. In January 1920 the building was commenced and the suit was instituted on the 19th of February 1920. I do not think there was such inordinate delay in instituting the suit as wound disentitle the plaintiff to obtain relief by way of injunction. There can be no doubt that any act by the defendants which results in obstructing the free access of light and air to which the plaintiff is entitled is *prima facie* an injury of a serious character, for which compensation in money would hardly be an adequate relief. In *Ramanujulu Naidu* v. *Apparanji Ammal* (2), it was held by their Lordships of the Madras High Court that in cases of this nature injunction was the rule and damages the exception. The plaintiff's right to an easement whereby he was entitled to have uninterrupted access of light and air through his windows and ventilators not having been contested in this appeal, he is *prima facie* entitled to insist that he should be maintained in his enjoyment of the easement. Moreover, there is ample authority for holding that the grant of an injunction is purely a discretionary matter. There being no allegation in this case that the discretion was not exercised in a

(1) 59 Ind. Cas. 671 ; 18 A. L. J. 956 ; 2 U. P. L. R. (A.) 884 48 A. 104.

(2) 9 Ind. Cas. 417 ; (1911) 1 M. W. N. 251 ; 9 M. L. T. 883 ; 21 M. L. J. 818.

judicial manner, I do not see how I can interfere with the orders of the Courts below which, under the circumstances, appear to me to be quite fair and reasonable.

Pandit Sheo Narain's next contention is that the decree of the learned District Judge is not in conformity with his judgment and that the buildings constructed by defendants should not be ordered to be pulled down in their entirety. It is pointed out that the finding as given in the judgment was to the effect that the kitchen in the lower storey should be demolished at least so as to bring the roof below the plaintiff's ventilator. C. W.-1. The decree, on the contrary, is an absolute decree for demolition without any reservations. It is admitted in arguments that the kitchen in the second storey must come down if the roof of the kitchen in the first storey is to be lowered, but it is contended that, in order to provide free access of light and air to the plaintiff's house, it is not necessary that the kitchen in the lower storey should be demolished as a whole. It is urged that this object can be gained by lowering the roof of the kitchen by a few feet. Mr. Tek Chand for the respondent does not object to this course being adopted and is agreeable to the necessary alterations being made in the decree. I accordingly modify the decree of the Court below and direct that, instead of plaintiff being awarded an absolute decree for the demolition of the kitchen in the first storey, he should be awarded a decree for an injunction to the effect that the defendants should lower the roof of the kitchen in that storey so as to bring it below the plaintiff's ventilator C. W.-1. As to the room which adjoins the kitchen in the second storey, it should be pushed back to the extent of 8 feet from the plaintiff's wall which I think would be quite sufficient to allow free admission of light and air into the plaintiff's house through his window, and the ventilator C. W. 2.

Lastly, it is contended that the defendants in building their room right up to the plaintiff's wall in the first storey have not encroached upon the plaintiff's rights in any way whatever and that the contemplated injury is more imaginary than real. It is unnecessary, however, to give any finding upon this point as it is agreed before me by the parties that the plaintiff should be given a declaration to the effect that the defendants should not by mere lapse of time acquire an easement of lateral support to their buildings by reason of the fact that their walls touch the walls of the plaintiff. The decree of the lower Court should accordingly be modified and, instead of the defendants being required to push back their room in the first storey, the plaintiff would be given a declaration as above indicated.

No other point is urged before me in arguments. The result is that the appeal substantially fails and is dismissed except in regard to the three points mentioned above. Parties shall bear their own costs in this Court.

N. K. *Appeal dismissed*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 774 OF 1902.

March 18, 1924.

Present :—Mr. Justice Daniels and
Mr. Justice Dalal.

PRAG NARAIN —DEFENDANT —APPELLANT
versus
MATHURA PRASAD AND OTHERS—
PLAINTIFFS —RESPONDENTS.

Hindu Law—Widow's estate—Relinquishment in favour of one out of several reversioners whether valid.

A relinquishment by a widow in favour of one out of several reversioners during her life-time is not valid.

Second appeal from the decree of the District Judge, Mainpuri, dated the 22nd February 1922.

Dr. *M. L. Agarwala* and Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—One Ram Bakhsh had four sons three of whom were Lala Ram, Jagan Nath and Ajodhia Prasad. The two plaintiffs to the suit in the first Court were sons of Lala Ram. *Musammat* Sunder Kunwar widow of Jagan Nath, executed a deed of relinquishment in favour of Prag Narain son of

Ajodhia Prasad. The sons of Lala Ram sued for a declaration that this deed would be null and void as far as their interests were concerned on the death of *Musammat* Sunder Kunwar. Both the Subordinate Courts have held that Jagan Nath was separate from his brothers. In that case on the death of *Musammat* Sundar Kunwar, the next reversioners would be the plaintiffs and Prag Narain. As stated by the learned Counsel for the appellant, the only question for decision here is whether a relinquishment by a widow in favour of one out of several reversioners during her life-time can be mantained. No authority was quoted in support of his contention that such a transfer was valid. The decree was correctly granted to the plaintiffs by the two lower Courts and we dismiss this appeal with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 35 OF 1923.

April 19, 1923.

Present :—Mr. Dalal, J. C.

GHASI RAM—DEFENDANT—APPELLANT
versus
UMA DATT—PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 7 *and* 102 —Bisardar, *suit for wages by—Limitation.*

A *bisardar* is neither a household servant nor an artisan or labourer and consequently a suit for wages brought by him does not fall within the purview of Art. 7 but is governed by Art. 102 of Sch. I to the Limitation Act.

Golamee v. *Chowkeedar Shaik Paela*, 18 W. R. 298, distinguished.

Revision against the judgment and decree of the Subordinate Judge, Bahraich, (exercising Small Cause Court powers) dated the 12th eptember 1922.

Mr. *H. K. Ghosh*, for the Appellant.

Mr. *Moti Lal Saksena*, for the Opposite Party.

JUDGMENT.—The plaintiff's suit for wages of 2½ years was decreed by a Court of Small Causes and the defendant has applied here under section 25 of the Act on the ground that the suit for more than a year's wages was time-barred The plaintiff is called a *bisardar*. In a book called, Kachehri Technicalities, 1877 "*bisar*" is translated as the gleanings left in the field for the lower orders, and it is explained that they are generally the perquisites of the village watchman who is paid by a share of crop which he watches. The question is whether Article 7 or Article 102 will apply to the case of such a servant. Article 7 is confined to the wages of a household servant, artisan or labourer. The learned Counsel for the appellant quoted a Calcutta ruling in the case of *Golamee Chowkeedar Shaik Paelan* (1). At that time the Limitation Act, No. XIV of 1859, was in operation and the limitation of one year was applied to the wages of servants, artisans and labourers. The word "servant" has been modified now by the word "household;" so Article 7 will not apply to all servants. The ruling quoted will, therefore, not cover the wording of Article 7 of the present Limitation Act.

It was next urged by the learned Counsel that a watchman was a servant employed in husbandry and was a labourer in consequence. Though he watches the crop, I do not think that his services can be classed as those relating to husbandry. There is also evidence that the plaintiff collected rent on behalf of the defendant. It appears to me that he was an outdoor servant and the term household servant cannot be applied to him. He is certainly not an artisan, nor a labourer. His case will not fall within Article 7 and so Article 102 must be applied to his case.

I dismiss this application with costs.

N. K. *Application dismissed.*

(1) 18 W. R. 298.

GULAB *v.* BHAGWAN DAS

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 751 OF 1922.

October 31, 1923.

Present :—Mr. Justice Sulaiman.

GULAB—PLAINTIFF—APPELLANT

versus

BHAGWAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 4—Land taken for planting grove, whether holding—Rights of grove-holder, whether transferable.

In a suit for ejectment for wrongful transfer of land it appeared that the land had been taken from the *zemindar* for planting a grove on payment of a *nazrana*, that the grove was actually planted and had been in existence for 32 years and that the land was incapable of cultivation:

***Held*, that the plot was neither let nor held for agricultural purposes and was, therefore, neither land within the meaning of the Agra Tenancy Act nor a holding ;**

(2) that, consequently, there could be no bar to the transferability of the rights of the defendant.

Jalesar Sahu v. *Raj Mangal*, 63 Ind. Cas. 437; 19 A.L.J. 616; 43 A. 606, followed.

Ganga Dei v. *Badam*, 5 A. L. J. 99; 3 M. L. T. 194; A.W. N. (1908) 51; 30 A. 134; *Daya Kishen* v. *Mohammad Wazir Ahmod*, 30 Ind. Cas. 565; 13 A. L. J. 838, distinguished.

Appeal from a decree of the Additional Subordinate Judge, Bareilly, reversing a decree of the Additional Munsif, Bareilly City.

Mr. *Durga Prasad*, for the Appellant.

Mr. *Narain Prasad Asthana*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for ejectment. The plaintiff is the *zemindar* and his allegation was that the defendants were non-occupacny tenants of the land on which some trees stood, and they had wrongly transferred them. The lower Appellate Court has found that the land had been taken from the *zemindar* for planting a grove on payment of a *nazrana*. The grove was thickly planted and was planted about the time when the land was taken. It has been in existence for 32 years, and in its present condition is incapable of cultivation. It accordingly found that defendants Nos. 3 to 6 were not non-occupancy tenants of any holding, but had the rights of grove-holders on this plot. This finding is fatal to this appeal. In section 4 of the Agra Tenancy Act 'holding' is defined as a parcel or parcels of land held under one tenure or one lease or engagement and the word lease is defined as land which is let or held for agricultural purposes. The finding of the Court clearly shows that this plot was neither let nor held for agricultural purposes, but that it was let for the planting of a grove and a grove exists on it and it is incapable of cultivation. The plot, therefore, is neither land within the meaning of the Act nor a holding. There can, therefore, be no bar to the transferability of the rights of the defendants. *Vide* the case of *Jalesar Sahu* v. *Raj Mangal* (1). The finding of the Court below that, under the circumstances, the rights are tranferable cannot be impugned.

Reliance has been placed on the case of *Ganga Dei* v. *Badam* (2), and the case of *Daya Kishen* v. *Mohammad Wazir Ahmad* (3) Both these cases, however, are distinguishable inasmuch as in those cases trees had been planted on agricultural holdings which had existed from before. When the holdings themselves were not transferable, they could not become transferable, after the planting of trees. I dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 63 Ind. Cas. 437; 19 A. L. J. 616; 48 A. 606.
(2) 5 A. L. J. 99; 3 M. L. T. 194; A. W. N. (1908) 51; 30 A. 134.
(3) 30 Ind. Cas. 565; 13 A. L. J. 838.

NARAYAN DAS *v.* MAHESHI LAL

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 1300 OF 1921.

March 20, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

NARAYAN DAS—DEFENDANT—APPELLANT
versus
MAHESHI LAL—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 30—Wagering contract—Intention to sell or purchase—Speculation, effect of—Contract, whether void.

A contract may be unenforceable, if it only amounts to wager on the rise or fall of the market and is not accompained by an intention to sell or purchase goods at a given time and place at a certain rate. Where, however, there is a real desire on the part of the vendor to sell and the buyer to purchase the goods agreed to be sold at the contracted rate, the contract is not a wagering contract and is enforceable and existence of speculation which forms an element in manytransactions does not make the contract void.

Kong Yee Lone and Company v. *Lowjee Nanjee*, 29 C. 461 ; 28 I. A. 239 ; 5 C. W. N. 714 ; 3 Bom. L. R. 476 ; 8 Sar P. C. J. 101 (P. C.) ; *Bhaggwandas Parasram* v. *Burjorji Ruttonji Bomanj*, 44 Ind. Cas. 284 ; 42 B. 373 ; 23 M. L. T. 203 ; 34 M. L. J. 305 ; 4 P. L. W. 229 ; 16 A. L. J 241 ; 27 C. L. J. 358 ; (1918) M. W. N. 315 ; 22 C. W. N. 625 ; 20 Bom. L R. 561 ; 7 L. W. 577 ; 11 Bur. L. T. 211 ; 45 I. A. 29 (P. C.) relied on.

Appeal against the decree of the District Judge, Gonda, dated the 22nd December 1922, upholding the decree of the Subordinate Judge, Bahraich, dated the 20th June 1991.

Mr. *Ram Chandra*, for Mr. *Har Dhian Chandra*, for the Appellant.

Mr. *Bisheshar Nath Srivastava*, for the Respondent.

JUDGMENT.—The suits which have given rise to these appeals were brought by the plaintiff-respondent for the recovery of damages. Both the parties are shop-keepers carrying on cloth business at Bahraich. On 8th September 1919 the plaintiff and the defendant were talking about the possible decline or rise of the market-rate and in the course of that conversation the plaintiff said the market-rate would not fall while the defendant said it would. Evidently the plaintiff agreed to purchase 100 pieces of muslin at Rs. 7 per piece and 25 pieces of long cloth at Rs. 20 per piece within a year and the defendant agreed to supply the same at those rates. The market rate for those goods, however rose and the defendant failed to supply the said goods. The plaintiff consequently sued for damages calculating the sum on the difference between the rates settled and the rates prevailing on the date of the last day fixed for delivery.

The main defence was that the contract was of a wagering or speculative character and consequently unenforceable. The Courts below found that there was nothing to show that there was no intention not to take delivery of the goods. As observed in *Kong Yee Lone and Company* v. *Lowjee Nanjee* (1), and *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (2), a contract may be unenforceable, if it only amounts to a wager on the rise or fall of the market and is not accompanied by an intention to sell or to purchase goods at a given time and place at a certain rate. To some extent speculation forms an element in many transactions relating to the sale and delivery of goods at a certain rate, because the market-rate for those goods may be liable to fluctuation, but the existence of such an elemant does not make the contract void, because it may yet be accompanied by a real desire on the part of the vendor to sell and the buyer to purchase the goods, agreed to be sold, at the contracted rate where such an intention is not a wagering contract and can be enforced. The Courts below found, though in a somewhat negative form, that the absence of such an intention was not proved. It is not possible to interfere with that finding here.

As regards the amount of damages, there was no disagreement between the parties as to the rates originally settled and those pre-

(1) 29 C. 461; 28 I. A. 239; 5 C. W. N. 714; 3 Bom. L. R. 476; 8 Sar. P. C. J. 101 (P. C.).

(2) 44 Ind. Cas. 284 ; 42 B 373 ; 23 M. L. T. 203 ; 34 M. L. J. 305; 4 P.L.W. 229; 16 A. L. J. 241; 27 C. L. J 358; (1918) .M W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211; 45 I. A. 29, (P. C.).

vailing on the last date fixed for delivery. The plaintiff has, therefore, been rightly awarded the amount claimed.

The appeals fail and are dismissed with costs.

N. K. *Appeals dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1714 OF 1922.

March 23, 1923.

Present :—Mr. Justice Moti Sagar.

Mt. TAHAN—APPLICANT—APPELLANT
versus
SHADI AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 7—Muhammadan Law—Natural guardian, powers of—Guardian, when should be appointed—Welfare of minor.

A natural guardian under the Muhammadan Law has no power to deal with the property of the minors and an alienation made by him or her would be altogether null and void.

The mother of certain minor children applied to be appointed guardian of their property. It appeared that an alienation of a part of the property was necessary to pay off certain debts on which interest was accumulating:

***Held*, that as it would be impossible for the mother to alienate the property so long as she did not get a certificate of appointment from the Court, this was a fit case for the appointment of a guardian.**

Appeal from the order of the Senior Subordinate Judge, Amritsar, dated 1st April 1922.

Mr. *K. J. Rustomji*, for the Appellant.

JUDGMENT.—*Mt.* Tahan, the appellant, who is the natural guardian of the persons of her minor children, applied to the Senior Subordinate Judge of Amritsar, for being appointed a guardian of their property.

This application was refused by the learned Judge on the 1st of April 1922, on the ground that the appointment was altogether unnecessary and that the applicant could act in the interest of her minor sons on her own responsibility. In my opinion, the learned Senior Subordinate Judge was clearly wrong in this view. A natural guardian under the Muhammadan Law has no power to deal with the property of the minors and an alienation made by him or her would be altogether null and void. It is alleged in the present case that an alienation of a part of the property of the minors is necessary to pay off certain debts on which interest is accumulating and that it will be impossible to alienate so long as she does not get a certificate of appointment from the Court. I think this was a fit case in which the application ought to have been accepted and a guardian appointed. The interest of the minors will be fully safeguarded by taking security from the guardian appointed and by ordering that no alienation will take place without the express sanction of the Court.

I accordingly accept the appeal and, setting aside the order of the Court below, remand the case for a re-decision with reference to the above remarks.

K. S. D. *Appeal allowed.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 49 OF 1922.

February 15, 1923.

Present :—Mr. Justice Heald.

MA SHIN—APPELLANT
versus
MAUNG HMAN AND OTHERS—
RESPONDENTS.

Estoppel—Transfer of immovable property—Report to Revenue Surveyor signed by transferor's heirs—Transferee in possession—Heirs, whether can deny transferee's title. Court-Fees Act (VII of 1870), s. 7 (v) (b)—Land in dispute separately assessed to revenue—Court-fees payable.

Plaintiffs, the children of *SM* by *PK* sued to recover possession of land from the widow of one *PC*

MA SHIN *v.* MAUNG HMAN

the son of *SM* by her second husband *PY* alleging that on the death of *PY* a partition was effected and *PC* had received his share separately. It appeared that the land in suit had been transferred by *SM* to *PC* and her report of the transaction for the Revenue Surveyor with a view to mutation of names in the offical records was signed by the plaintiffs;

Held, that as the plaintiff had stood by with full knowledge of the transaction and had allowed the land to stand in the name of *PC* they were, under the circumstances, estopped from denying his title.

Where the land in dispute forms an entire holding which is separately assessed to revenue Court-fees should be assessed at five times the annual revenue under section 7 (v) (*b*) of the Court-Fees Act.

Appeal against the decree of the Divisional Court, Tharrowaddy, in Civil Appeal No. 19 of 1921.

Mr. *S. M. Bose*, for the Appellant.

Mr. *Shaw*, for the Respondents.

JUDGMENT.—Respondents are children of Ma Sun Ma by Pauk Kyi who is said to have died about 35 years ago. After Pauk Kyi's death Sun Ma married Pyu Yaung, who already had six children by a former marriage; and she had one child, Po Chit, by Pyu Yaung. Pyu Yaung died abont 15 years ago leaving Sun Ma and children belonging to each three families.

Respondents' case was that on Pyu Yaung's death a partition was effected, that Po Chit received a sum of Rs. 500 in cash and two buffaloes, that Po Chit and his wife, Ma Shin, the present appellant, who lived with Sun Ma, and worked certain lands which belonged to Sun Ma, had procured the entry of those lands in the Revenue Registers in their names and had mortgaged them to one Shwe Dun, that because Po Chit and Pyu Yaung's other family had already received their share on partition, Po Chit had no claim to inheritance in respect of those lands, and that respondents, as children of Sun Ma by Pauk Kyi, were the sole heirs to Sun Ma's estate, including the lands.

Po Chit's widow, Ma Shin, and representatives of Pyu Yaung's family by his earlier wife were made defendants, as was also the mortgagee, Shwe Dun.

Appellant replied that the lands fell to the share of Po Chit at the partition, and were transferred by Sun Ma to herself and Po Chit at the time of her marriage with Po Chit, that respondents themselves signed the entry in the Revenue Register as witnesses, that other properties claimed by the respondents were given by Sun Ma to her and Po Chit, and that respondents had no right to any of the property which they claimed.

The representatives of Pyu Yaung's earlier family made no claim to any share of the property in dispute.

The mortgagee, Shwe Dun, said that the lands were transferred by Sun Ma to Po Chit and appellant with respondents' knowledge and consent and that the mortgage also was made with their knowledge.

The Trial Court found that appellant failed to prove that Po Chit had any title to the lands and gave respondents a decree for possession without deciding an issue which had been raised as to whether Shwe Dun was a transferee in good faith from ostensible owners for consideration.

Appellant appealed on the merits and also raised a question of calculation of Court-fees for the purposes of costs.

Respondents also appealed on the ground that the Trial Court ought to have determined the issue as to the effect of Shwe Dun's mortgage.

On appellant's appeal the Divisional Court confirmed the Trial Court's finding that appellant failed to prove that Po Chit had any title to the lands, and, on the question of Court-fees, held that the Trial Court was right in entering as costs Court-fees on the market-value of the land as stated in the plaint.

On respondents' appeal the Divisional Court remanded the case for the Trial Court's finding on the issue as to the effect of the mortgage. The Trial Court then found that Shwe Dun took the mortgage without knowledge or notice of respondents' title. The Divisional Court, on the other hand, found that Shwe Dun was aware of the precarious nature of his mortgagors' title and accepted the mortgage with notice of respondent's claim. Respondents were accordingly given a decree for possession as against both appellant and Shwe Dun, together with a declaration that Shwe Dun's mortgage did not affect the lands.

MA SHIN *v.* MAUNG HMAN

Appellant now comes to this Court on second appeal on the grounds that the lower Courts were wrong in finding that the transfer of the lands to Po Chit, on which she relied, could not be proved, and were also wrong in finding that Court-fees were properly assessed by the Trial Court on the market-value of the lands.

I have read the records and heard the learned Advocates on both sides.

As for appellant's appeal on the merits there is a concurrent finding of the two lower Courts that the lands did not fall to the share of Po Chit at the partition, and that finding cannot now be disputed. If the lands did not fall to the share of Po Chit there is clearly no basis for appellant's suggestion that the transfer of the lands by Sun Ma to Po Chit was by way of succession or inheritance, and no question of the validity of a transfer by way of succession or inheritance without registered deed arises. On the facts found by the lower Courts, the transfer could not have been made by way of inheritance or succession and as the transfer was not made by registered deed it conveyed on title.

But I do not think that this finding is sufficient to dispose of appellant's case. There can be no doubt that the lands were actually transferred by Sun Ma to Po Chit in 1915. Sun Ma's report of the transaction to the Revenue Surveyor with a view to mutation of names in the official records was admittedly signed by the first respondent and purports to have been signed by all the respondents. The second third and fourth respondents naturally deny that they signed it, but the Revenue Surveyor, who is an independent witness swears that all the respondents were present when the report was made, that the first respondent signed it, and that the rest of the respondents held the pen when he wrote their names as witnesses. There is other evidence to the same effect and I have no hesitation in accepting it. I have little doubt that what really happened was that Po Chit who was a child when his share of the inheritance was allotted to him, claimed that share from his mother, Sun Ma, when he married appellant, and that as she was unable to pay the Rs. 500 in cash she transferred the land to him instead, getting the respondents to sign the record of the transaction as witnesses in token of their knowledge of and consent to the transfer.

Under these circumstances, respondents are, in my opinion, estopped from denying Po Chit's title. They stood by with full knowledge of the transaction and allowed the transfer to him to be made. They allowed the land to stand in his name and that of his wife thereafter and took no action. If they had raised any objection, Po Chit would have been able to take steps to get a legal transfer ; but, instead of objecting, they actually signed the record of the transfer as witnesses. It is ture that Po Chit did not get a legal title to the lands, but, under the circumstances, respondents cannot be heard to deny his title and their suit must fail.

As the respondents' suit fails no question of the effect of Shwe Dun's mortgage arises and his appeal must succeed.

As for the question of Court-fees, it seems clear that the learned Judge of the Divisional Court misread the authorities to which he referred. The decision in the Allahabad case which was mentioned in the Chief Court's General letter No. 5 of 1919 was to the effect that when entire holdings, that is, areas separately assessed to revenue, or definite fractional shares of such separately assessed areas, are in dispute, then Court-fees are to be levied under section 7 (v) (*b*) of the Court-Fees Act, but where field plots or parts of field plots which are not separately assessed are in dispute, then section 7 (v) (*d*) of the Act applies. In the present case the lands in dispute form an entire holding which is separately assessed to revenue, and, therefore, the provisions of section 7 (v) (*b*) apply and the Court-fees, so far as the lands are concerned, should have been assessed on five times the annual revenue, which was apparently Rs. 40-1-0. The costs will be calculated accordingly in the final decree.

The respondents' suit is dismissed with costs throughout.

K. S. D. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 1 OF 1922.

December 8, 1921.

Present:—Mr. Kennedy, J. C , and Mr. Aston, A. J. C.

DIPCHAND DOWLATRAM—PLAINTIFF—APPELLANT

versus

FIRM OF PERMANAND CHIMANDAS—DEFENDANTS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7 (iv)—Plaintiff, right of, to value relief—Appeal against dismissal of suit—Plaintiff, whether can vary valuation.

Where there is no basis of cash valuation, the plaintiff can make an imaginary valuation subject to his paying an additional Court-fee on what may be ultimately found due.

Although the valuation placed by the plaintiff is not expected to be exact it must be a reasonable valuation and not merely arbitrary or fanciful and the valuation in a plaint binds a plaintiff in a subsequent memorandum of appeal in the same manner and to the same extent as it binds the defendant.

Kanji Mal v. *Panna Lal*, 28 Ind. Cas. 262; 7 P. R. 1915; 15 P. L. R. 1916; *Srinivasacharlu* v. *Perindevamma*, 33 Ind. Cas. 602; 30 M.L.J. 402; 30 M. 725; *Samiya Mavali* v. *Minammal* 23 M. 490 ; 10 M L. J. 240 ; 8 Ind. Dec. (N.S.) 744, followed.

Sant Singh v. *Nathu Mal*, 18 Ind. Cas. 480; 115 P. L. R. 1913; 94 P. W. R. 1913 ; distinguished.

Appeal from the decree of the Additional Judicial Commissioner, Sind.

Mr. *Kundanmal Dayaram*, for the Appellant.

Mr. *Tahiram Maniram*, *Amicus Curiæ*.

JUDGMENT.

Aston, A. J. C.—The question for decision is whether the plaintiff's memorandum of appeal is properly stamped.

It appears that the valuation which the plaintiff placed on the relief which he sought when filing his suit was Rs. 2,000.

The plaintiff's suit was dismissed on the ground that the suit was not maintainable as framed. He has filed a memorandum of appeal against the decree dismissing his suit but in the memorandum of appeal he estimates the value of relief which he seeks at Rs. 200.

Section 7 of the Court-Fees Act, 1870, lays down the method of computing fees payable in certain suits.

This section, after providing that in suits for money, the amount of fees payable shall be according to the amount claimed, that in suits for maintenance and annuities, according to the value of the subject matter, which is stated to be ten times the amount claimed to be payable for one year, and that in suits for other moveable property having a market-value according to the market-value at the date of presenting the plaint, proceeds to deal with another kind of suit.

There are suits for moveable property of no market-value, suits to enforce a right to share in joint family property, suits for a declaratory decree and consequential relief, suits for an injunction, suits for easements and suits for accounts.

With regard to such suits it is provided that the amount of fee payable shall be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

The reason for this provision seems obvious. It would be difficult for the Legislature to provide a method for computing the value of moveable property, which has no market-value, of a right to a share in joint family property, of a suit for a declaratory decree and consequential relief, of a suit for an injunction, of suits for easements and suits for accounts.

In some of these suits, *e.g.*, for injunctions and easements there is no market-value by which to compute the valne of the relief sought, in others, *e.g.*, for a right to share in joint family property it would require almost a suit itself to compute accurately the value of the relief sought.

The Legislature, therefore, in the first instance has enacted that the fee payable is to be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

Section 7 (iv), however, proceeds. —

"In all such suits the plaintiff shall state the amount at which he values the relief sought."

It has been held by this Court in *Motiomal* v. *Melapbai* that these words take away from the appellant, if he is not the plaintiff, the right which is conferred on him in the earlier part of the section. This case followed *Kanji*

Mal v. *Panna Lal* (1), *Srinivasacharlu* v. *Perindevamma* (2), and *Samiya Mavali* v. *Minammal* (3), in which the Court held that where the plaintiff had valued the relief prayed for under clause (iv), section 7 of the Court-Fees Act and has obtained a decree and the defendant appeals against the whole decree he is bound by the valuation in the plaint.

It seems to me to follow that although valuation placed by the plaintiff is not expected to be exact it must be a reasonable valuation and not merely arbitrary or fanciful and the valuation in a plaint binds a plaintiff in a subsequent memorandum of appeal in the same manner and to the same extent as it binds the defendant.

The Legislature could never have intended that the plaintiff should have an absolute discretion to declare any value he liked, whether nominal or otherwise, when filing his plaint, and when filing his memorandom of appeal, and that the defendant should be fettered by mere whim or caprice of the plaintiff.

The case of *Sant Singh* v. *Nathumal* (4), is relied on by the plaintiff-appellant. There the plaintiff valued his suit for purposes of jurisdiction at Rs. 1,100. The District Judge found that in a connected suit the plaintiff, who was then a defendant had estimated his share at from Rs. 30,000 to Rs. 35,000 and ordered the plaintiff to pay enhanced Court-fee calculated on Rs. 30,000. The Punjab Chief Court held that the mere fact that the plaintiff as a defendant in another suit estimated his share at Rs. 30,000 was hardly a tufficient reason for assuming that he hoped to recover Rs. 30,000 in the suit in which he was plaintiff. The Court, however, concluded that the District Judge had authority to say that the plaintiff's valuation of his relief was unreasonably low and should be enhanced.

Similarly, in a case in this Court, *viz*, *Chandumal* v. *Kissomal*, where the plaintiff had valued the relief sought at Rs. 600 in the plaint and affixed a Court-fee stamp of Rs. 10 only on the memorandum of appeal. The ground on which this Court held that the memorandam of appeal was properly stamped, was not that it was within the plaintiff's discretion to vary his valuation of the relief sought in the memorandum of appeal, but because the relief sought in the appeal was substantially less than that sought in the Trial Court since he was not appealing against the whole decree, some important issues having been found in his favour.

In the present case the plaintiff is appealing against the whole decree and the only reason given for the stratling depreciation of the value at which plaintiff estimates the relief sought, *viz.*, from Rs. 2,000 to Rs. 200 is that the plaintiff is somewhat impressed by the allegations in the written statement.

This does not appear to me to be a sufficient ground to justify a departure from the valuation made by the plaintiff when he filed his suit.

I would accordingly hold that the memorandum of appeal is insufficiently stamped, and that the amount at which the relief sought is estimated should be the same as that stated in the plaint, *viz.*, Rs. 2,000.

Kennedy, J.C.—There is a question whether the memorandum of appeal is properly stamped, and I concur that the present memorandum of appeal is inadequately stamped. The plaintiff (now the appellant) brought a suit against the firm of Permanand for dissolution of partnership, and recovery of balance due to him on taking the accounts, estimating that there would be Rs. 2,000 due to him. The suit was rejected on the ground that he was not a partner of the firm of Permanand, but of an individual member of the firm. Against that judgment and decree he is now appealing. He has claimed now (altering his valuation) and has estimated the value of his claim to be Rs. 200.

The question, therefore, is whether in the present instance the appellant-plaintiff having once valued his relief at Rs. 2,000 and having had his claim totally rejected on a ground which has nothing to do with the valuation of his claim is at liberty to change that valuation in appeal. I am of the opinion that he is not.

(1) 28 Ind Cas. 262 ; 7 P. R. 1915 ; 15 P. L R. 1916.
(2) 33 Ind. Cas. 602 ; 39 M. 725; 30 M. L. J. 402.
(3) 28 M. 490 ; 10 M. L. J. 240 ; 8 Ind. Dec. (N. S.) 744.
(4) 18 Ind. Cas. 480 ; 115 P. L. R. 1913 ; 94 P. W. R. 1913.

The matter is somewhat difficult. It seems to me the principle applied is merely this. Where there is no basis of cash valuation, the plaintiff can make an imaginary valuation subject to his paying an additional Court-fee on what may be ultimately found due. It is possible that not only in the plaint, but also in the memo. of appeal, the condition of the plaintiff's case might be such as it may be such as it may be impossible for him to estimate what would come to him if his appeal were successful. But in the present case I cannot see the appellant is in that predicament. As matters stand at present, there is a finding against him by which he is declared not entitled to recover a fixed sum of Rs. 2,000 from the respondents. And that judgment he is attempting to set aside. It does not seem, therefore, that he can actually assert that his claim and appeal is not capable of being estimated at a cash vale. It is for a similar reason that a defendant-appellant has not the same option as is in such cases conferred on the plaintiff-appellant of putting an imaginary value on the subject-matter of appeal. Because in the case of the defendant who is an appellant there of course must be a decree against him for a particular sum of money It could not have been intended that where there is a decree refusing the plaintiff a particular sum of money, he should be allowed to estimate his claim at any fanciful figure that appears proper to him.

I think, therefore, the plaintiff-appellant should stamp on Rs. 2,000 Stamp to be paid within three weeks.

K S. D.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1071 OF 1922,

November 30, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

BABBAN PANDAY—PLAINTIFF—APPELLANT

versus

LACHHMAN CHAUDHRI AND ANOTHER DEFENDANTS—RESPONDENTS.

Pre-emption—Custom, proof of—Wajib-ul-arz, *entry in, value of—Later and earlier* wajib-ul-arzes—Wajib-ul-arz *of Settlement of* 1885 *in Basti and Gorakhpur Districts—Presumption—Lapse of custom.*

The Courts ought, in dealing with the question of the existence of a custom of pre-emption, to begin with the last record. If the last record contains a record of a custom of pre-emption, a similar custom set out in earlier *wajib-ul-arzes* is corroborative evidence. It is not proper to start with the earliest *wajib-ul-arz* and to consider whether it was possible that a custom could have grown up by that time and then to proceed to consider subsequent *wajib-ul-arzes*. The proper starting point is the last *wajib-ul-arz*. [p. 585, col. 1.]

In the Gorakhpur and Basti Settlement rules relating to the Settlements which were made about the year 1885 the Board of Revenue issued special instructions regarding the preparation of a record of a custom of pre-emption. [p. 585, col. 1.]

Settlement Officers were directed to record a custom of pre-emption when the proprietors, (being other than Muhammadan proprietors) expressly demanded, that a note of the custom should be made and further, proved conclusively, that the custom existed Therefore, where a *wajib-ul-arz* prepared under the instructions contains a statement that a custom exists it must be assumed that the necessary proof was forthcoming before the Settlement Officer before that record was made—in other words, that there was proof which conclusively satisfied the Settlement Officer of the existence of the custom. [p. 585, col. 1.]

It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family any custom relating to pre-emption must necessarily lapse. The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which it relates eventually comes into the hands of a single individual proprietor the custom is there and then extinguished. [p. 585, col. 2.]

Appeal from a decree of the First Additional District Judge, Gorahkpur, dated the 20th of April 1922.

Mr. St. C. Thompson, for the Appellant.

Mr. N. Upadhiya, for the Respondents.

JUDGMENT.—We cannot maintain the judgments of the Courts below in this case. We think that the plaintiff was entitled to succeed and that it was established that a custom of pre-emption exists.

The plaintiff brought into Court extracts from the *wajib-ul-arzes* of 1833, 1860 and 1885 and he also claimed to have in support of his case a decree in which the right of pre-emption had been recognized.

Clearly, it lay heavily on the defendants to rebut this evidence led on behalf of the plaintiff.

We have had a number of these Basti cases before us recently and it seems to us that the position regarding these *wijib-ul-arzes* in Basti and Gorakhpur is not properly appreciated by the Courts there.

It was brought to the notice of the learned Judge of the Court below in this case that the *wajib-ul-arz* prior to the year 1885 was a document of special importance.

We have in other cases found it necessary to draw attention to the fact that in the Gorakhpur and Basti Settlement rules relating to the Settlements which were made about the year 1885 the Board of Revenue issued special instructions regarding the preparation of a record of a custom of pre-emption.

Settlement Officers were directed to record a custom of pre-emption when the proprietors, (being other than Muhammadan proprietors) expressly demanded, that a note of the custom should be made and further, proved conclusively, that the custom exists. It seems to us, therefore, that when we find in a *wajib-ul-arz* prepared under these instructions a statement that a custom exists it must be assumed that the necessary proof was forthcoming before the Settlement Officer before that record was made—in other words, that there was proof which conclusively satisfied the Settlement Officer of the existence of the custom.

It is in our opinion a mistake to treat these documents in the way in which the Courts below seem to treat them. We ought, in dealing with the question of the existence of custom, to begin with the last record. In this instance, the record was prepared in 1885. If it is proved that records of custom are set out in the earlier *wajib-ul-arzes* of 1860 and 1833, that is, corroborative evidence. It is not proper to start with the *wajib-ul-arz* of 1833 to consider whether it was possible that a custom could have grown up by that time and then to proceed to consider subsequent *wajib-ul-arzes*. The proper starting point is the last *wajib-ul-arz*.

We have it, therefore, that there is a very strong presumption here in favour of the existence of custom and it remains to be seen what evidence was forthcoming by way of rebuttal. We disagree entirely with the view as to the evidence relating to the history of the village which has been taken by the Court below. It seems to be clear on all hands that this was one of those numerous villages in which there was a superior proprietor and a number of inferior proprietors called *birtyas*. It would seem that in the earlier short term Settlements which were made before the first Regular Settlement came to be made under the Regulation of 1833, the revenue engagements were taken from the superior proprietor. A reference to the *Gazetteer* shows that in the earlier days of the British Administration this was the policy of the Government. Later on, however, that policy was changed and the practice sprang up of taking the revenue engagement from the inferior properietor or *birtya* and providing for the rights of the superior proprietor by declaring that a certain amount of *malikana* shall be payable to him.

This is what has happened in the present case. It appears that in the year 1837 a certain petition was put in by a member of a family residing in this village. He represented that he himself and his co-sharers had been *birtyas* in this village and had been in possession since the time of the Nawab Wazir of Oudh, that is to say, since before the year 1800.

The object of this petition was to obtain the revenue engagment, the *birtyas* apparently desiring, that the settlement should be made with them and not, as heretofore, with the superior proprietor. There is nothing whatever in this petition to indicate that it was impossible in any way that a custom of pre-emption should have grown up by that time or subsequently. It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family any custom relating to pre-emption must necessarily lapse. The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which it relates eventually comes into the hands of a single individual proprietor the custom is there and then extinguished. That, however, is not the case here for, as we have pointed out, in the application which was made in the year 1837 the applicant stated

KABIR-UD-DIN MONDOL *v.* ENTAJ MONDOL

that there were other people who were co-sharers with himself.

On all hands, therefore, it is clear that the very strong presumption in favour of the existence of custom which is to be based upon the *wajib-ul-arz* prepared in the year 1885 has not, in any way, been overturned by the evidence of the history of the village. The case to our mind is a perfectly clear one, and, as we have said, we must hold that the existence of the custom should, on this evidence, have been held to be established.

There remains the question of the consideration. It is stated in the sale-deed that the property was being sold for the sum of Rs. 2,999. The allegation of the plaintiff was that the true consideration was only Rs. 1,100.

The Court of first instance found on this issue that the genuine consideration for the sale was a sum of Rs. 1,647 only.

When the plaintiff went in appeal the question of consideration was raised again, but, in view of the finding to which the learned Judge came regarding the existence of the custom, he did not consider it necessary to decide this issue. It will now be necessary for us to remit an issue to the learned District Judge asking him to find the true consideration for the sale now sought to be pre-empted. No further evidence will be taken. The finding of the learned Judge ought to be returned to us with as little delay as possible, and ten days from the date of the receipt of the learned Judges finding will be allowed to the parties to file objections.

Z. K. *Issue remitted.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 867 OF 1923.

March 10, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

KABIR-UD-DIN MONDOL AND ANOTHER DECREE-HOLDERS—PETITIONERS

versus

ENTAJ MONDOL AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908). ss. 115, 151, 152—Decree not in conformity with judgment—Application for amendment—Proper remedy—Court, inherent power of—Order refusing amendment—Revision—High Court, whether will interfere.

Where the decree is not in conformity with the judgment, an application for review of the judgment is not the only remedy. Sections 151 and 152 of the Code of Civil Procedure give the Court ample jurisdiction to correct mistakes, to pass such orders in the exercise of the inherent power vested in the Court as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.

The inherent power of the Court vested in it by its own constitution is not limited to sections 151 and 152 of the Civil Procedure Code.

An order dismissing an application under sections 151 and 152, Civil Procedure Code amounts to a refusal on the part of the Court to exercise jurisdiction vested in it by law and the High Court can set it aside in revision under section 115, Civil Procedure Code.

Civil rule in the matter of the order. dated the 28th April 1923 in Mis. Case No. 3 of 1923 (amendment of decree) arising out of mortgage suit No. 195 of 1912 of the Munsif, 2nd Court, Katwa (Burdwan).

Babu *Prokash Chandra Majumdar*, for the Petitioner.

Babu *Baranashibasi Mukerjee*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the Munsif of Katwa, dated the 28th April 1923 refusing an application by the petitioner for amendment of the final decree in a mortgage-suit. The learned Munsif suggested that the proper remedy of the plaintiff was to apply for a review of the judgment and dismissed the present application which purported to have been made under sections 151 and 152, Civil Procedure Code, on the ground that the decree sought to be amended was not in conformity with the judgment. In the preliminary decree thirteen persons had been named as defendant againsts whom the decree was obtained. There was an appeal and on appeal there was some modification made by the Appellate Court. In the final decree only the names of four of the defendants appeared as judgment debtors, these are defendants Nos. 1, 3, 4 and 5. The learned Munsif has based his opinion that

the present application under section 151 or section 152 was not maintainable mainly on two facts noticed by him. In the first place, he says that there is no clerical mistake in the final decree as the return of notices shows that only the names of those on whom notices of final decree were served were entered in the decree. This statement of fact is not correct. We have been taken through the record and we find that there is proof of services on at least eleven of the defendants. All the defendants were mentioned in the preliminary decree except defendants Nos. 2 and 7. The other fact on which he relies is that in the application for final decree the plaintiff stated the names of only those defendants who were principal defendants. This also is not correct. The application has been placed before us and we find that the plaintiff named no less than thirteen judgment-debtors therein. These facts have not been controverted by the learned Vakil for the opposite party. That being, so, clearly, this is a case in which the decree is not in conformity with the judgment. The order passed on the application for final decree made by the petitioner is in these terms: "Service of notice proved. An affidavit filed in support of the petition stating that the decretal amount has not been realised from defendants. Time of grace expired. No objection put in: ordered the decree be made final with costs." We have observed that the application for final decree mentioned thirteen judgment-debtors and the order passed by the Court upon it purported to pass final decree against all the judgment-debtors. We do not consider that the plaintiffs only remedy is to apply for a review of judgment. Sections 151 and 152, Civil Procedure Code, give the Court ample jurisdiction to correct mistakes like the present, to pass such order in the exercise of the inherent power vested in the Court as may be necessary for the ends of justice, or to prevent abuse of the process of the Court. We may remark that the inherent power of the Court as vested in it by its own constitution is not limited to sections 151 and 192, Civil Procedure Code. See the cases of *Brijratan* v. *Joynarain* (1) and *Harmanage Singh* v. *Ram Gopal Achari* (2). We think that the present case is one in which the Court should amend the decree.

It has been argued by the learned Vakil for the opposite party that we have no jurisdiction to interfere with the order passed by the Court below under section 115, Civil Procedure Code. The effect of the order complained against is that the lower Court has refused jurisdiction which it undoubtely had under sections 151 and 152, Civil Procedure Code. We think that the result of the order passed by the lower Court is likely to cause sericus injury to the petitioner. We, therefore, hold that the order of the Court below should be set aside and that Court should be directed to dispose of the petitioners' application according to law. The opposite party will be entitled to take such objection as they may be advised to take at the time of the disposal of this application. In the circumstances of this case, each party will bear his own costs of this Rule. The Rule is made absolute on the above terms.

Rule made absolute.

M. B.
K. S. D.

(1) 7 Ind. Cas. 676; 37 C. 649.

(2) 23 Ind Cas. 419; 20 C. L J. 18; 18 C. W. N. 772.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 135 OF 1924.

February 28, 1924.

Present:—Mr. Justice Sulaiman.

CHAUDHRI HAR SARUP—DEFENDANT—APPELLANT

versus

BRIJNANDAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 4 (5), 79—Tenant, whether includes rent-free grantee—Rent-free grantee, ejectment of—Suit, whether cognizable in Revenue Court—Proper remedy.

Under section 4, sub-clause (5) of the Agra Tenancy Act, a tenant does not include a rent-free grantee.

If, therefore, a rent-free grantee has been wrongfully ejected by the *zemindar* no suit under section 79 of the Agra Tenancy Act can be brought

in the Revenue Court. The only remedy open to the rent-free grantee is to sue in a Civil Court.

Second appeal against the decree of the Subordinate Judge, Muzaffarnagar, dated the 1st November 1923.

Mr. *M. A. Aziz*, for the Appellant.

JUDGMENT.—The only point raised in this case is that the present claim is bared by the principle of *res judicata*. The plaintiffs claimed to be the *doblidars* of the plot in dispute. Mr. Aziz admits that *doblidar* is the local name for a rent-free grantee. Previous to this suit the plaintiffs had brought a suit in the Revenue Court against the defendant alleging that the defendant was their tenant. The Revenue Court held that the defendant was not the plaintiffs' tenant at all and directed that the plaintiffs should sue the defendant for possession in the Civil Court. The only point on which the judgment of the Revenue Court is conclusive is that no relation of landlord and tenant subsisted between the parties. That judgment did not decide as to whether or not the plaintiffs were the rent-free grantees.

In the present civil suit the plaintiffs in no way tried to get round the finding of the Revenue Court that there was no relation of landlord and tenant between the parties. They claimed to be rent-free grantees and not tenants, nor do they allege that the defendant is their tenant. I do not, therefore, see how any question of *res judicata* arises in this case. I may note that, under section 4, sub-clause (5), of the Agra Tenancy Act, a tenant does not include a rent-free grantee. It follows, therefore, that if a rent-free grantee has been wrongfully ejected by the *zemindar* no suit under section 79 of the Agra Tenancy Act can be brought in the Revenue Court. The only remedy open to a rent-free grantee is, therefore, to sue in a Civil Court. I am accordingly of opinion that this appeal is without any force. I dismiss it under O. XLI, r. 11 of the Code of Civil Procedure.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 129 OF 1921.

February 27, 1924.

Present :—Mr. Justice Newbould and Mr. Justice Ghosh.

JNANENDRA NATH ROY CHAUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM RANJAN BANERJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Widow gift by—Consent of reversioners, effect of—Surrender.

Alienation by a widow with the *consent of* reversioners can only be looked on as affording evidence that the alienation was under circumstances which rendered it lawful and valid; or, in other words, the consent of the reversioners affords presumptive evidence that the alienation by the widow was for legal necessity. This presumption cannot arise in the case of a gift by the widow in favour of a stranger and it cannot possibly be held to be evidence of alienation for value for purposes of necessity.

Rangasami Gounden v. *Nachiappa Goundan*, 50 Ind. Cas. 498; 46 I. A. 72; 42 M. 523; 36 M. L. J. 493; 17 A. L. J 536; 29 C. L. J. 539; 21 Bom L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105 (P. C.); followed.

The surrender by a widow of her widow's estate can only be made in favour of the next reversioner. If the widow makes a gift of her husband's property in favour of a stranger and if the reversioner has consented to the gift being made such consent by the reversioner cannot be held to have conferred any title on the stranger beyond the life-interest of the widow.

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 15th March 1921.

Babu *Dwarkanath Chakrabarty*, (with him Babu *Kali Kinkar Chakraburty* and *Gopendra Nath Das*), for the Appellants.

Babu *Mohendra Nath Roy* (with him Babus *Dinesh Chandra Roy*, *Deva Prasad Ghosh* and *Krishna Lal Banerji*), for the Respondents.

JUDGMENT.—This appeal is by the plaintiffs for the recovery of possession of certain immoveable properties after declaration of

title. These properties originally belonged to one Gagan Chandra Roy Chowdhury who died in 1857 leaving a widow Kritarthamoyee Debi and a daughter by a predeceased wife Rangini. Rangini was married to one Chandra Sekhar Banerjee who resided in the house of his father-in-law. Kritarthamoyee made a gift of all the properties left by her husband Gagan in favour of Chandra Sekhar by a deed, dated the 4th January 1866. At that time the next reversioners of her husband's estate were Rangini who, if she survived the widow, would get a woman's estate, and Bishnu Chandra Banerjee who was the daughter's son of Gagan's great-grand-father. Rangini died sometime after the execution of the deed of gift and Chandra Sekhar apparently remained in possession of the property. On the 16th December 1891 Bishnu Chandra along with another person named Surendra Lal Roy Chowdhury executed a deed of release called a *Nadabi Ekrar* in favour of Chandra Sekhar with regard to those properties relinquishing their interest, and on the same day two documents were executed by Chandra Sekhar, one in favour of Bishnu Chandra and the other in favour of Surendra Lal giving some properties to those persons. Surendra was an agnatic relative of Gagan Chandra Roy Chowdhury Kritarthamoyee died on the 14th February 1919. Bishnu Chandra had predeceased her. The present plaintiffs have brought the suit out of which this appeal arises for recovery of the properties left by Gagan on the allegation that they are the next reversionary heirs after the death of Kritarthamoyee. These plaintiffs are the sons of Surendra Lal Roy Chowdhury who died in October 1918. The defendants are the sons of Chandra Sekhar Banerjee by another wife whom he had married after the death of Rangini and grandsons. The defendant No. 6 is the heir of Bishnu Chandra Banerjee and defendant No. 7 is the transferee from defendant No. 6.

The suit has been dismissid by the Subordinate Judge and the plaintiffs have preferred this appeal. It is not questioned that the present plaintiffs are the reversionary heirs of Gagan after the death of his widow Kritarthamoyee. The only question that has been argued and which requires consideration in this case is, what is the effect of the transactions we have already referred to with regard to the interest of the plaintiffs.

It is contended on behalf of the plaintffs that Kritarthamoyee's deed of gift in favour of Chandra Sekhar Banerjee could not give a complete title to the donee so as to affect the interest of the plaintiffs. It is urged that at that time Rangini, the daughter, was alive and she was no party to this transaction. The subsequent affirmation of the transaction by Bishnu and Surendra in 1891 cannot confer a good title on the aliance, and in any case a transfer by a widow with the concurrence of the then expectant reversionary heirs only raises a presumption that the transfer by the widow was for legal necessity, and as in the present case the transfer was only by way of gift the defendants cannot rely on any such presumption in this case, and the plaintiffs are, therefore, entitled to succeed. The appellants rely mainly on the principle laid down in the case of *Rangasami Goundan* v. *Nachiappa Goundan*, (1) decided by the Privy Council.

It is contended on behalf of the respondents that Chandra Sekhar acquired a good title by the transaction, and it is objected on their behalf that the question of Rangini having been alive at the time of the gift by Kritarthamoyee should not be allowed to be raised here as it was not raised in the Court below and, therefore, the defendants did not adduce any evidence that the deed of gift by Kritarthamoyee was in concurrence with that lady, and it is pointed out that Rangini was an attesting witness to the deed of gift. It is further urged that Bishnu Chandra Banerjee who was the next male reversionary heir of Gagan in 1866 had consented to the deed of gift being executed in favour of Chandra Sekhar at that time, as it appears from the recitals contained in the deed of release executed by Bishnu and Surendra. On these facts it is contended that the gift in favour of Chandra Sekhar was made by the widow with the consent and concurrence of all the next reversioners and, therefore, it conferred a valid title to Chandra Sekhar and the plaintiffs cannot, therefore, claim any interest to the property. Reliance has been placed on a

(1) 50 Ind. Cas. 488; 46 I. A. 72; 42 M. 523; 36 M. L. J. 498; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105 (P.C.).

certain passage in the case of *Rangasami Goundan* v. *Nachiappa Goundan* (1) on behalf of the respondents. The passage on which they rely, which is at page 80 of the report in the Indian Appeals, runs thus:—"The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs and it was an obvious extension of the doctrine to hold that inasmuch as he or they were *in* title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent." It is contended that the act of the widow should be considered as a surrender in favour of the next reversioner, and the consent of the next reversioner to the deed of gift should be taken as a conveyance by the next reversioners in favour of the donee. That can hardly be a proper view of the transactions. The widow did not surrender her estate to the next reversioner. She made a gift in favour of a stranger. The surrender by a widow of her widow's estate can only be made in favour of the next reversioners, and even it it be assumed that the reversioners had consented to the gift being made by Kritarthamoyee, we have to consider the effect of such consent. The principle laid down in *Rangasami Goundan's case* (1) and the other cases decided by the Privy Council is that alienation by a widow with the consent of reversioners can only be looked on as affording evidence that the alienation was under circumstances which rendered it lawful and valid; or, in other words, the consent of the reversioners affords presumptive evidence that the alienation by the widow was for legal necessity. This presumption, however, cannot arise in the present case. Their Lordships observed in *Rangasami Goundan's* case (1) at page 85 of XLVI Indian Appeals: "Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity." The case is the same here. The consent of the reversioners then to the alienation made by the widow in this case cannot be held to have conferred any title on Chandra Sekhar beyond the life interest of the widow Kritarthamoyee. After the death of Kritarthamoyee the plaintiffs would be entitled to the property left by Gagan. It is hardly necessary to point out that the plaintiffs are not affected by the acts of their father Surendra as they do not claim under him. They claim in their own right as heirs of Gagan. There is nothing, therefore, in this case which can prevent them from obtaining a decree.

The appeal is allowed and the suit is decreed. The title of the plaintiffs to all the properties left by Gagan is declared. The plaintiffs would be entitled to mesne profits from the date of the death of Kritarthamoyee up to the date of delivery of possession.

The plaintiffs will get their costs as against the defendants in this Court and in the Court below.

M. B. *Appeal allowed.*

K. S. D.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 373 OF 1921.

April 8, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

RAM CHANDER AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat BHAGWATI ALIAS BHAGWAN DEI AND ANOTHER—PLAINTIFFS AND LACHHMI NARAIN ALIAS LACHHMAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (1) (g)—Sale—Covenant to indemnify vendee on loss of property—Statutory covenant, whether excluded.

Plaintiffs purchased certain property from the defendants under a deed which recited that if any portion of the property was lost as a result of a claim by any encumbrances, the vendors would indemnify the vendees to the extent of the loss suffered. Subsequently, on a decree for sale being obtained by a mortgagee of the property, the plaintiffs had to pay a large sum of money to avoid sale. They then brought a suit to recover the amount from the defendants:—

Held, (1) that the express covenant by the vendee to pay a proportionate amount if any portion of the property was lost on account of a claim on a prior encumbrance, excluded the statutory covenant to be

found in section 56 (1) (*g*) of the Transfer of Property Act ;

(2) that inasmuch as the parties substituted a written contract for the statutory contract they could not now throw away the written contract and rely on the statutory contract ;

(3) that as no portion of the property had passed out of the hands of the plaintiffs-vendees, they were not entitled to recover the amount claimed.

First appeal from the decree of the Subordinate Judge, Aligarh, dated the 16th June 1921.

Mr. *P. L. Banerji*, for the Appellants.

Messrs. *N. P. Asthana* and *Panna Lal*, for the Respondents.

JUDGMENT.—The sole question involved in this appeal is the interpretation of a clause of the sale-deed.

The facts are these :—The predecessors-in-title of the plaintiffs obtained a sale-deed from some of the defendants and the predecessors-in-title of others on 24th January 1907 for a sum of Rs. 6,500. It was stated in the sale-deed that the property was subject to only one encumbrance of Rs. 4,000. It was further stated that there was no other encumbrance, and if any party either as a co-sharer or as an encumbrancer laid a claim and if, as the result of such a claim, any portion of the property was lost, the vendors would indemnify the vendees to the extent of the whole of the purchase-money in case the whole of the property was lost, or in the case of a partial loss, to the extent of a proportionate amount of the purchase-money.

What happened later on was this : A certain lady, *Musammat* Parbati, brought a suit for the recovery of a large sum of money by sale of the property sold on foot of a mortgage, dated 3rd December 1882 It is stated in one of the grounds of appeal, and it is not denied by the other side, that the suit was dismissed by the Court of first instance on the ground that this ancient mortgage had been paid off. On appeal, however, this Court held that the mortgage subsisted and a decree was made for sale of the property. The result was that the plaintiffs had to pay a large sum of money amounting to Rs. 13,000 and odd. They, accordingly, instituted the suit out of which this appeal has arisen for the recovery of the amount paid by them with interest and interest *pendente lite.*

For the defendants it was urged in the Court below, and it is urged in this Court, that the vendees took an express contract in place of the statutory contract to be found in section 55 (1) (*g*) of the Transfer of Property Act and that they are not entitled to recover anything.

As we have stated, the sole question for determination is whether the express contract in the sale-deed excludes the statutory contract mentioned above.

We have already stated what the contract was. The contract has been translated in the paper book as follows :—

"We, our heirs and representatives have no sort of claim or title left to the property sold. If, God forbid, any person comes forward as partner or co sharer and brings a claim, or if an encumbrance, etc., is found in respect of the whole, or part of the property sold, and as a result of the claim the property passes out of the possession of the vendees, we, the vendors shall, under that circumstance, pay to the vendees aforesaid the consideration of this sale-deed to the extent the property sold passes out of their possession, together with the costs which may be incurred by them."

There can be no doubt that, at the time of the sale contract, the question did arise as to what would happen if a prior encumbrance, not mentioned in the sale-deed, was discovered. There can be no doubt that the parties tried to solve the question. It was agreed that the vendors would pay a proportionate amount, not exceeding the total sale price, if any portion of the property was lost on account of a claim on a prior encumbrance. It appears to us that this express covenant excluded the statutory covenant already referred to. It has been urged on behalf of the plaintiffs-respondents that the parties really did not contemplate the position which has now arisen, that is to say, they did not contemplate that there would be a decree for sale under a prior encumbrance and the vendees would pay off that mortgage. But, in our opinion, this and many other contingencies could have arisen on account of a

prior encumbrance. For example, a prior encumbrance might have been by way of conditional sale. It could have been argued with equal force, that such a contingency was not contemplated by the parties. But we have clearly in the sale-deed, the covenant that in the case of a prior encumbrance being discovered what would happen. The parties substituted a written contract for the statutory contract and, in our opinion, they cannot throw away the written contract and rely on the statutory contract.

The result is that, in the circumstances that have happened, the plaintiffs are not entitled to any relief at all. No portion of the property has passed out of the hands of the vendees ; therefore, the circumstances in which alone they could claim damages have not arisen.

It seems to us that the vendors never contemplated that they would be called upon to pay anything more than the purchase price. This clearly shows that they never contemplated that they would be called upon to pay such a large sum as has been claimed.

The result is that we set aside the decree of the Court below and dismiss the suit of the plaintiffs with costs in both Courts. The costs in this Court will include Counsel's fees on the higher scale.

N. H.

K. S. D. *Appeal accepted.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 26, 1923.

Present :—Lord Dunedin, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

MALIREDDI AYYAREDDI—APPELLANT
versus
ADUSUMILLI GOPALAKRISHNAYYA AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 101—Mortgages, several—Payment of earlier mortgage by owner, effect of—Priority charge, whether kept alive—Presumption.

In India, where there are several mortgages on a property, the owner of the property subject to the mortgage may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor; or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. Where there is no indication to the contrary, it must be presumed that the owner intended to keep alive the previous charge if it would be for his benefit.

Gokaldas Gopaldas v. *Puranmal Premsukh Das*, 11 I. 10 C. 1035; A. 126; 8 Ind. Jur. 396; Sar. P. C. J. 548; 5 Ind. Dec (N. S.) 692, (P. C.); *Dinebundhu Shaw Chowdhury Jogmaya Dasi*, 29 I. A. 9 ; 29 C. 154 ; 12 M. L. J 78 ; 4 Bom L. R. 288 ; 6 C. W. N. 209, (P. C.) ; *Mahomed Ibrahim Hossein Khan* v. *Amrika Pershad Singh*, 14 Ind. Cas. 496 ; 39 I. A. 68 ; 11 M. L. T. 265; (1912) M. W. N. 367 ; 9 A. L. J. 332 ; 14 Bom. L. R 280 ; 16 C. W. N. 505 ; 15 C. L. J. 411 ; 22 M. L. J. 463 ; 39 C. 527 (P. C.) **followed.**

For the purposes of this rule it is immaterial that the charge paid off comprised properties not included in the other charges.

The rule, however, is not applicable if the owner had personally covenanted to pay the later mortgage-debt.

Appeal from the judgment of the High Court, Madras, dated the 26th January 1920, affirming the judgment of the Sub-Judge, Masulipatam.

Mr. *K. V. L. Narasimham*, for the Appellant.

Mr. *B. Dube*, for the Respondent.

JUDGMENT.—Certain Indian landowners within the district of Masulipatam effected 1st, 2nd and 3rd mortgages on their property; the 1st and 3rd being on the lands alone, the 2nd on the crops also. They were afterwards sued to judgment by some creditors for ordinary debts, and their lands were sold in execution of the judgment but subject to the mortgages The purchaser of the equity of redemption was one Pingala, who paid rupees 1,000, and thereout the judgment-debt was satisfied.

The second mortgagee then instituted his suit to enforce his mortgage, making the original mortgagors the third mortgagee and Pingala defendants; and having obtained judgment, he from time to time obtained orders for sale

of the crops. In one case it would seem as if the crops were actually sold in execution ; in others, Pingala, or the present respondents who bought Pingala's interests during the course of the proceedings, paid the second mortgagee sums of money and saved the crops from seizure. While this was going on, the third mortgagee, who is the present appellant, brought a suit, making the original mortgagors and Pingala parties ; and in this suit the lands were sold out and out, freed and discharged from the mortgages. After payment of the amount due to the first mortgagee and the expenses of the sale and so forth, there remained in Court to the credit of the cause a sum of Rs. 1,327 with some annas and pies.

The respondents, the purchasers from Pingala, who had been added as supplemental defendants in the suit brought by the appellant, thereupon claimed to be subrogated to the second mortgagee, and in right of the latter, to receive this sum out of Court. They made this claim on the 22nd July 1918, for the following reasons : At the time of the decree in favour of the third mortgagee which was made on appeal by the High Court on the 13th February 1917, there was still due to the second mortgagee the sum of Rs. 1,990. Now, the decree of the High Court provided that Pingala or his assignees should be at liberty to pay the amount due under the decree obtained by the second mortgagee, and that, by doing so, they would be relegated to the rights of that mortgagee. Accordingly, the respondents paid Rs. 1,990 to the second mortgagee, and on the 20th of December 1917, full satisfaction by payment through the Court was recorded.

The application of the respondents for the payment out of the money in Court was resisted by the appellant, who contended that, when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee but is to be taken as clearing the property from prior incumbrances for the benefit of the later mortgagee.

Now, quite apart from the general law on the subject, the decree of the High Court, from which there was no appeal, had provided that in respect of any payment made by the owner of the property to the second mortgagee he should acquire the right of the second mortgagee. This would be sufficient for the determination of the question immediately in dispute, because the sum in Court, Rs. 1,327 odd, is less than the sum of Rs. 1,990 which the respondents paid to the second mortgagee when final satisfaction was entered. And accordingly the Subordinate Judge had no difficulty in deciding the immediate application in favour of the respondents.

From this decision the present appellant appealed to the High Court at Madras. This Court, in affirming the actual decision, went further and stated a principle in accordance with which the present respondents will not only be entitled to stand in the shoes of the second mortgagee in respect of Rs. 1,990, paid at the time of the final satisfaction, but also in respect of several payments that they or Pingala had made from time to time to save the crops from being seized. This question, as the Judges in the High Court rightly pointed out, was not determined by the previous decree of the High Court, which only affected payments made subsequent to that decree.

It is, therefore, necessary to investigate matters a little more closely. It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage-debt, but in this case there was no such personal covenant. It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, section 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.

So far, therefore, as Pingala or the respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee. This could hardly be disputed

by Counsel for the appellant, having regard to the decisions of this Board. [*Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (1), and *Dinobundu Shaw Chowdhury* v. *Jagmaya Dasi* (2), and *Mahomed Ibrahim Hessein Khan* v. *Amrika Pershad Singh* (3).] The point, however, on which he really relied arose under the peculiar conditions of the second mortgage, which was upon the crops as well as upon the land. He contended that sums paid to the second mortgagee to save the crops from seizure must be deemed to be sums paid in reduction of the second mortgage, and not purchases *pro tanto* of that mortgage.

Their Lordships fail to follow the contention. There was an incumbrance upon a composite security, land and crops. It became necessary for the owner subject to the incumbrance, to pay sums of money to the incumbrancer to prevent his enforcing his charge from time to time. The incumbrancer could sell his charge or portions of his charge to anyone, and there is nothing in law or good sense to eliminate the owner of the property from the list of possible purchasers. It is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption, and no reason appears why it should not be assumed that he intended to act in the way most beneficial to himself.

If, instead of the mortgage being on lands and crops, it had been on three separate estates, and proceedings had been taken against one of them only, money paid to save off such proceedings might certainly be considered to be purchase-money and not redemption-money. So in the case of these crops. Any sums paid by Pingala or the respondents to save the sale of crops should be deemed to be *pro tanto* purchases of the second mortgage. It is suggested by the appellant that the sum of Rs. 2,058 odd received in April 1914, was not paid by Pingala but was the fruits of a sale in execution If this should prove to be so, and there is nothing to qualify it, the present respondents would not in respect of that sum be entitled to stand in the shoes of the second mortgagee. But in all cases where they have paid the money, they are entitled to the benefit. *A fortiori* they are entitled to keep the order made in their favour by the Judge of the Subordinate Court and confirmed by the High Court, and to have the money in Court paid out to them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant: Mr. *E. Dalgado.*

Solicitor for the Respondents: Mr. *Hy. S. L. Polak.*

(1) 11 I. A. 126; 10 C. 1095; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

(2) 29 I. A. 9; 29 C. 154; 12 M. L. J. 73; 4 Bom. L. R. 238; 6 C. W. N. 209 (P. C.).

(3) 14 Ind. Cas. 496; 39 I. A. 68; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 C. 527 (P. C.).

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 30 OF 1923 AND CIVIL REVISION NO. 71 OF 1923,

October 28, 1922.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Foster.

LACHHMAN LAL—OPPOSITE-PARTY—APPELLANT

versus

PADARATH SINGH AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 96 (3), 141, applicability of—Execution of decree—Compromise, order passed on—Appeal, whether lies.

Section 96 (3) of the Civil Procedure Code is restricted to suits only and cannot be extended to execution proceedings.

Section 141 of the Civil Procedure Code is confined entirely to proceedings in original suits and does not regulate appeals from orders in execution proceedings.

Appeal from the order of the District Judge, Gaya, dated the 6th January 1923, reversing the order of the Subordinate Judge, Gaya, dated the 28th October 1922.

Mr. *S. C. Mitra*, for the Appellant.

Messrs. *A. B. Mukerjee* and *Shiveshwar Dayal*, for the Respondents.

LACHHMAN LAL *v.* PADARATH SINGH

JUDGMENT.

Jwala Prasad, J.—Miscellaneous Appeal No. 30 and Civil Revision No. 71 of 1923 arise out of an order passed on the 6th January 1923 by the District Judge of Gaya in connection with execution proceedings. The decree-holder is the applicant before us. He had obtained a compromise-decree against the opposite party on the 27th June 1921. As the decree was not satisfied, he levied execution thereof in April 1922, and the properties of the judgment-debtor were sold in three lots on the 28th June 1922, fetching altogether Rs. 1,077 which exactly covered the amount due under the decree. The judgment-debtor applied under O. XXI, r. 90, to have the sale set aside which led to Miscellaneous Judicial Case No. 42 of 1922. On 12th September 1922 the parties filed a joint petition of compromise, by the terms whereof the sale was to be set aside upon the judgment-debtor paying up a sum of Rs. 1,160 to the decree-holder up to the 25th October 1922. The 26th October was a holiday, and on the 27th October the judgment-debtor filed a petition stating that he had tendered the aforesaid sum of Rs. 1,160 on the 25th October to the decree-holder and that he refused to accept the same and that when the judgment-debtor came to Court to put in the money he found that the Court had risen for the day. He, therefore, asked for a *chalan* to deposit the money, and prayed that the sale be set aside. The Court allowed the judgment-debtor to depositt he money "at his own risk." In the meantime, on the 25th October 1922, the Court had passed an order stating that the judgment-debtor had failed to pay up the money as compromised and that the sale be confirmed and the execution case dismissed on part satisfaction. The Court further dismissed the Miscellaneous Judicial Case No. 42 of 1922, that is, the proceeding instituted by it upon the application of the judgment-debtor under O. XXI, r. 90. The result of the order of the Subordinate Judge has been that the sale is confirmed.

Aggrieved by the order of the Subordinate Judge, the judgment-debtor appealed to the District Judge who, by his order of the 6th January 1923, remanded the case with directions to dispose of the application of the judgment-debtor of the 27th October 1922 after taking evidence.

Mr. Mitra, on behalf of the decree-holder, contends that this order of the District Judge is without jurisdiction, inasmuch as no appeal lay to him from the order of the Subordinate Judge passed on the 25th October 1922. Mr. Mitra says that the order of the Subordinate Judge was passed on compromise and, therefore, no appeal lay from that order under section 96, clause (3), of the Code of Civil Procedure. The judgment-debtor's contention is that the order of the Subordinate Judge was passed in contravention of the compromise, inasmuch as he had tendered the money on the 25th October well within the time fixed by the terms of the compromise for payment of the same. If this contention is correct, section 96 of the Civil Procedure Code can, in no case, apply. That section would also seem to be inapplicable inasmuch as it is restricted to suits only and cannot be extended to execution proceedings. Reliance is placed upon section 141 of the Code which says that the procedure laid down in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. The history of the legislation has been fully summarised in Dr. Mulla's (now Hon'ble Mr. Justice Mulla) Code of Civil Procedure, 7th edition, page 307. The section corresponds to section 647 of the old Code of 1882, and the conflict between the different High Courts of Calcutta, Allahabad and Bombay was set at rest by an explanation being added to the section excluding the application thereof to execution proceedings. The Privy Council decision in the case of *Thakur Prasad* v. *Sheikh Fukirullah* (1) construed the section, as it then stood without the explanation, as being confined entirely to original matters instead of to suits The present section 141 has taken advantage of the discussions in the authorities quoted above and is worded in such a manner as to leave no manner of doubt that it is confined entirely to proceedings in original suits. We are, however, relieved of the question in view of the fact that the judgment-debtor's application was under O. XXI, r. 90 to set aside the sale and that the result of the order

(1) 17 A. 106 ; 22 I. A. 44 ; 5 M. L. J. 3 ; 6 Sar. P. C. J. 526 ; 8 Ind. Dec. (N. S.) 393 (P. C.).

of the Subordinate Judge of the 25th October 1922 has been to disallow the application and to confirm the sale. The Code expressly provides for an appeal from such an order ; *vide* O. XLIII, r. 1 (*j*). Therefore, we have no hesitation in overruling the contention of Mr. Mitra and in holding that an appeal properly lay to the District Judge.

Upon merits also we have no hesitation in holding that the view taken by the learned District Judge is correct and that the judgment-debtor is entitled to have the allegations made by him in the petition of the 27th October 1922 fully investigated and that if his allegations be true he acted well within the terms of the compromise petition, and the sale should have been set aside.

In the result, the appeal and the application are dismissed with costs which will be calculated according to scales for appeal. There will be no separate costs in the application.

Foster, J.—I agree.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 306-B OF 1923.

March 10, 1923.

Present :—Mr. Kinkhede, A. J. C.

RAJARAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BAPU—DEFENDANT—RESPONDENT.

Evidence (Act I of 1872), ss. 102, 114—Burden of proof—Party, duty of—Onus, when shifted.

A party is bound to discharge the bu rden that lies on him by adducing evidence on his own side, Cut he can also sustain the onus caet on him by the facts he may elicit by cross-examination of the opposite party's witnesses.

Plaintiff sued to recover possession of a house on the strength of a sale-deed executed in his favour by the defendant almost twelve years before the date of the suit. The defendant had been in possession of the house throughout without paying any rent and without having executed any rent note. The defendant admitted the execution of the sale-deed but pleaded that the sale was not real or for consideration and was not intended to be acted upon ;

Held, that, under the circumstances, it was legitimate to infer that the sale was without consideration and the onus was on the plaintiff to show that consideration had passed, in spite of the fact that theexecution of the sale-deed had been admitted by the defendant.

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 68 of 1923, dated the 23rd July 1923.

Mr. *D. T. Mangalmoorti*, for the Appellants.

Mr. *R. R. Jaywant*, for the Respondent.

JUDGMENT.—The present appellants claimed to be purchasers of a house belonging to one Bapu under a sale-deed, dated 1st July 1910. This suit was instituted by Rajaram, and Pandurang, who is the co-purchaser with Rajaram, was joined as defendant No. 2. The vendor Bapu was in possession of the house in spite of the sale, without payment of any rent and without executing any rent note. The present suit was instituted on 30th June 1922 just a day before it would have become time-barred. The defence was that the sale was not real and intended to take effect and, that, it was not for any consideration and further that it was intended to defraud certain persons. The first Court decreed the claim. The defendant No. 1, therefore, appealed. The Court of appeal has held that the vendor Bapu has failed to establish the fraudulent nature of the transaction by his own evidence, but has observed that, although there was nothing for plaintiff to rebut still he chose to give evidence which went against him. It, therefore, held that plaintiff was not entitled to the relief claimed by him. The vendees have come up in second appeal and they contend that the lower Appellate Court has wrongly held that the onus was shifted to the plaintiff to prove the passing of consideration.

In my opinion the decision appealed against can be well supported on authorities. On the case set up by the defendant No. 1 the initial burden was undoubtedly on him to substantiate his defence. A party is no doubt bound to discharge the burden that lies on him by adducing evidence on his own side, but he can also sustain the onus cast on him by the facts

he may elicit by cross-examination of the opposite party's witnesses. See *Mati Kahanji* v. *Dipchand Virchand* (1),quoted with approval in *Bhagwant* v. *Kedari* (2). The lower Appellate Court was, therefore, right in considering that the onus was shifted to the plaintiff, but that latter's own evidence threw great suspicion on the genuineness of the sale-deed, dated 1st July 1910. There is yet another aspect of the case which justifies the conclusion that the sale must not have been intended to pass ownership. The fact that the vendees are out of possession and that the vendor has all along been in possession for nearly 12 years and that the suit is lodged practically on the last day of the limitation, clearly gives rise to the inference either that the sale was not a real transaction, or that possession was withheld because no consideration was passed or intended to be passed under the sale. Under such circumstances, the onus of proving either the reality of that transaction or the passing of the consideration would rest on the plaintiff and not on the defendant-vendor, whose possession has remained undisturbed so long.

The delay on the plaintiff's part in suing for possession for nearly 12 years ought, in the ordinary course of things, to give rise to some adverse inferences against him. It was necessary for the plaintiff to explain away his want of possession, and non-recovery of any rent from the vendor for all these 12 years. He could have succeeded by adducing clear proof of the passing of the consideration for the sale, and by showing that he had acquired the title and that the vendor was in possession on his account. But the lower Appellate Court has held that his evidence is quite unconvincing. In *Achobandil Kuari* v. *Mahabir Prasad* (3), which was a case of a vendee suing after the lapse of 8 years for possession of the property purchased under a registered deed of sale the execution of which was admitted by the vendor, but of which the vendor had denied receipt of consideration, and in which the plaintiff had produced no evidence in proof on the payment of consideration, Oldfield and Tyrrell, JJ., held that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for a period of 8 years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession has been withheld because of the non-payment of the consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. This case was followed with approval in *Bihari* v. *Ramchandra* (4), which was a case of usufructuary mortgagees who were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired. Sir John Stanley, C. J., and Justice Banerji held in that case ona plea raised by the defendant, that the burden of proving that consideration had passed was rightly shifted to the plaintiff. There, as in this case, the lower Appellate Court did not place any reliance on the oral evidence adduced on either side, but finding that no steps were taken for recovery of possession for a period of 12 years all but one day, drew the inference from this that no consideration was passed. The learned Judges observed as follows in this connection.—

"The fact that no step was taken by the plaintiffs for so long a period raises the presumption that the plaintiffs did not consider during this long period that they were entitled to possession. We think that such an inference is, under the circumstances not, unreasonable, and that the Courts below were justified under the circumstances in throwing upon the plaintiffs the burden of proving as a fact that consideration did pass. The case is very similar to that of *Achobandil Kuari* v. *Mahabir Prasad* (3)."

These observations are very appropriate and apply with full force to the present case.

In the peculiar circumstances of the case beforeme, I would, therefore, notonly infer that no consideration had passed but would say that it was not passed because it was never intended to pass, and further that it was not intended to pass because there was no intention to part with, or acquire, title and possession, and that

(1) 5 B. H. C. R. A. C. J. 81.
(2) 25 B. 202 at p. 207 ; 2 Bom. L. R. 986.
(3) 8 A. 641 ; A. W. N. (1886) 242 ; 5 Ind. Dec. (N. S.) 380.
(4) 10 Ind. Cas. 927 ; 33 A. 483 ; 8 A. L. J. 368.

the vendees' silent submission to the vendor's withholding possession for nearly 12 years was consistent with such intention. The lower Appellate Court's view, therefore, does not appear to me to be erroneous or unsound in any way. The appeal, therefore, fails and is dismissed with costs. Costs in the Courts below will be paid as already ordered.

N. H *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 295 OF 1923.

December 13, 1923.

Present :—Justice Sir Jwala Prasad, Kt.

THAKUR PRASAD LAL —PETITIONER
versus
SUKHLAL SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, r. 100—Execution of decree—Dispossession—Application, dismissal of, for default—Restoration—Inherent power of Court.

An application under O. XXI, r. 100 of the Civil Procedure Code must be entertained and disposed of according to law.

Where the order passed on such an application was, " Petitioner absent File" :

Held, that the order was not legal and the petitioner was entitled to have the application properly registered and disposed of and that the application could not be treated as having been dismissed in default and no question of restoration arose.

A Court has ample jurisdiction under section 151 of the Civil Procedure Code to restore an application under O. XXI, r. 100 of the Code which has been dismissed in default.

Ram Narain v. *Ramdhan Singh*, 72 Ind. Cas. 668; 4 P. L. T. 647, followed.

Revision from the order of the Subordinate Judge, Deoghar, dated the 12th April 1923.

Mr. *Satya Sunder Bose*, for the Petitioner.

Mr. *P. C. Ray*, for the Opposite Party.

JUDGMENT.—This is an application against the order of the Subordinate Judge, dated the 12th April 1923, directing the restoration of an application made by the opposite party under O. XXI, r. 100 of the Civil Procedure Code.

The learned Vakils on both sides have argued the most contentious point, namely, as to whether O. IX, r. 4 of the Code applies to an application under O. XXI, r. 100. In the course of their arguments they have taken me through all the authorities on the subject, which are very voluminous, and the conflicting views taken by the Judges of the different High Courts. Amongst those cases may be mentioned the following :—

(1) *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (1), Special Bench decision which held that O. IX. r. 9 does not apply to an order passed under O. XXI, r. 90;

Satya Narayan Lal v. *Gobind Sahay*, (2) (1918), a decision of a Division Bench of this Court to the contrary.

The recent decision referred to is that of *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (3). In that case Mr. Justice Das held that O. IX, r. 4, does apply to an application under O. XXI, r. 100. As regards the Special Bench decision referred to above he says: " Though the decision itself is binding on me. I do not think that I ought to be compelled to accept that which logically follows from that decision as equally binding on me, especially as I consider that the decision in *Bhubaneshwar Prasad Singh* v. *Tilakdharilal* (1), needs re-examination."

I have also been referred to several decisions of the Calcutta High Court, notably to that of Sir Lawrence Jenkins in *Hari Charen Ghose* v. *Manmatha Nath Sen* (4), which held that O. IX, r. 13 does not apply to an application under O. XXI, r 100.

All the decisions have been founded upon the pronouncement of their Lordships of the Judicial Committee in *Thakur Prasad* v. *Fakirullah*, (5), and upon the construction of section 141 of the Civil Procedure Code.

(1) 49 Ind. Cas. 617; 4 P. L. J. 135 ; (1919) Pat. 75 (F. B).
(2) 43 Ind. Cas. 951; 3 P. L. J. 250; 4 P. L. W. 102.
(3) 71 Ind. Cas. 484; 2 Pat 372; 4 P. L. T. 93; (1923) Pat. 78 ; 1 P. L. R. 134 ; (1923) A. I. R. (Pat.) 239.
(4) 19 Ind. Cas. 683 ; 41 C. 1 ; 18 C W. N. 343.
(5) 22 I A. 44; 17 A. 106; 5 M. L. J. 3; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 358 (P. C.).

MAN SINGH *v.* MADHO SINGH

Recently I had to consider this question in the case of *Lachuman Lal* v. *Padarath Singh* (6), Mr. Justice Das does not refer in his decision in *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (3), to his earlier decision in *Babu Jugul Kishore* v. *Bechinder Mohan* (7), wherein he seems to have taken an entirely contrary view.

In view of the decision given by Mr. Justice Das, which, to a large extent, conflicts with the view taken by the Special Bench of this Court and with his own view in the case referred to above, I would have been inclined to refer this case to a larger Bench ; but as I was thinking of doing so I looked into the record of the case and it seemed to me that a reference in this particular case would not be necessary.

The Court in the present case does not seem to have acted under O. IX, r. 4, as was the basis of the contention of the learned Vakil on behalf of the petitioner, nor was the application of the opposite party ever made under that provision of the law. On the 11th November 1922 the opposite party made an application under O. XXI, r. 100, affixing *talbana* (Court-fee) for service of notice upon the opposite party. That application was headed O. XXI, r. 100, and under the law the application had to be entertained and disposed of. On the 11th November, when the application was filed, the Court on the margin thereof noted " with case on 18th November 1922." On 18th November 1922, the Court made the following note : "Petitioner absent. Put up on 20th November 1922." On 20th November 1922, it is noted in the margin that " Petitioner still absent. File".

The opposite party then, on the 14th December 1922, made an application asking for the hearing and disposal of his original application made on the 11th November 1922. No doubt, in his application the opposite party has in the end asked for the restoration of his former application, but there was nothing to be restored, inasmuch as the first application was not disposed of in accordance with law. The Court had not rejected or dismissed it, but had simply ordered it to be filed on account of the absence of the opposite party. This kind of order is not sanctioned by the Code nor has it any meaning. The practice of noting the word " File " in judicial matters, such as the present one, has been fully discussed by me in a case of this Court.

The opposite party was entitled to have his application properly registered and disposed of. The application does not seem to have been registered nor was any order sheet started in connection therewith. All orders are written on the margin of the application. The method employed by the Court below is irregular. Even if the Court below meant to dismiss the application by the word " File " employed by it, it had ample jurisdiction to retore it under section 151 of the Civil Procedure Code. No authority is needed upon the point, for the power vested under section 151 is wide enough: vide *Ram Narain* v. *Ramdhan Singh* (8).

The application is, therefore, dismissed with costs. Hearing fee two gold mohurs.

Z. K. *Revision dismissed.*

(6) 79 Ind. Cas. 594; 4 P. L. T. 735
(7) 52 Ind. Cas. 416
(8) 72 Ind. Cas. 668; 4 P. L. J 647.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO 840 OF 1922.

December 3, 1923.

Present :—Mr. Justice Kanhaiya Lal.

MAN SINGH—DEFENDANT—APPELLANT

versus

MADHO SINGH AND OTHERS —PLAINTIFFS —RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 57—Occupancy tenant, grove planted by—Trees, whether belong to Zemindar or tenant—Suit to recover value of tree appropriated by tenant, nature of—Appeal, second—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 35, 43 A—Civil Procedure Code (Act V of 1908) s. 102.

An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so, the landholder has got the power to eject him for doing an act detrimental to the purpose for which the land was let under section 57 of the U. P. Tenancy Act (II of 1901). But that power can only be exercised within one year from the date of the conversion.

The general rule applicable to stray trees growing on an occupancy holding does not apply to groves planted by tenants with the implied or express acquiescence of the *Zemindars*. Where land has been let to a tenant for the special purpose of planting a grove thereon or where a grove planted by a tenant has been allowed to exist unchallenged by the *Zemindar*, the person who plants the grove

acquires a transferable interest therein, and, in the absence of a custom to the contrary, the trees become his property.

Jalesar Sahu v. *Raj Mangal*, 63 Ind. Cas. 437; 43 *A.* 606; 19 A. L. J. 616; Lal *Baijnath Singh* v. *Thakur Chandrapal Singh*, 73 Ind. Cas. 529; 21 A. L. J. 457; (1923) A. I. R. (A) 553, followed.

A *Zemindar* claiming a right to the fallen wood of self-sown trees, which have been growing on an occupancy holding, must prove some custom or contract by which he is entitled to take such wood, and the rule applies *a fortiori* to a grove which has been planted by the tenant.

Nathan v. *Kamla Kuar*, 13 A. 571 ; A. W.N. (1891) 167 ; 7 Ind. Dec. (N. S.) 361, followed.

The incidence of an agricultural holding does not attach to a grove planted by an occupancy tenant on his holding which has been allowed to exist unchallenged for a long time.

A suit by a *Zemindar* to recover from an occupancy tenant the value of a tree growing on his holding which has been wrongfully appropriated by the latter falls within the purview of Articles 35 and 48 A of Schedule II to the Provincial Small Cause Courts Act, and is not, therefore, a suit of a small cause nature within the meaning of section 102 of the Civil Procedure Code.

Appeal against the decree of the Additional District Judge, Aligarh, dated the 31st of March 1922.

Mr. *A. Sanyal*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to a mango tree which formed a part of a grove standing in No. 254 *Khasra* of the village Nagla Lala and had fallen in a storm sometime in July 1921. The plaintiffs are the *zemindars* of that village. The defendant, Man Singh, is the grove-holder, or the descendant of the person who had originally planted the grove. The land in question was at one time his occupancy holding but the portion which is now covered by the grove was converted into a grove sometime before the old Settlement. The allegation of the plaintiffs was that the defendants had no right to sell the fallen wood and appropriate its price. The Courts below found in their favour and decreed the claim. It is objected on behalf of the plaintiffs that no second appeal lies, because the suit was of a Small Cause Court nature. The allegation of the plaintiffs, however, amounted to a charge of criminal misappropriation of the wood ; and clause 35 of the Second Schedule of the Provincial Small Cause Courts Act, 1887 excluded it from the jurisdiction of a Small Cause Court. Clause 43 A of the said Schedule would be similarly applicable. Even if these Articles had not been applicable, there would have been sufficient reason for converting this appeal into a petition in revision to meet the ends of justice.

The main point about which the parties are at issue relates to the right of a person, who had planted a grove on what was originally an occupancy holding, to cut the trees or appropriate the fallen wood thereof. An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so, the landholder has got the power to eject him for doing an act detrimental to the purpose for which the land was let under section 57 of the U. P. Tenancy Act (No. II of 1901). But that power can only be exercised within one year from the date of the conversion. The defendant Man Singh stated that the grove stands on about two *bighas* of land and that it had been planted by his ancestors. The plaintiffs admitted that the tree in dispute was 80 years old. Their witness Roddar Singh similarly admitted that the tree in dispute appertained to a grove belonging to Man Singh whose ancestors had planted it. The general rule applicable to stray trees growing on an occupancy holding does not apply to groves planted by tenants with the implied or express acquiescence of the *Zemindars*. Where land has been let to a tenant for the special purpose of planting a grove thereon or where a grow planted by a tenant has been allowed to exist unchallenged by the *Zemindar*, the person who plants the grove acquires a transferable interest therein, and in the absence of a custom to the contrary the trees become his property (vide *Jalesar Sahu* v. *Raj Mangal* (1), and *Baijnath Singh* v. *Chandrapal Singh* (2). In *Nathan* v. *Karala Kuar* (3), it was held that a *Zemindar* claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy holding must prove some custom or contract by which he was entitled to take such wood. This rule will apply *a fortiori* to a grove which has been planted by the tenant. In *Chokhe Lal* v. *Behari*

(1) 63 Ind. Cas. 437 ; 43 A. 606 ; 19 A. L. J. 616.
(2) 73 Ind Cas. 529 ; 21 A. L. J. 457 ; (1923) A. I. R. (A) 553.
(3) 13 A. 571 ; A. W. N. (1891) 167 ; 7 Ind. Dec. (N.S.) 361.

Advocate High Court
Jammu & Kashmir

PAHALAN GARAIN *v.* CHOTU KUNJA

Lal (4), it was held that under the general law a grove-holder possessed all rights in respect of his grove which were excluded by the provision of the *wajib-ul-arz*. When the *wajib-ul-arz* in the present instance was prepared the *Zemindars* claimed that the grove-holders had no right to cut the trees standing in the grove without their permission, while the tenants claimed a right to cut the trees without any reference to the landholders, and no decision was arrived at. The grove in dispute unquestionably stands on a part of a larger holding, but, as the lower Appellate Court points out, the holding consists of a number of plots and the grove stands on one of them and forms a separate entity. The incidence of an agricultural holding does not attach to such a grove after it has been allowed to exist so long unchallenged. The appeal is, therefore, allowed and the suit of the plaintiffs dismissed with costs here and hitherto.

Z. K. *Appeal allowed.*

(4) 60 Ind. Cas. 115 ; 18 A. L. J. 820 ; 2 U. P. L. R. (A.) 292.

PATNA HIGH COURT.

CIVIL REVISION NO. 296 OF 1923.

December 12, 1923.

Present:—Justice Sir Jwala Prasad., Kt.

PAHALAN GARAIN AND OTHERS—PETITIONERS

versus

CHOTU KUNJA—OPPOSITE PARTY.

Chota Nagpur Tenancy Act (VI of 1908) s. 177—Rent suit—Jus tertii, *plea of—Procedure.*

Where in answer to a rent suit the right of a third person to receive rent is pleaded, that third person must be made a party to the suit and the plea must be decided in his presence.

Sundar Roy v. *Hema Mahton*, 41 Ind. Cas. 191 ; (1917) Pat. 189 ; 2 P. L. J. 386, followed.

Revision from the decision of the Additional Deputy Commissioner, Dhanbad, dated the 14th April 1923, setting aside the decree of the Deputy Collector, dated the 5th February 1923.

Messrs. *L. M. Ganguly* and *S. C. Mazumdar*, for the Petitioners.

Messrs. *P. C. Rai* and *Raghunandan Prasad*, for the Opposite Party.

JUDGMENT.—This is an application against the decision of the Deputy Commissioner of Dhanbad, dated the 14th April 1923, whereby he set aside the decree made by the Deputy Collector, dated the 5th February 1923, in a rent suit instituted by the petitioners. The suit for rent was for the years 1327 and 1328.

The plaintiffs purchased the interest of one Sarda Prasad Tewari in the *mouza* in execution of a mortgage-decree and obtained possession of the property through Court. Sarda Prasad was himself a mortgagee from one Mityamani Debya, widow of Pursottam Rai. The interest purchased by the plaintiffs was the *Brahmotar* right held by Pursottam Rai in this village. The defendants are tenants in that *mouza* and plead payment of rent to an *Ijaradar* of the *Zemindar* of the *mouza* upon the ground that the *Zemindar* had resumed the *Brahmotar* right and himself became *Sebaith* from 1317 or 1912, and that since then he has been in possession through his own *Ijaradars*.

The Deputy Collector who tried the suit, held that the payment of rent, if any, made to the *Ijaradar* was not in good faith. The *Ijaradar* has been examined in this case in support of the plea taken by the defendants. Accordingly, the Deputy Collector decreed the suit of the plaintiffs.

The Deputy Commissioner in appeal held that the question raised by the defendants was one of title, and consequently was not within the competency of the Revenue Court to decide, he, however, was of opinion that the question raised by the defendants should have been taken to the Civil Court not by them but by the plaintiffs, and consequently he dismissed the suit. He has referred to the objection of the petitioners before him as to his being competent to entertain the appeal, inasmuch as the suit raised a question of title the decision

whereupon of the Desuty Commissioner was not final, and consequently no appeal lay to the Deputy Commissioner from the decision of the Deputy Collector under section 218, clause (2). This question the Deputy Commissioner found to be a little complicated and, therefore, has not given his definite opinion; none the less he has tried the appeal and disposed of of it by setting aside the decree made by the Deputy Collector.

It appears to me that the procedure adopted in the trial of the suit has contravened the provisions of section 177 of the Chota Nagpur Tenancy Act. That section lays down that when the claim of a third person to receive rent is pleaded, that third person should be made a party to the suit and the plea must be decided in his presence. This view was upheld in *Sunder Roy* v. *Hemal Mahton* (1), decided by this Court. The facts of that case are largely similar to the present one and upon a plea similar to that taken in the present case it was held that the intervenor was a necessary party. That case was decided in 1917. Since then the law has been made still more stringent by the amendment of section 177 of the Chota Nagpur Tenancy Act in 1920. Before the amendment the words were

> "the right to receive the rent of the land or tenure cultivated or held by the tenant is disputed, and such right is claimed by or on behalf of a third person on the ground that such third person, or a person through whom he claims, has actually and in good faith received and enjoyed such rent before and up to the time of the institution of the suit.
>
> "Such third person shall be made a party to the suit, and the question of the actual payment of the rent to such third person in good faith shall be inquired into and the suit shall be decided according to the result of such inquiry."

For the words "the right to receive..... third person," the following words have now been substituted "the tenant or a third person pleads that the right to receive the rent of the land or tenure cultivated or held by the tenant belongs to such third person." The plea, therefore, may be taken by the tenant or a third person. In each case the person on whose behalf the title is set up must be made a party.

The result is that the entire proceedings in this case being *ultra vires* after the institution of the suit are set aside, and the case is, therefore, remanded to be tried *de novo* after making the third person on whose behalf the tenants raised the plea, parties to the case.

In the result, the application is allowed; the costs will abide the result.

Z. K. *Revision allowed.*

(1) 41 Ind. Cas. 191; (1917) Pat. 189; 2 P. L. J. 886.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 109 OF 1923.

February 15, 1924.

Present :—Mr. Kinkhede, A. J. C.

SETH MULCHAND—PLAINTIFF—APPLICANT

versus

AGENT, G. I. P. RY. CO., BOMBAY, AND TRAFFIC MANAGER, E. I. RY. CO., CALCUTTA—DEFENDANTS—NON-APPLICANTS.

Railways Act (IX of 1890), s. 77—Short delivery of goods—Loss—Claim for damages—Burden of proof—Notice whether necessary, Civil Procedure Code (Act V of 1908), s. 115—Onus misplaced—Finding of fact—Revision.

In a suit for recovery of damages against a Railway Company for short delivery of goods consigned to it, the onus lies on the Railway Company to prove the loss in order to claim exemption under the Risk Note and the plaintiff must prove wilful neglect of the Company's servants as the cause of the loss, in order to fasten the liablity for it on the Company.

More allegation of loss by the Company or admission of the non-delivery by the plaintiff is not sufficient to discharge the burden of proving the loss.

No notice is required to be served on a Railway Company under section 77 of the Railways Act where the claim is for non-delivery or short-delivery of goods.

A consideration of the evidence from a wrong point of view owing to the onus of proof having been wrong-

ly placed makes the finding liable to be set aside in revision.

E. I. Ry. Company v. *Kali Charan Ram Prasad*, 69 Ind. Case 103; 3 P. L. T. 215 ; (1922) Pat. 145, (1922) A. I. R. (Pat) 106, followed.

Appeal against the decision of the Judge, Small Cause Court, Hoshangabad, in Civil Suit No. 597 of 1922, dated the 7th February 1923.

Mr. *K. V. Deoseerk*, for the Applicant.

Mr. *P. Lobo*, for the Non-Applicant.

ORDER.—The applicant, Seth Mulchand, is the consignee of 32 bags of sugar weighing 87 maunds 37 seers despatched to his address at Itarsi on the G. I. P. Railway by his Adtya from Kidderpur docks, a station on the E. I. Railway, under Invoice No. 29 as per Railway Receipt No. 13390 1749, dated 28th July 1921. On 15th August 1921. The G. I. P. Railway Company at their Itarsi station gave delivery to plaintiff of 27 bags only the remaining 5 bags weighing 16 maunds, 16 seers were thus short-delivered. In spite of demands, both the Companies failed to deliver the said 5 bags of sugar. Hence the present suit was lodged on 23rd June 1922 for recovery of Rs. 489-12-0 on account of damages for short-delivery of 5 bags plus interest at Re. 1 per cent. per mensem and other charges including a claim for refund of the excess Railway frieght recovered from the plaintiff. The suit is instituted against both the G. I. P. and E. I. Railway Companies the G. I. P. Railway Company being defendant No. 1 and the E. I. Railway Company defendant No. 2. The defence of the G. I. P. Railway Company is that there being no contract between plaintiff and that Company, and the goods, not being accepted by it, no suit could lie against it ; that no loss of goods having taken place on the line of the defendant No. 1 the plaintiff was not entitled to anything as against that Company under section 80 of the Indian Railways Act. The defendant No. 2. (E. I. Railway Company) made a somewhat elaborate defence, which may be summarised under the following heads :—

(*a*) misjoinder of parties ;

(*b*) absenee of legal and proper notice of the claim to E. I. Railway Company as required by sections 77 and 140. Indian Railways Act ;

(*c*) Risk Note Forms A and B, absolving the Companies from all liability, for loss of goods in transit as a running train theft.

It was also added that of the goods found short no trace was or could be found, even until the date of the defence. The plaintiff's right to sue as a holder of the Railway invoice was also disputed.

In his oral pleadings the plaintiff alleged that the notice was given to the Traffic Manager, E. I. Railway Company, and that the Agent. E. I. Railway Company was informed of the plaintiff's claim by the Deputy Traffic Manager, Commercial, Bombay. He denied that there was a running train theft. The following points for determination were framed by the Judge, Small Cause Court:

1. Was a proper notice served on the Agent, E. I. Railway Company ?
2. Under what conditions were the goods consigned ?
3. Was the loss due to the wilful neglect of the Companys' servants and where did it occur ?
4. Is the plaintiff entitled te sue for the loss of these goods ?
5. Can the plaintiff recover the excess and, if so, how much ?
6. Can the plaintiff recover interest and costs of correspondence and, if so, how much ?
7. To what relief is the plaintiff entitled ?

The plaintiff examined two witnesses, the Goods Clerk as P. W. 1 and himself as P.W. 2. He filed a number of documents in support of his claim. The Judge of the Small Cause Court found that no proper notice was served on the Agent of the E. I. Railway Company ; that the goods were consigned on Risk Notes Forms A and B ; that there was theft in the running train but that there was no evidence on the plaintiff's side to prove that there was wilful neglect on the part of the Railway Administration; that the loss occurred between Buxar and Didarnagar on the E. I. Railway Company ;

that the plaintiff was not entitled to sue for the loss of goods, that he was not entitled to claim the excess frieght. Exhibits P-1 to P-13 are correspondence letters and their acknowledgments, etc., that passed between the present plaintiff and the G. I. P. Railway Company from time to time. The latter wrote to plaintiff to await reply from the E. I. Railway Company which was being addressed by that Company in connection with the present claim. Ultimately, the G. I. P. Railway Company by their letter, Exhibit P-13, informed the plaintiff that the Claims Superintendent of the E. I. Railway Company had instructed them to repudiate the claim under the terms of the Risk Note in Form B. The defendant E. I. Railway Company had filed the Risk Notes in Forms A and B signed by the consignor and examined two witnesses to prove the said Risk Notes and examined the Guard of the train by which the goods were despatched as also one Umanath Pande, who had checked at Mongal Sarai the waggon carrying the goods. The plaintiff's claim was dismissed and hence the plaintiff has come up in revision and urges the following grounds:—

1. That the learned Judge framed a wrong issue throwing the burden of proof on the plaintiff regarding the loss.
2. That the finding on issue No. 3 was wrong in law and fact.
3. That in any case the defendants Companies were not justified in recovering from plaintiff's Rs. 25-2-0 the excess fare for short-delivery of goods.
4. That the notice was properly served.

I will take up grounds 1 and 2 first. It has been argued before me, on the strength of the ruling reported in *Hanumant Rao* v. *The G. I. P. Railway Company* (1), that the burden has been wrongly thrown on the plaintiff. It is pointed out that the plaintiff all along complained of non-delivery of 5 bags of goods and never admitted that the goods were lost. That, on the contrary, the E. I. Railway Company admitted in paragraph 3 of their written statement, dated 10th October 1922 that the message regarding the shortage had been issued but that there was no trace of the goods yet. It is, therefore, contended that neither mere allegation of loss by the Company nor an admission of non-delivery by the plaintiff is evidence of loss. If the Railway Company proves the loss they are exempted from the liability by the Risk Note unless the plaintiff proves that his case comes within the exception mentioned therein. Issue No. 3 has been framed on the assumption that there is loss and the Court below called upon plaintiff to adduce proof of wilful neglect of the Companies' servants as the cause of the loss. This, in view of the Full Bench decision in *Hanumant Rao* v. *The G. I. P. Railway Company* (1), is not correct. The issue should have been framed so as to throw the onus on the Railway Company to prove the loss and the plaintiff should have been given an opportunity to rebut the Company's evidence by proof of neglect on their part. The Court not having done so, its finding cannot be said to have been properly arrived at, after due consideration of the evidence, from the right point of view. It cannot, therefore, stand.

The next question is as regards the sufficiency of the notice on the E. I. Railway Company. The provisions of section 77 of the Indian Railways Act make it obligatory to serve notice in writing on the Company in the case of a claim for refund of an overcharge or for loss, destruction or deterioration of the goods. The wording of section 77, as it stands, does not show that such a notice is required to be served where the claim is for short-delivery of goods: see *E. I. Railway Company* v. *Kalicharan Ram Prasad* (2). The present case, as laid in the plaint, is clearly one of non-delivery or short-delivery of goods, and not one of loss, deterioration or damage to the goods consigned. Under such circumstances, the E. I. Railway Company was not entitled to any notice, and the case is maintainable against that Company without such notice. The point as regards the sufficiency of notice served on the Traffic Manager of the E. I. Railway Company instead of on the Agent does not, therefore, arise. Even if it arose, the question is not quite free from difficulty; the rulings

(1) 72 Ind. Cas. 333; 19 N. L. R. 56, (1923) A. I. R. (N.) 223.

(2) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106.

seem to be conficting, while some of the High Courts hold that notice served on the Traffic Manager is not sufficient, others hold that it is sufficient, if the subordinate officer on whom the notice is served sends it on to the Agent, or informs him of the contents within six months. It has also been held that there is nothing in the Act which prevents the Railway Administration or its Agent or Manager from deputing an Officer to receive the notice required by sections 77 and 140 of the Railways Act. Whether the Officer is empowered by the Agent to receive such notice on his behalf is a question of fact to be determined in each case. Agency may be proved either by direct evidence of authority or by a course of conduct which, in the opinion of the Court, would justify the inference that the subordinate official was authorised to receive notice on behalf of the Agent: see *A. Mahadeva Aiyar* v. *The South Indian Railway Company, Ltd.* (3).

There has not been a proper trial of this question and still the Court has come to a decision adverse to the plaintiff on this point.

As the case is going back for trial on the question of loss, I think, this question of fact also should be tried out fully as the fate of this case must depend upon the proper decision of these two main points. The case must, therefore, go back for fresh decision on both these points. The lower Court has not stated any reasons why the defendant Company should be entitled to recover overcharges and still give short-delivery of goods. The case is, therefore, remanded for fresh decision on this point also with advertence to the above remarks.

Parties will be given opportunity to adduce such additional oral and documentary evidence as they may find necessary to support their respective cases. It will be useful for the plaintiff to call upon both the defendants Companies to produce all correspondence in original which took place between the Companies *inter se* and between the plaintiff and the Companies or any one of them relating to the transaction in suit. In the circumstances of the case, I direct that the costs of this Civil Revision should remain as spent. Costs in the lower Court will abide the result.

G. R. D. *Revision allowed.*
K. S. D. *Case remanded.*

(3) 69 Ind. Cas. 59 ; 42 M. L. J. 202 ; 14 L. W. 684 ; 30 M. L. T. 112 ; 45 M. 135 ; (1922) A. I. R. (M.) 362 ; (1921) M. W. N. 878 (F. B.).

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 120 OF 1923.

July 31, 1923.

Present :—Mr. Justice Kanhaiya Lal.

SURAJMAN CHAUBE—PETITIONER

versus

ANJORE SHUKUL—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Civil Procedure Code (Act V of 1908), ss. 48, 100, 102, 115—Execution of decree—Decree executable after some time—Limitation, operation of—Decree of Small Cause nature—Order for execution—Second appeal, if competent—Erroneous decision—Refusal to exercise jurisdiction—Revision.

Under the Limitation Act, the period of three years for the enforcement of a decree or order must be taken to commence from the date when the decree or order becomes executable.

Rameshvar Singh v. *Homeshvar Singh*, 59 Ind. Cas. 686 ; 19 A. L. J. 26 ; 1 P. L. T. 731 ; 40 M. L. J. 1 ; (1921) M. W. N. 21 ; 33 C. L. J. 109 ; 25 C. W. N. 837 13 L. W. 546 ; 6 P. L. J. 132 ; 23 Bom. L. R. 721 ; 30 M. L. T. 189 ; 48 I. A. 17 (P. C.) ; *Aiyasamier* v. *Venkatachela Mudali*, 37 Ind. Cas. 741 ; 40 M. 989 ; 31 M. L. J. 513 ; (1916) 2 M. W. N. 296 ; 20 M. L. T. 391 ; 4 L. W. 507, followed.

Lalta Prasad v. *Sheo Sahai* 1 A. W. N. (1885) 193, distinguished.

The period of limitation for execution of a decree or order which becomes executable on a date subsequent to that of the decree or order, is governed by Art. 181 of Sch. I to the Limitation Act.

A date capable of being made certain by the computation of time provided for payment is as certain for the purposes of Art. 182 of Sch I to the Limitation Act as a specific date entered in or provided for by the decree.

Section 48 of the Code of Civil Procedure deals with the maximum limit of time provided for execution of a decree and does not prescribe the period within which each application for execution is to be made. Under it the right to apply accrues from the date when the default in making the payment occurs ; and there is

nothing in that section governing the provisions applicable to periodical applications for the execution of a decree which can be made after the right to apply for execution has accrued, so long as the decree subsists and is capable of execution.

No second appeal lies against an order for the exequtions of a decree passed in a suit of the nature of a small cause of value below Rs. 500, but the petition of appeal may be treated as a petition in revision.

Haraka v *Ram Sarup*, 12 A. 579; A. W. N. (1890) 06; 6 Ind. Dec. (N. S.) 1115; *Narayan Parmanand 2. Naginda Bhaidas*, 30 B. 113; 7 Bom. L. R. 641, relived on.

Where a decision is so palpably erroneous as to amount almost to an improper refusal to exercise jurisdiction, as, for instance, where the Court refuses to execute a decree as time-barred, while the decree is not so barred, the High Court will interfere in revision.

Civil revision from the order of the Subordinate Judge, Jaunpur, dated the 23rd December 1922.

Mr. *Mushtaq Ahmad*, for the Petitioner.

Mr. *Haribans Sahai*, for the Opposite Party.

JUDGMENT.—In this case a preliminary objection has been taken to the hearing of the appeal that no second appeal is maintainable. The suit was one of a Small Cause Court nature below Rs. 500 in value and, as held in *Haraka* v. *Ram Sarup* (1), and *Narayan Parmanand* v. *Nagindas Bhaidas* (2), no second appeal lies against an order of execution of a decree in a suit of that kind. The petition of appeal can, however, be treated as a petition in revision. Let the petition be, therefore, removed from the register of second appeals and registered as a petition in revision and dealt with as such.

On the 11th of November 1918 a decree for money was obtained by the decree-holder applicant agaist *Musammat* Rajwanti as a legal representative of her husband Mahip Shukul in accordance with a compromise which provided that the money should be re-payable without interest within six month and that if no such payment was made the decree-holder should be entitled to recover his money with interest at Re. 1 per mensem from the date of the decree. The terms of the compromise were embodied in the decree.

(1) 12 A. 579 ; A. W. N. (1890) 206 ; 6 Ind. Dec. (N. S.) 1115.

(2) 30 B. 113 ; 7 Bom. L. R. 641.

According to the above decree the money fell due on the 11th of May 1919. An application for execution was made by the decree-holder on the 7th of November 1921 against the estate of Mahip Shukul in the hands of Ram Sumer who was described as having obtained possession of the property of the deceased on the death of *Musammat* Rajwanti as his reversionary heir. Ram Sumer denied that he was in possession of any property of Mahip Shukul or that he was his reversionary heir. He pointed out that *Musammat* Rajwanti had an adopted son named Ram Anjor and that the decree-holder should obtain execution against him. Ram Anjor appeared and stated that he had been adopted by Mahip Shukul. The name of Ram Anjor was, therefore, substituted in place of Ram Sumer in the application for execution.

Ram Anjor thereupon filed an objection, stating *inter alia* that he was not bound by the decree, as he had been adopted by Mohip Shukul and had not been made a party to the suit and that the decree was in any case barred by limitation against him. That objection was dismissed for default. The Court in which the execution proceeding was pending, however, proceeded to determine the question of limitation and came to the conclusion that the decree was barred by time because the substitution of the name of Ram Anjor was made after the expiry of more than three years from the date of the decree. On appeal that order was upheld. Both the Courts below omitted to notice that the decree was not capable of execution till the 11th of May 1919, that is, till after the expiry of six months from the date of the decree, because the judgment-debtor had been allowed the option of paying the decretal money within that period without interest. No payment was, however, made; and, as held by their Lordships of the Privy Council in *Rameshvar Singh* v. *Homeshvar Singh* (3), Article 181 is applicable to such a case, under which the period of limitation is three years from the time when the right to apply accrues. Their Lordships pointed out that, when the Limitation Act of 1908 prescribed three years from the date of

(3) 59 Ind. Cas. 636 ; 19 A. L. J. 26; 1 P. L. T. 781; 40 M. L. J. 1 ; (1921) M. W. N. 21 ; 38 C. L. J. 109 ; 25 C. W. N. 337 ; 13 L. W. 546 ; 6 P. L. J. 182 ; 23 Bom L. R. 721 ; 30 M. L. T. 189 ; 48 I. A. 17 (P. C.)

a decree or order as a period within which it must be enforced, the language read with its context referred only to an order or decree made in such a form as to render it capable, in the circumstances, of being enforced. In *Aiyasamier* v. *Venkata Chela Mudali* (4), the date of the decree in clause (*a*) of section 48 of the Code of Civil Procedure was similarly interpreted as meaning the date when the decree became executable. The decree in the present case did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed; and whether Article 181 or Article 182, clause (7), of the Indian Limitation Act (No. IX of 1908) was applied, the time from which the period of limitation began to run would not be deemed to have commenced till after the expiry of that period. The amount to which the decree-holder was entitled became then determinable and recoverable.

It is contended on behalf of the judgment-debtor that Article 181 does not apply to cases covered by section 48 of the Code of Civil Procedure and that Article 182, clause (7), similarly does not apply where no certain date is fixed for the payment of the decretal money. But section 48 of the Code of Civil Procedure deals with the maximum limit of time provided for execution and does not prescribe the period within which each application for execution is to be made. The right to apply for execution accrues under it from the date when the default in making the payment occurs; and there is nothing in that section governing the provisions applicable to periodical applications for the execution of a decree which can be made after the right to apply for execution has accrued, so long as the decree subsists and is capable of execution. A date capable of being made certain by the computation of the time provided for payment is as certain for the purpose of Article 182 of the Indian Limitation Act as a specific date entered in or provided for by a decree or order. The decision in *Yusuf Khan* v. *Sirdar Khan* (5), to which a reference has been made during the hearing, has been considered in *Kaveri* v. *Venkamma* (6) and *Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (7). Whatever might be said as regards a decree directing the payment of an annuity, no such consideration would arise, where a specific period is fixed for payment of the money and the right to apply for execution is postponed till default is made in payment within that period.

A reference has also been made to the decision in *Lalta Prasad* v. *Sheo Sahai* (8), but in that case the decree, though purporting to have been passed in accordance with the terms of a compromise, did not specify the limit of time within which the decretal money was to be paid.

In any case, the substitution of the name of Ram Anjor in the original application for execution of the 7th of November 1921 had the effect of validating the application for execution made against the estate of Mahip Shukul, though a legal representative who was not in possession of that property was wrongly entered as having been in possession thereof.

The lower Appellate Court has referred to the decision in *Gyanendra Nath Basu* v. *Rani Nihalo Bibi* (9), but in that case the second application was made for execution against certain property against the legal representative after the previous application for execution against other property had been dismissed against persons who were not really the legal representatives of the deceased judgment-debtor. The decree in the present case was passed against the estate of Mahip Shukul and it was against that estate that the present application for execution was made, though the legal representative was wrongly described as Ram Sumer instead of Ram Anjor, who was eventually substituted in the place of the former.

It is also urged that an erroneous decision on the question of limitation cannot be challenged in an application for revision under section 115 of the Code of Civil Procedure, but whether section 115 of the Code of Civil Procedure or section 107 of the Government of India Act is applied, the decision of the Courts below which ignores that the decree, as it was originally passed, was not capable of

(4) 37 Ind. Cas. 741 ; 40 M. 989 ; 31 M. L. J. 513 ; (1916) 2 M. W. N. 296 ; 20 M. L. T. 391 ; 4 L. W. 507.
(5) 7 M. 83; 2 Ind. Dec. (N. S.) 643.
(6) 14 M. 396 ; 5 Ind. Dec. (N. S.) 277.
(7) 12 B. 65 ; 6 Ind. Dec. (N. S.) 529.
(8) A. W. N. (1895) 193.
(9) 6 Ind. Cas. 88; 32 A. 404 ; 7 A. L. J. 512.

execution till the expiry of six months from the date of the decree, is so palpably erroneous as to amount almost to an improper refusal to exercise the jurisdiction which was vested in the Court, to execute the decree to the prejudice of the party entitled to execute the same.

The application is, therefore, allowed and the execution case remanded to the Court of first instance with a direction to reinstate it under its original number and to proceed to dispose of it in the manner provided by the law. The costs here and hitherto will abide the result.

K. S. D. *Application allowed.*
N. H.

MADRAS HIGH COURT.

REFERRED CASE NO. 5 OF 1922.

September 28, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Wallace.

THE SECRETARY TO THE BOARD OF REVENUE (INCOME-TAX), MADRAS—REFERRING OFFICER
versus
S. R. M. A. R. RAMANATHAN CHETTIAR—ASSESSEE.

Income-Tax Act (VII of 1918) s. 9 (2), cl. 7—Machinery in state of repair, sale of—Loss—Assessee, whether entitled to reduction.

Under section 9, sub section (2), clause (vii), of the Income-Tax Act an assessee is not entitled to a deduction from the annual profits of loss incurred by him by sale of certain machinery in his business where the machinery is not sold or discarded as obsolete. The words "as obsolete" in clause I (vii) of the section govern not only the immediately preceding word "discarded" but also the earlier word "sold".

Case stated under section 51 of the Indian Income-Tax Act VII of 1918 by the Secretary to the Board of Revenue (Income tax) Madras.

Mr. *C. V. Ananthakrishna Aiyar*, for the Crown.

Mr. *M. Subbaroya Aiyar*, for the Assessee.

JUDGMENT.

The Chief Justice :—The question referred for the opinion of the Court is whether the assessee is entitled to the deduction from the annual profits of what, in fact, is a loss made by him by the sale of certain machinery or plant. He carried on various businesses two of which consisted of rice mills. He sold those mills and wishes to bring into account the difference between the purchase price of the machinery at those mills and the sale price, giving credit for the amounts, if any, allowed to him in previous years for depreciation. Whether he can do so or not turns on the proper interpretation of section 9 of the Income-Tax Act, VII of 1918, sub section (2), clauses (vi) and (vii). Certain specified allowances are thereby made which may be taken into account in arriving at the profits of the business. While the machinery is being used, clause (vi) allows a certain annual depreciation on such machinery, the practice being, we are told, to consider that the machinery has a life of 15 years, and, therefore, to allow an annual depreciation as a general rule of 6⅔%. Clause (vii) deals with cases where the machinery has been sold or discarded as obsolete, and in that case, the assessee is entitled to deduct from his profits the difference between the original cost, reduced by the annual allowances for depreciation added together, and the amount for which the machinery is actually sold or its scrap value. It was contended in this case that the assessee who had got rid of these two mills by sale had sold them as obsolete. There was no finding of fact as to this in the original case referred to this Court and for that reason we sent it back to the Commissioner. Evidence has been taken before him and he has found as a fact that the machinery was sold as not obsolete. It appears that, so far as one of the mills is concerned, the machinery had been allowed to get into a very bad state of repair, and required the expenditure of a considerable sum to put it in proper working order. Evidence has also been given that it had been put in proper working order by the purchaser and is being used for its proper purposes, namely, the milling operations. On that the Commissioner has found the fact that the machinery was not obsolete, and I cannot see how we can say that he was wrong in so finding.

It is then argued that, on the true construction of clause (vii) all sales of machinery are included irrespective of whether they are sold by reason of their being obsolete; in other words, that the words "as obsolete" govern the word 'discarded' appearing immediately before them and not the word 'sold'. The phraseology of this clause is not very happy because it is. . . . . obvious that the words could bear either meaning: but the Statute has been punctuated, and we must take the punctuation marks as part of the statute. If it was intended to read the words "as obsolete" as governing 'sold' one would expect to find a comma after the word 'sold'. There is none, the comma being put after the word 'obsolete'. Further, it does not (*Sic*) probable that the Legislature meant to provide a deduction for losses on sales of a machinery by manufacturing concerns without at the same time providing for the bringing into account as profits any profits that might be made on such sales. Sales of machinery are sales of part of the capital of a concern of this kind, and thus resulting profits or losses on such sales are dealt with quite apart from this section. Without this clause at all, the Commissioner, can and does consider whether or not realised profits or realised loss on such a sale is to be brought into account or not, and the answer depends on whether the sale is in fact part of the ordinary business operations of the concern.

On these grounds, I think the answer to the question referred to us is that the assessee is not entitled to the deduction claimed.

The question originally referred to us was "Is an assessee disentitled from claiming from out of his income from business an allowance under section 9 (2) (vii) in respect of a rice mill machinery when the assessee has ceased to derive profits from rice mill business though he earns profits from other parts of his business?" That question does not arise as we find that he is not entitled to an allowance under section 9 (2) (vii) because the machinery was not sold or discarded as obsolete. We are told that the assessee came here originally believing that the point he had to argue was whether the fact that he ceased to derive profits from his rice mill business when he earned profits from other parts of his business prevented section 9 (2) (vii) applying, and he understood from the wording of the reference that the whole case was going to proceed in this Court on the basis that he would be entitled to an allowance under section 9 (2) (vii) but for the fact that he ceased to carry on the rice mill business, and that this was admitted. I think there is a good deal in what he says, and that he could not have had any idea from the terms of the reference that he was going to be called upon to aruge the question whether or not the sale of his business machinery had been because that machinery had become obsolete and that, therefore, he was not entitled under section 9 (2) (vii) in any event. In these circumstances, I think that there must be no costs of this reference.

Wallace, J:—I agree. I have nothing to add.

V. N. V. *Reference answered in the negative.*
K. S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 583 OF 1922.

February 6, 1924.

Present:—Mr. M. B. Kinkhede, A. J. C.

BHAIRONPRASAD AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
Mahant LAXMI NARAYAN DAS AND
ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act, (I of 1872) s. 3—"Matters before the Court," scope of—Proof, what constitutes—Civil and criminal cases, Quantum of proof necessary—Good faith—Consideration—Burden of proof.

The expression "matters before it" in section 3 of the Evidence Act includes matters which do not fall within the definition of "evidence" as given in it, which must be read with that of "proved" given in the said section. [p. 610, cols. 1 & 2.]

Proof considered as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of Courts is effected by (1) evidence or statements of witnesses, admissions

BHAIRONPRASAD *v.* LAXMI NARAYAN DAS

or confessions of parties as also production of documents, (2) presumptions,(3) judicial notice, (4) inspection. [p. 610, col. 2.]

The probative force, which is the extent to which any individual material of evidence aids in the establishment of the general truth, must be sufficient to induce the Court either to believe in the existence of the fact sought to be proved or to consider its existence so probable that a prudent man ought to act upon the supposition that it exists. [p. 610, col. 2.]

What circumstances will constitute proof can never be the subject of general definition. [p. 610, col. 2.]

In Civil cases what is required or considered sufficient is preponderance of probability while in Criminal cases, the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal, as reasonable men beyond all reasonable doubt unless otherwise proved. [p. 610; col. 2.]

Where the good faith as also the consideration of a transaction are in question, the primary duty must rest on the alienee to prove both. [p. 612, col 1.]

Appeal against the decision of the Additional District Judge, Raipur, in Civil Appeal No. 74 of 1922, decided on the 14th September 1922.

Mr. *V. Bose*, for the Appellants.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—I think the case must go back. The lower Appellate Court's decision appears to have been very much influenced by the absence of certain links in the affirmative evidence on record which would have connected the several parts thereof and made the plaintiffs' story more probable and believable. The oral as also the documentary evidence on record was consequently not fully appreciated by that Court. The *lacuna* which was wanting could have been *required* to be supplied by the lower Appellate Court under the ample power vested in it by law, or at any rate presumptions allowable under law could have supplied their place if the Court had made them instead of insisting on the giving of affirmative evidence. Every Court is bound to base its decision not merely on "evidence" but on "matters before it." The expression "matters before it" in section 3 of the Evidence Act includes matters which do not fall within the definition of "evidence" as given in that section. Therefore, in determining what it *evidence* other than "evidence" in the phraseology of the Act, the definition of "evidence" must be read with that of "proved" given in the said section. Proof in strictness marks merely the *effect* of evidence. Proof considered as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of the Court is effected by (a) *evidence* or statements of witnesses, admissions or confessions of parties, as also production of documents; (b) *presumptions*; (c) *judicial notice*; (d) *inspection* which has been defined as the substitution of the eye for the ear, in the reception of evidence, as in the case of observation of the demeanour of witnesses, local investigation, or in the inspection of the instruments used for the commission of a crime. The extent to which any individual material of evidence, aids in the establishment of the general truth is called its *probative force*. This force must be sufficient to induce the Court either to believe in the existence of the fact sought to be proved or to consider its existence so probable that a prudent man ought to act upon the supposition that it exists. (Ameer Ali's Law of Evidence, 6th Edition, page 112).

The circumstances of each case must determine whether a prudent man ought to act upon the supposition that the facts exist from which a liability is to be inferred. What circumstances will constitute proof can never be the subject of a general definition. But one thing is clear that in Civil cases what is required or considered sufficient is preponderance of probability, while in Criminal cases, owing to the serious consequences of an erroneous condemnation both to the accused and the society, the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt—Parke, B., in *R.* v. *Sterne* (1) cited in Best on Evidence, 11th Edition, page 84. In the *Queen* v. *Madhub Chunder Giri Mohunt* (2), we find the following observations:—

> "In ordinary civil cases, a Judge of fact must find for the party in whose favour there is a preponderance of proof, although the evidence be not entirely free from doubt. In criminal cases, no weight of preponderant

(1) Surrey Sum. Ass. 1843, M. S.
(2) 21 W. R. 13 at p. 20 Cr.

> evidence is sufficient short of that which excludes all reasonable doubt. The party accused is entitled to the benefit of the legal presumption in favour of innocence, and in doubtful cases that may suffice to turn the scale in his favour."

The Additional District Judge while considering the question whether the injunction which was granted on the application of the plaintiffs on 6th Decembec 1917 as per Exhibit P-2 was actually issued or not, has observed as follows :—

> " Exhibit P-2 does not show that an injunction was as a matter of fact issued. Much less does it show against whom it was issued and in respect of which property."

The Additional District Judge in making this remark has failed to give plaintiffs the benefit of the ordinary presumption that attaches to conduct of men in official matters. Every Court is furnished with a machinery for giving effect to its orders and it would be unjust to think that the subordinate staff attached to each Court fails in its duty of carrying out the orders of the Court. On the contrary the Courts should, in my opinion, presume that the common course of business has been followed in the case; section 114, illustration (*f*), of the Indian Evidence Act enables the Court to presume that the common course of business has been followed in particular cases; of course, this presumption could be rebutted by showing that the common course of business was interrupted by disturbances, etc. Section 16 of the Evidence Act lays down that when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. The presumption in such cases arises out of the application of the general maxim *omnia praesumuntur rite esse acta* and proceeds on the well recognized fact that the conduct of men in official and commercial matters is to a very great extent uniform. In such cases there is a strong presumption that the general regularity will not, in any particular instance, be departed from. I do not think that in the case of Courts of civil jurisdiction equipped with Court Readers, and process-writers and a regular staff of process-servers under a duly qualified Nazir, it would not be too much to expect that the usual course of business was followed by all officials concerned. Every one is presumed to govern himself by the rules of right reason and consequently that he acquits himself of his engagements and duty. Whenever it is established that one act is the usual concomitant of another the latter being proved the former will be presumed ; for this is in accord with the experience of common life. It is simply the process of ascertaining one act from the existence of another (Ameer Ali's Law of Evidence, 4th edition, page 205).

The Circulars lay down the duty of the Court Readers and process-writers attached to the Court to look into the records and see the orders and to carry them out. I am not prepared, therefore, to presume failure in the discharge of their duties by the clerks attached to a Court, as the lower Appellate Court appears to have done. I would rather go to the length of observing that in the common or usual course of natural events human conduct and public and private business, in their relation to the facts of this particular case the lower Appellate Court ought to have presumed that the injunction granted was not only issued as per orders of the Court, but that the same was likely to have been and must have been served in due course on the principal defendant. Section 114 of the Evidence Act gives ample scope for such a presumption being made. From the absence of any complaint in the subsequent proceedings on the part of the plaintiff on the score of non-service of the injunction I think the Court would have been justified in thinking that it must have been been served duly before the date of the next hearing which was 3rd January 1918. Otherwise, the plaintiff who was anxious to thwart the defendants' attempt at alienation would not have sat quiet over the affair. The machinery of the *Nazarat* for effecting service of notices, orders and injunctions issued by the Courts on the civil side may presumably be credited with sufficient degree of regularity in the matter of the systematic operation of the service of processes so as to ensure their delivery to the proper addressees.

The injunction which the Court granted was not as effective a remedy as the order of attachment would have been, but I do not think the Court of Appeal would

have been justified in holding that because plaintiff did not get the full relief of attachment he prayed for he would spurn at the lesser preventive relief the Court was pleased to grant, so as not to pay the necessary process-fee for the issue of the injunction granted. His self-interest dictated to him the necessity of taking very prompt steps to obstruct the defendant in the act of giving effect to the meditated alienation of property which he was afraid was going to prejudice his (plaintiff's) interests as a creditor. The case was fixed for final disposal and still the defendant No. 1 Sobha did not dare to attend, and the other defendant prayed for an adjournment on the ground that Sobha was conversant with facts; thus discloses an attempt to procrastination and the actual defence put in still confirms this impression of any right-minded man. Under these circumstances, it would have been unusual for the plaintiff to have kept quiet and to have omitted to move the Court over again for the issue of an injunction had the one ordered to be issued remained unissued or unserved. I have absolutely no doubt on the point of issue and service, although I should have myself very much wished that the plaintiff could and ought to have supplemented the evidence by more positive proof tending in that direction. He has now produced before this Court a certified copy of the Register showing the issue of processes from the Court which granted the injunction and it corroborates in every particular the presumptions which I have drawn here. I, therefore, think, that the lower Appellate Court has failed to draw the natural inferences or presumptions which it could legitimately have drawn, or that, at any rate, it ought to have *required* the plaintiff to supply the *lacuna* that was found wanting in the case. I, therefore, admit the additional evidence of the certified copy of the Register of processes, which is filed along with the memorandum of second appeal.

Where the good faith as also the consideration of a transaction are in question, the primary duty must rest on the alienee to prove both. Proof of consideration without proof of good faith will not be sufficient to entitle him to verdict in his favour. The case has not been approached by the lower Appellate Court, which has reversed the decision of the first Court, from the right point of view, and consequently I think it must go back to that Court for fresh decision with due advertence to the above remarks.

The appeal is allowed with costs. The appellants will get a refund of Court-fees paid on the memorandum of second appeal. The costs in the Courts below will abide the event.

G. R. D. *Appeal allowed; case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 898 OF 1922.

December 30, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Maulvi SHARIF AHMAD ALVEE—PLAINTIFF—APPELLANT

versus

MUHAMMAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—**Wajib-ul-arz**, *entry in, construction of*—**Shurkayan shikmi**, *meaning of.*

An entry in a *wajib-ul-arz* provided that on the occasion of a transfer, the first right to take the property would be given to "*shurkayan shikmi*" and that, if they declined, an offer should be made to the other proprietors of the *thok* or *mahal*:

***Held*, (1) that the primary idea underlying the word *shikmi* was inclusion, that is to say, the *shurkayan shikmi* must, in some way or other, be connected with the vendor by reference to inclusion in some thing which contained them both, e.g., a *khata*;** [p. 613, col. 2; p 614, col. 1.]

(2) that, therefore, the expression *shurkayan shikmi* meant those proprietors in the *thok* or *mahal* who were proprietors in the same *khata* with the vendor.

Abdul Shakur v. *Mendai*, 23 A. 260; A. W. N. (1901) 63, followed.

Bohal Singh v. *Mubarak-un-Nissa*, 5 A. L. J. 52; A. W. N. (1908) 16; 30 A. 77, dissented from.

Appeal from the decree of the Subordinate Judge, Muzaffarnagar, Meerut, dated the 20th March 1922.

SHARIF AHMAD ALVEE *v.* MUHAMMAD

Mr. *Nehal Chand*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal raises a somewhat difficult question of interpretation in connection with the provisions of a certain *wajib-ul-arz* relating to pre-emption.

According to what is stated in the *wajib-ul-arz*, on the occasion of a transfer, the first right to take the property is given to a class which is defined in the wajib-ul-arz as "*shurkayan shikmi.*" It is provided that in case the members of the first class decline to accept the offer of the property then the offer is to be made to the second class of persons who are described as "*digar malikan thok o mahalke*" A great deal of controversy has arisen regarding the meaning to be attached to the words "*shurkayan shikmi.*" We have been referred to a decision of a Bench of this Court reported in *Abdul Shakur* v. *Mendai* (1). In that case it was sought to attribute to the expression "*hissedaran shikmi*" a meaning derived from blood relationship. In other words, the suggestion was that *hissedaran shikmi* were people who had issued from the same "*shikam*;" that is to say, the expression was used in the same sense as the English expression "uterine brothers."

This interpretation was definitely rejected by both Judges in that case and on the interpretation of the *wajib-ul-arz* in that case it was held that "*hissedaran shikmi*" meant in that particular case co-sharers in the same *khata*, the *khata* being a smaller sub-division of a *patti*. A *patti* is, in the ordinary acceptance of the term, a smaller division than the *thok*.

On the other hand, it was decided by another Bench of this Court in the case reported in *Bahal Singh* v. *Mubarak-un nissa* (2) that the words "*shikmi shurkayan*" are intended to denote relatives by blood and not co-sharers in any sub-division of a *mahal*. We have, therefore, divergence of opinion regarding the matter now before us and it is open to us to take our own course. The interpretation put on this expression in the case *Bahal Singh* v. *Mubarak-un-Nissa* (2) does not commend itself to us.

(1) 28 A. 260 ; A. W N. (1901) 63.
(2) 5 A. L. J. 52 ; A. W. N. (1908) 16 ; 30 A. 77.

We cannot agree that, in any circumstances, the expression "*shikmi shurkayan*" was ever intended to apply to persons who are connected by blood relation.

We agree with the view which was taken in the earlier case and we, therefore, hold that in the present case the words "*shurkayan shikmi*" should be interpreted in a similar sense.

It is indeed true that the language of the *wajib-ul-arz* with which we are now dealing is not identical with the language of the document which was before the earlier Bench but, having regard to all the circumstances, it seems to us that the only meaning of which the expression is susceptiable here is the meaning which was given to it in the judgment of Sir Arthur Strachey and Mr. Justice Banerji.

If we look at the language of the *wajib-ul-arz* itself this construction appears to be the only reasonable one.

We have already stated that the second class of pre-emptors consists of "other proprietors of the *thok* and *mahal*."

It follows from the use of the word "*digar*" in the second category that the persons who are described in the first class as "*shurkayan shikmi*" must also be proprietors of the thok (*malikan thok*).

How, then, are we to distinguish between the proprietors of a *thok* who are specified in the second division? There must obviously be some basis of classification, and in our opinion that basis is to be found in the word "shikmi." And in interpreting that expression it seems to us that the only reasonable meaning which it can bear is that the persons who are described as "*shurkayan shikmi*" are persons who, being proprietors in the *thok*, are brought into a closer relationship than proprietors of the *thok* by being included in a sub-division of the *thok*, as, in this instance, a *khata*. The principle of decision which was adopted in the earlier of the two reported cases applies here. We quote the following from the judgment of the learned Chief Justice in that case (see page 262 of I. L. R., 23 Allahabad) :—

"The primary idea, as Mr. Justice Banerji has said is inclusion; that is to

> say, the *kissedaran shikmi* must in some way or other be connected with the vendor by reference to inclusion in something which contains them both, such as, in the case before us, in this *khata* in which the shares of both are included."

Applying this interpretation to the *wajib-ul-arz* now before us, we must hold that the decision of the Court below is erroneous. The facts are these:—The sale sought to be pre-empted was made on the 2nd of January 1920, and, looking at the sale-deed, it appears that two items of property were sold, namely, items out of two distinct *khewats* or sub-divisions of the *thok*, namely, Nos. 265 and 269.

It is proved beyond all dispute that the plaintiff in this case and the vendor are co-sharers in one of these *khewats*, namely, No. 269.

At the time this transfer was made the purchaser was a stranger to the village but subsequently he acquired by a gift a share in *thok Ansaryan* in *khewat* No. 323.

It may be mentioned that *khewats* Nos. 265 and 269 are also in *thok Ansaryan*.

This property which the vendee has acquired has undoubtedly constituted him one of the proprietors of the *thok*, and unless the plaintiff has got a superiror right the suit must fail.

For the reasons given, we think that the plaintiff must be deemed to have a superior right with respect to the item of property comprised in *khewat* No. 269. The reason is that both the plaintiff and the vendor are linked more closely together by their being included in one *khewat* or *khata*. In our view of the case, therefore, the correct decision should be that the plaintiff is entitled to have his claim decreed regarding the item of property sold in *khewat* No. 269.

As regards the item comprised in *khewat* No. 295 he is in no better position than the vendee, and the suit regarding that item should be dismissed.

The result is that the case must be sent back to the lower Appellate Court for decision of the suit on this basis. The Court will now proceed to decide the other questions outstanding between the parties. Costs will abide the event.

Z. K. *Appeal decreed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 161 OF 1922.

March 14, 1924.

Present :—Mr. Kinkhede, A.J.C.

BALAJI VINAYAK BUTI—DEFENDANT—APPELLANT

versus

VITHOBA—PLAINTIFF—RESPONDENT.

Mortgage—Suit to enforce mortgage—Person in possession of mortgaged property whether necessary party—Decree in favour of prior mortgagee—Subsequent mortgagee whether bound—Puisne mortgagee, suit by—Prior mortgagee, duty of—Plaint not showing defendant's interest—Civil Procedure Code (Act V of 1908), O. VII, r. 5, O. XXXIV, r. 1.

Merely because a person is in possession of mortgaged property he cannot be said to have such interest in the mortgage-security or the right of redemption, as would make his joinder as co-defendant to a suit to enforce a mortgage, absolutely necessary under O. XXXIV, r. 1, Civil Procedure Code. [p. 616, col. 2.]

A decree obtained against the mortgagor by a prior mortgagee on the basis of his mortgage without impleading the subsequent mortgagee cannot bind the latter. [p. 616, col. 2.]

It is only in a suit brought by a puisnee mortgagee for the express purpose of selling the mortgaged property free of prior encumbrance that the prior mortgagee is bound to set up and prove his mortgage. [p. 616. col. 2.]

A plaint which does not show that the defendant is interested or claims to be interested in the subject-matter of the suit and that he is liable to be called upon to answer the plaintiff's demand is a defective plaint, because it does not comply with the requirements of O. VII, r. 5, of the Civil Procedure Code. The Court is in such a case bound to call upon the plaintiff to disclose his cause of action correctly against each defendant. [p. 616, col. 2; p. 617, col. 1.]

Appeal against the decree of the District Judge, Wardha, in Civil Appeal No. 126 of 1921, dated the 4th January 1922.

Mr. *V. D. Kale*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by a mortgagee on the basis of a mortgage dated 6th October 1914, for sale of the mortgage-property which consists of a house, shop, and the crops of certain occupancy land. Defendant No. 1 is the mort-

BALAJI VINAYAK BUTI *v.* VITHOBA

gagor, while defendant No. 2 is impleaded as a co-defendant on the ground that he is in possession of the house and the shop. The amount alleged to be due on the mortgage is Rs. 1,781-5-0 on account of principal and interest calculated up to 11th April 1921 and the plaintiff seeks a decree directing defendants Nos. 1 and 2 to redeem the mortgage by payment of that amount and costs and future interest and in the case of failure for realizing the same by sale of the property. The defendant No. 1 admitted the execution of the bond in suit and the receipt of consideration. The defendant No. 1 stated that the property mortgaged with plaintiff was already mortgaged with defendant No 2; that in execution of the decree obtained on that mortgage defendant No. 2 had purchased that mortgaged property. The defendant No. 2's agent in his oral examination gave further details as regards his mortgage and also the mortgage-suit and the auction-sale and urged that his mortgage-decree was still unsatisfied. When asked with reference to these details the plaintiff denied knowledge of the mortgage, presumably because he was not made party to the mortgage-suit, but added that if it be found that it was a valid mortgage then he was willing to redeem the same. Issues were framed and, curiously enough, the defendant No. 2 was called upon to prove his prior mortgage as against the plaintiff in a suit where the only relief claimed was a decree for sale of the mortgaged property, on the basis of the second mortgage and not for sale expressly free of the defendant No. 2's prior incumbrance, on the ground that it was either non-existent or invalid. The case was fixed for evidence of both parties for 25th August 1921. The plaintiff's mortgage was held proved by the first Court. Defendant No. 2 filed only a copy of the mortgage, dated 26th July 1913, and of the preliminary decree obtained by him on 30th October 1917. He could not file the original deed which had become merged in the decree and was with the record of Civil Suit No. 596 of 1917 of the Court of Munsif, Waroa. The Trial Court observes that defendant No. 2 did not take any steps to cause the original mortgage-deed to be produced or show any cause for admitting secondary evidence of certified copy of the same. As the original document was not before the Court and could not be shown to the witnesses who were summoned to prove it, the Trial Court treated the copy of the mortgage as inadmissible and held that defendant No. 2 has failed to prove the genuineness of the earlier mortgage. The Court, therefore, held that nothing was proved to be due to defendant No. 2 and accordingly decided to pass a decree directing defendant No. 1 alone to pay Rs. 1,781-5-0 and the costs of the suit and interest on Rs. 1,000 at 1½ per cent. per mensem as the price of redemption. This decision was followed by a preliminary decree under O. XXXIV, r. 4, Civil Procedure Code, but that decree gave defendant No. 1 alone, who had practically no interest in the property, a right to redeem, and did not declare anything about defendant No. 2's liability to redeem the second mortgage or about plaintiff's non-liability to redeem defendant No. 2's mortgage.

The plaintiff did not appeal against what was virtually a paper decree against defendant No. 1, but an appeal was preferred to the District Judge's Court by defendant No. 2 against it under the erroneous notion that there was a decree against him. The District Judge dismissed the appeal and it is against this dismissal the present second appeal has been preferred by defendant No. 2. The defendant No. 2 urges several grounds of appeal labouring under the same erroneous impression that there was a decree against him. After the arguments had been partly heard it was discovered in this Court that no decree was passed against defendant No. 2 compelling him to redeem the plaintiff's mortgage. This disclosure changed the aspect of the whole case, and the parties asked for amendment of the proceedings, and I gave leave to them to move this Court for pointing out the particular amendments they desired. The plaintiff desires that the amendments be so made as to show that a decree was passed against the defendant No. 2, as it were, from the very outset.

The defendant No. 2 opposes the amendment on the ground that the plaintiff cannot be given a decree in unqualified terms. He declares that he does not want to redeem the plaintiff's mortgage. He is willing to a decree being passed for sale of the mortgaged property subject to such rights of his as he may have as a prior mortgagee. But the plaintiff does not

seem willing to accept such a decree. This form of decree would have left the question open to both the parties or the ultimate auction-purchaser to have the factum and validity of the prior mortgage, dated 26th July 1913, adjudicated upon in a second suit. Owing to this disagreement between the parties, as to the form in which relief is to be given in this case, I am constrained to decide the question whether or not the present appeal as also the appeal to the first Appellate Court were maintainable.

It has been held in *Maku* v. *Kishan* (1) that it is only the decree against which there is a right of appeal. No decree having been passed against defendant No. 2 the plaintiff was bound to have appealed against the decree as passed and moved the Appellate Court to pass it. The decree of the first Court as it stands at present is final as between the parties, namely, plaintiff and defendant No. 1, but the plaintiff derives no advantage from it as there is no direction in it to defendant No. 2 to redeem the plaintiff's mortgage, and the latter cannot be visited with consequences of his failure to redeem, by sale to the property in his (defendant No. 2) hands, nor can the defendant No. 2 say that the sale of the property be held subject to his prior mortgage, because there is no decree to that effect. The plaintiff must thank himself for having got a decree which practically gives him no relief against the mortgaged property. Of course, this does not prevent him from going through the farce, if he so desires, of causing the mortgaged property to be formally sold and the same may be purchasedfor what it is worth, but the auction-purchaser shall not be entitled to get possession of the property purchased as against defendant No. 2 against whom no decree is passed. It was to avoid this anomalous result that I had suggested to the parties the middle course of agreeing to a decree being passed even against defendant No. 2 subject to the qualification that the mortgaged property may be sold in execution of the plaintiff's mortgage-decree subject to such rights as the defendant No. 2 may be able to establish on the basis of his alleged prior mortgage. But the plaintiff does not seem prepared to accept such a decree. As, in my opinion, there is no decree against the defendant No. 2, the litigation must be taken to be still pending as against defendant No. 2. The appeal to the District Judge as also the second appeal to this Court were, therefore, premature. I have, therefore, no alternative but to dismiss the second appeal as premature and unmaintainable. I direct that each party shall bear his own costs of this appeal.

The justice of the case, however, requires that, although this second appeal is premature, should treat it as a revision and set aside the decisions of the Courts below which, if allowed to stand, may create complications hereafter and as I think the case deserves to be remanded with further directions for trial *de novo*. I accordingly proceed to consider the matter on the revision side as was done in *Govind Rao* v. *Narayan Rao* (2).

It is only in a suit brought by a puisne mortgagee for the express purpose of selling the mortgaged property free of the prior incumbrance that the prior mortgagee is bound to set up and prove his mortgage, the present is not a suit of that character. It is a suit by a puisne incumbrance to work out his rights on the puisne mortgage only wherein the defendant No. 2 is impleaded simply because he is in possession of the mortgaged property. Merely because a person is in possession of the mortgaged property, he cannot be said to have such interest in the mortgage-security or in the right of redemption, as would make his joinder as co-defendant to a suit to enforce a mortgage absolutely necessary under O. XXXIV, r. 1, Civil Procedure Code. This Court has laid down in *Sukha Ganda* v. *Chaura Saspathy* (3), that if a person in possession of mortgaged property is joined as a co-defendant to a mortgage suit not because he has any right of redemption but because he is in possession of some of the mortgaged property such a person should be discharged from the suit.

A plaint which does not show that the defendant is interested or claims to be interested in the subject-matter of the suit and that he is liable to be called upon to answer the plaintiff's demand is a defective plaint, because it does not comply with the requirements of O. VII, r. 5 of the Civil Procedure Code. The

(1) 15 Ind. Cas. 985 ; 8 N. L. R. 92.

(2) 17 C. P. L. R. 129 at p. 130.
(3) 17 C. P. L. R. 29 at p. 30.

Court is in such a case bound to call upon the plainitff to disclose his cause of action correctly against each defendant. It is just possible that the person in possession may be a trespasser and as such he may not be a necessary party to the mortgage-suit: *Adam Khan* v. *Dattaram* (4). He may equally be a person interested in the mortgage and be in possession in consequence of such interest. Therefore, whether such interest is in the nature of a paramount title or of a paramount lien, or one derived from the mortgagor subsequent to the date of the mortgage in suit is a matter which the plaintiff must be compelled to state in the plaint or in the pleadings so as to enable the Court to ascertain whether the person impleaded as defendant on the ground of his being in possession was rightly impleaded as a necessary or a proper party to the suit. It is this failure, on the part of the plaintiff, to state clearly the necessary information in the plaint or in the pleadings, and, on the Trial Court's part, to exercise the oridinary care of examining the plaint with a view to see that it complies with the requirements of the law as regards the frame of the suit, or to examine the parties, that has caused all this trouble. If the Court of first instance had insisted upon the plaintiff's disclosing in the plaint the nature and the mode of acquisition of the interest in virtue of which the defendant No. 2 was in possession, it would have at once enabled the Court to know that his right to possession was, on plaintiff's own admission, based upon the title as auction-purchnser in pursuance of a decree based on the prior mortgage, dated 26th July 1913. This disclosure by the plaintiff in the plaint of the nature of defendant No. 2's interest in the property would have enabled the Court to call upon the defendant No. 2 to make his election under section 101, Transfer of Property Act, as to whether he wished to take his stand on his rights as an auction-purchaser, or fall back on his rights as a prior mortgagee, and the plaintiff could then have been similarly asked to say whether he wants to have the scope of his mortgage suit based on the puisne mortgage, enlarged so as to comprise a claim either for redemption of the prior mortgage, or for a mere declaration that he is entitled to sell the property on the basis of his own second mortgage free or subject to defendant No. 2's prior mortgage, as the case may be. If the plaintiff did not admit these facts, the Trial Judge ought to have insisted upon the plaintiff definitely stating in what other way, if any, according to him, the defendant No. 2 had derived his right to redeem and also to possession if not as an auction-purchaser under the decree based on the prior mortgage and demanded proof from him of defendant No. 2's such interest. In other words, he ought to have beed asked to state definitely whether or not he admitted as correct the version given by defendant No. 2 of the origin of his title to possession. The defendant No. 2 should have also been asked definitely whether he wished to redeem the subsequent mortgage or whether he would like to have any adjudication in the suit itself regarding his rights under prior mortgage. The case as it stands discloses that there has been a very perfunctory trial and neither party has been properly examined with regard to the several essential points and the result has been most unsatisfactory and prejudical to the interest of both plaintiff and the defendant No. 2.

It will be desirable to point out here that the scope of a mortgage suit is a very limited one, much more so where the mortgage sought to be enforced is only a puisne mortgage and not the first mortgage of the property. What is mortgaged to a puisne mortgagee is only a right to redeem because that is the only interest left in the mortgagor after he has once created a first mortgage upon the property, and, therefore, as the object of the mortgage suit is to cut off the equity of redemption of persons interested in the right to redeem, the only persons who can be impleaded as defendants to such a suit are the mortgagor or persons deriving title from the mortgagor subsequent to the date of the mortgage, or persons who claim to be interested in the residuary equity of redemption. It is on this principle that the Legislature has added an explanation to r. 1, O. XXXIV of the Civil Procedure Code, which says that puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit. . . . This explanation is new and has been inserted with a view to supersede certain decisions under section 85 of the Transfer of Property Act, to the effect that a prior mortgagee is a

(4) 47 Ind. Cas. 536 ; 17 N. L. R. 176.

necessary party to a suit for sale or foreclosure by a puisne or subsequent mortgagee of which I might cite an instance from our High Court *Chulaji* v. *Fakir Shah* (5). It declares that a prior mortgagee is not a necessary party to such a suit.

In the present case, therefore, the defendant No. 2 in his capacity of a prior mortgagee was not a necessary party. But he had the double character of being also the mortgagor's representative and as such he could, if he chose to, redeem the second mortgagee. But these characters or any of them ought to have been disclosed by the plaintiff himself in the plaint or admitted in the pleadings. This has not been done. It is no doubt clear that the fact that the prior mortgagee had obtained a decree on the basis of his mortgage against the mortgagor without impleading the plaintiff, subsequent mortgagee could not affect the second mortgagee's right to redeem the first mortgage. The sale held at the instance of the prior mortgagee had not the effect of displacing the second mortgagee and leaving him with nothing but a claim against the balance, if any, of the sale proceeds of the property after satisfying the first mortgagee. He had, as some High Courts recognize, a right to sell the property for what it is worth. The omission to implead the second mortgagee in the first mortgagee's suit did not, therefore in any way, prejudice his rights. As a second mortgagee he could have sued the mortgagor for sale of the property subject to the first mortgage or he could have redeemed the first mortgage and then sued the mortgagor for sale on both the mortgages. But finding that the plaintiff had done neither of these two things in this suit, it was the incumbent duty of the Trial Court to call upon him to state definitely in which of the two ways he wanted to proceed, and whether he would like to amend his plaint and claim any of those reliefs. The powers which O. X of the Civil Procedure Code vest in the Civil Courts to examine the parties are mainly intended to draw out by *viva voce* examination the real points in controversy between them and thus prevent the real matter in dispute remaining undecided or left out from consideration, There are other enabling provisions also in O. XI and O.XII of the Civil Procedure Code which the parties can avail themselves of and thus reduce the points of dispute between them and lessen the number of issues to be framed in the case. I am firmly of opinion that if the Court of first instance had exercised its powers, or the defendant No. 2 had taken advantage of the appropriate provisions of the Civil Procedure Code in the matter of elucidating admissions on these points there would have been little or no controversy as regards the character of his interest in the subject-matter of the suit.

The result of these irregularities or defects in the procedure of Trial Court has been that the trial was defective from the very beginning and the real points necessary for proper determination of the controversy between the parties have not been able to place before the Court all the documentary evidence necessary for the proper adjudication of their respective rights. I think that it is in the interest of both parties and of justice, that I should remand the case for trial *de novo*. I, therefore, acting on the revisional side, set aside the decisions of the Courts below so far as they relate to the defendant No. 2 and remand the case to the first Court for trial *de novo*, with advertence to the above remarks, as between plaintiff and defendant No. 2. Both parties are to blame for this result and I, therefore, direct that the costs of the appeal to the District Judge will be borne by the party incurring them while those of the Trial Court will abide the event.

G. R. D.
K. S. D.

Appeal treated as Revision and allowed:
Case remanded.

(5) 17 C. P. L. R. 139.

CHIDAMBARAGURUKKAL *v.* SIVAGNANA SUNDARAM PILLAI

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 362 OF 1921.

February 8, 1924.

Present :—Mr. Justice Venkatasubba Rao.

CHIDAMBARAGURUKKAL ALIAS DEVENDRASAIVA PURANTHARA PANDITHAR—PLAINTIFF—APPELLANT

versus

SIVAGNANA SUNDARAM PILLAI AND OTHERS—DEFENDANTS —RESPONDENTS.

Landlord and Tenant—Tenancy, origin of, not known —Nature how determined—Conduct of parties, Evidentiary value of—Long occupation on same terms—Uniform rent—Inference.

When the origin of a tenancy is not known, evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy.

Sciuratnam Aiyar v. *Venkatachala Goundan*, 56 Ind. Cas. 117 ; 43 M. 567 at p. 577 ; (1920) M. W. N. 61 ; 27 M. L. T. 102 ; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485; 47 I. A. 76 (P. C.) ; *Ismail Khan Mahomed* v. *Jaigun Bibi*, 27 C. 570 ; 4 C. W. N. 210 ; 14 Ind. Dec. (N. S.) 874, **relied on.**

Where in a suit in ejectment against tenants, it was found that for at least three generations the defendants' family had been occupying the land without any alteration in terms and during that period, the rent had been far below the economic rent, and uniform and fixed rent had been paid :

Held, **that, under the circumstances, the Court was entitled to infer permanent rights of tenancy.**

Ponniah Nadan v. *Deivanai Ammal* 52 Ind. Cas. 247; 36 M. L. J. 463; 9 L. W. 453; 26 M. L. T. 311; *Palaniyandi Melevarayan* v *Vadamalai Odayan*, 28 Ind. Cas. 956 ; 2 L. W. 728 ; **relied on.**

Appeal against the decree of the Court of the 2nd Additional Subordinate Judge, Coimbatore, in A. S. No. 5 of 1920 (A. S. No. 243 of 1920, on the file of the District Court, Coimbatore) preferred against the decree of the Court of the Principal District Munsif, Erode, in O. S. No. 326 of 1919.

Mr. *S. T. Srinivasagopalachariar*, for the Appellant.

Mr. *T. M. Krishnaswamy Aiyar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by an *Inamdar* against his tenant.

The first question to be decided is whether the grant to predecessor of the plaintiff was of the land, or the grantee not owning the *Kudivaram* of the land revenue only. Section 3 (d) of the Estates Land Act does not, in terms, apply because the suit concerns not a village but only a small plot of land. The point has, however, to be decided with reference to considerations similar to those that would apply if the case fell within that section. If the grant were forthcoming it would be the most valuable evidence but, unfortunately, the grant is not before the Court, although it is agreed that the land was granted come centuries ago during the period of the Madura Kings. The learned Subordinate Judge has, on a consideration of the materials before him, come to the conclusion that the *Inamdars* were entitled only to the *melwaram*. I agree with him. Proceedings connected with the *Inam* enquiry are relied upon by both the parties. At the enquiry, the *Inamdar* made the statement that the land was let to *ryots* for "*Kandaya*" cultivation. The Subordinate Judge is of the opinion that this supports the defendants' case. The word "*Kandayam*" is defined as either a fixed portion of the tax payable or rent paid in money as distinguished from rent paid in kind (*See* McLean's Manual of Administration of the Madras Presidency). The Judge presumably thinks that the word is used in the *Inam* statement in the former sense and I am not prepared to say that he is wrong. The *Inam* title-deed is inconclusive. It acknowledges the title of the *Inamdar* to the "*Inam*" and says that it has been subject to a quit-rent of Rs. 2-4-0, that the *Inam* has been hereditary but not alienable and liable to lapse on failure of lineal heirs. It then recites,—

"On your agreeing to pay an annual quit-rent of Rs. 4-4-0 . . . . your *Inam* tenure will be converted into a permanent freehold ; in which case the *land* will be your own absolute property."

On behalf of the plaintiff, it is argued that the use of the word "land" denotes that the original grant was of the soil. This contention I am not prepared to accept. The word "land" is not used with special reference to the subject of the grant. The words "*Inam*"

and 'Land' are used indifferently and in the context no significance attaches to the use of the particular word "Land." The tenants are not parties to this document and there was no occasion to refer to the rights of the *Inamdar* as distinguished from those of the tenants. The plaintiff next relies upon a receipt for rent executed by himself. It refers to "My *Iuam Vengayam Kadu* which belongs to me."

It is said that this contains an assertion by the *Inamdar* that he was the owner of the land. A similar argument was advanced with reference to the statement of the *Inamdar* made at the *Inam* enquiry "the lands are let to *ryots* . . . " Even where the tenant is admittedly possessed of the *kudivaram*, the landholder refers to his *melvaram* right as land and, therefore, no inference favourable to the plaintiff can be drawn from the circumstance. It is true that there is no presumption that an *Inam* grant is a grant of the land revenue only and that each case must be decided with reference to the circumstances connected with it. But the Subordinate Judge has on a consideration of all the circumetances come to the conclusion that the grantee was not the owner of both the *varams*, and I am not prepared to interfere with this finding.

Granting that the *Inamdar* was possessed of both the *varams*, the next question to be decided is whether the defendants have proved the existence of a permanent tenancy. The Court has to find whether the defendant's predecessors possessed occupancy rights at the inception of the relations of the parties, not whether there was a subsequent change in those relations, the latter alternative not having been suggested. See *Seturatnam Aiyar* v. *Venkatashala Gounden* (1), and when the origin of a tenancy is not known evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy. See *Ismail Khan Mahomad* v. *Jaigun Bibi* (2),

It has been contended that permanence, if claimed, must be established and that the burden of proof lies on the tenant. The learned Subordinate Judge has found that the true inference from the facts proved is that the tenure is permanent and not precarious. Granting that the *onus* is on the tenant, the Subordinate Judge has found that the defendants have made out their case and I am not prepared to disturb his finding. For at least three generations, the defendants' family have been occupying the land without any alteration in terms, and during that period, the rent has been far below the economic rent and uniform and fixed rent has been paid. The plaintiffs have not been able to give any evidence that at any time a different rent was paid or the rent was ever enhanced. It is suggested on behalf of the plaintiffs that they were absentee landlords, that when they went to the village of the defendants, the latter who were *karnams* attended to the wants of the plaintiffs and that it was likely that a low rent was fixed on account of these considerations. This has not been accepted the lower Appellate Court as an explanation. The facts suggested on the one side and the uniform and low rent on the other have not been shown to be related as cause and effect. It is quite as likely that, because the defendants and their ancestors have been tenants of the plaintiff's family, the former have from time to time rendered small services to the latter. The Judge was entitled to infer, from the continuance of the land in the same hands at a low and unvarying rent, permanent rights of occupancy. *Ponniah Nadan* v. *Deivanai Ammal* (3), and *Palaniyandi Melevarayan* v. *Vadamalai Odayan* (4).

In the result, the second appeal fails and is dismissed with costs but subject to the following reservation. The defendants do not object to a decree being passed in favour of the plaintiff for the rent admitted by them to be due, and I accordingly pass a decree for Rs. 54. With this modification the lower Appellate Court's decree will be confirmed.

V. N. V.
K. S. D. *Decree modified.*

(1) 56 Ind. Cas. 117; 43 M. 567 at p. 577; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485; 47 I. A. 76 (P. C).

(2) 27 C. 570; 4 C. W. N. 210 ; 14 Ind Dec. (N.S.) 374.

(3) 52 Ind. Cas. 247 ; 36 M. L. J. 463; 9 L.W. 453; 26 M. L T. 311.

(4) 28 Ind. Cas. 956 ; 2 L. W. 723.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 141 OF 1922.

March 20, 1924.

Present :—Mr. Kinkhede, A. J. C.

TULARAM AND OTHERS—PLAINTIFFS —APPELLANTS
versus
Mt. SUMRATI—DEFENDANT —RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 80—Settlement parcha—Presumption of correctness—Civil Procedure Code (Act V of 1908), s 11—Erroneous decision on question of law, whether res judicata—*" Litigating under same title," meaning of—Parties to subsequent suit—Title, when must come into existence—Construction of document—Question fact or law.*

A Settlement *parcha* is not Strictly so called a Settlement entry but only a rent certificate to which no presumption of correctness under section 80 of the C. P. Land Revenue Act of 1917 can apply. [p. 622, col. 1.]

An erroneous decision on a point of law operates as *res judicata*. [p. 622, col. 2.]

Parma Sao v. *Gobrya*, 14 C. P. L. R. 109, followed.

The title by which the parties to the subsequent suit claim must, for purposes of *res judicata*, be subsequent to the commencement of the former suit, because transferees prior to the date of such suit are not bound by the decision of the suit. [p. 622, col. 2.]

The words "between parties or between parties under whom they or any of them claim, litigating under the same title" in section 11 of the Civil Procedure Code cover a case where the latter litigant occupies by succession the same position as the former litigant. [p. 622, col. 2.]

Madhavrao Harisharrao v. *Anusuya Bai Eknath Jope*, 36 Ind. Cas. 505 ; 40 B. 606 ; 18 Bom. L.R. 768, followed.

The interpretation of the terms of a deed is a question of law.

Appeal against the decree of the District Judge, Hoshangabad, in Civil Appeal No. 115 of 1921, dated the 22nd December 1921.

Mr. *S. B. Gokhale*, for the Appellants.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Respondent.

JUDGMENT.—The decision of this case hinges upon the right interpretation of a clause of reservation relating to the field in suit in the sale-deed dated the 31st March 1897, Exhibit P-5. If the clause made Dhanaram, who purchased the eight-annas share of the village of Birpur from *Mt.* Sunder Patelin, the landlord of the vendor, and the latter or her sons the tenants, of the *khudkast* field old No. 24 area 10-31 rental assessment corresponding to new No. 26 area 10-47 of *mouza* Birpur reserved by the vendor to herself and her sons in perpetuity, with the special privilege of enjoying it *muafi* or free from payment of rent or revenue, whatever it may be, then the question to be considered is, had the vendor's or her son's tenancy come to an end, before the plaintiff got the land on lease from the purchaser Dhanaram by means of *patta* dated the 8th July 1916, Exhibit P-7, executed by him after taking a surrender, Exhibit P-6, dated the 1st June 1916 of the land from one Kaliram to whom the same had been given for enjoyment during his lifetime as a maintenance grant by the vendor's son Sitaram, so as to entitle plaintiff to succeed in this suit. If the interest be held to be proprietary then the plaintiff's suit must necessarily fail. The nature of the interest carved out in favour of Kaliram by the vendor's son Sitaram will be the next point to be considered in this connection.

So far as I have been able to understand the case, the conclusion arrived at by the lower Appellate Court seems to be correct and I uphold it, though for different reasons. In my opinion the land appears to have been held in proprietary right by *Mt.* Sunder or her son Sitaram, and that the purchaser acquired no right to demand any rent or revenue in respect thereof either from the vendor or her heir or their nominees or transferees like Kaliram or other persons holding under them, and that, consequently, Dhanaram could not take a surrender of the same and dispose it of by lease and create a tenancy in favour of plaintiff, and that the latter, therefore, could not and did not acquire the rights of a tenant in respect of the said land. The clause expressly reserves the *khudkast* land, rent or revenue free to the vendor and her successors-in-interest, in perpetuity, and does not purport to create or reserve only a limited interest therein, or otherwise limit the scope thereof by

merely reserving a tenant right in the same. There are no words in the deed which could be construed as granting only a lease of the land or creating a mere tenant right. There was nothing to prevent the parties to the deed from inserting appropriate words to show that the reservation was intended only to carve out the status of a permanent tenant with the incident of heritability attached to it, and not to leave the entire interest of a proprietor intact. The reservation must, therefore, be taken, and I hold it, to be of the entire interest which the transferor could otherwise have passed to the transferee, and that the vendor thus remained the owner of the *khudkast* land reserved just as she was of the other 8-annas *malguzari* share held by her.

The plaintiff has secured the Settlement *Parcha*, Exhibit P 1, in respect of the land in suit at the recent Survey Settlement which took place in 1917-18. It is not strictly so called a Settlement entry but only a rent certificate to which no presumption of correctness under section 80 of the Central Provinces Land Revenue Act of 1917 can apply. Assuming that Exhibit P-1 carries with it any such presumption of correctness, I think that, in view of the other facts proved in the case, the presumption has been sufficiently rebutted, so as to disentile the plaintiff from claiming the status of a tenant for himself ; consequently, the defendant who as the widow of Sitaram would be entitled to succeed to whatever status her husband, or mother-in-law Sunder Patelin enjoyed in respect of the land, cannot be excluded from such enjoyment. I think that even if it be assumed that all or any of the decisions and orders in the previous suits and proceedings, Exhibit D. 15 to Exhibit D-22, may not necessarily operate as *res judicata*, they have got great evidentiary value and can serve to shift the onus to the plaintiff of proving that the interest reserved by the vendor was that of a tenant and not of a proprietor : *Lakshman* v. *Amrit* (1), *Neamut Ali* v. *Gooroo Doss* (2), compare also *Sakharam* v. *Shriram* (3). It, however, appears that the point was directly and substantially in issue in the suit for profits between Dhanaram and Sitaram, and whether the decision (Exhibit D-21) was right or wrong, it ought to operate as *res judicata*, although the decisions in the rent suits, Exhibits D-15, D-16 to D-20 and D-22, may not do so in view of *Dwarkanath Roy* v. *Ram Chand Achi* (4). Even if the decision may have been an erroneous decision on a point of law, because interpretation of the terms of a deed is a question of law, it operate as *res judicata* : *Parmu Sao* v. *Gobrya* (5), between the parties or between parties under whom they or any of them claim litigating under the same title. The title by which the parties to the subsequent suit claim must for purposes of *res judicata* be subsequent to the commencement of the former suit : because transferees prior to the date of such a suit are not bound by a decision in that suit compare *Sitaram* v. *Amir Begam* (6), *Joy Chandra Banerjee* v. *Sreenath Chatterjee* (7), *Niaz-ullah Khan* v. *Nazir Begam* (8), *Abdul Alli* v. *Miakhan Abdul Hosein* (9), and *Ramchandra Dhondo* v. *Malkapa* (10). The words "between parties or between parties under whom they or any of them claim litigating under the same title" in section 11 of the Civil Procedure Code, cover a case where the latter litigant occupies by succession the same position as the former litigant : *Madhavrao Hariharrao* v. *Anusuyabai* (11).

I, therefore, hold that it was not open to Dhanaram or to plaintiff, who is a transferee from him, to re-agitate the question as regards the status of the vendor *Mt.* Sunder or of her son or of the latter's heir, namely, the present defendant, in respect of the *khudkast* land expressly reserved under the terms of the saledeed, Exhibit P-5. Down to 1914 Dhanaram's right to style himself either as proprietor or as landlord in respect of the field in dispute and to recover its rent or revenue either from

(1) 24 B. 591 at p. 599 ; 2 Bom. L. R. 386; 12 Ind. Dec. (N.S.) 924.
(2) 22 W. R. 365.
(3) 10 Ind. Cas. 700 ; 7 N. L. R. 23 at p. 25.
(4) 26 C. 428 (F. B.) ; 3 C. W. N. 266 : 13 Ind. Dec. (N. S.) 876.
(5) 14 C. P. L. R. 109.
(6) 8 A. 324 ; A. W. N. (1886) 101 ; 5 Ind. Dec. (N.S.) 105.
(7) 32 C. 957 (P.C.) ; 1 C. L. J. 23.
(8) 15 A. 108 ; A. W. N. (1892) 246 ; 7 Ind. Dec. (N.S) 786.
(9) 10 Ind. Cas. 690 : 35 Bom. 297 : 13 Bom. L. R. 268.
(10) 36 Ind. Cas. 448 : 40 B. 679 ; 18 Bom. L. R. 757.
(11) 36 Ind Cas. 505 ; 40 B. 606 ; 18 Bom. L. R. 768.

Sitaram or his under-lessees has been consistently negatived, and the question would no longer be liable to be re-opened.

Plaintiffs says that the transaction between Kaliram and Sitaram which took place some time in 1914 was on the defendant's own admission a transfer of tenant-right which was prohibited by the Central Provinces Tenancy Act of 1898, and consequently the same had to be avoided in the manner and to the extent provided by section 71 of the said Act. But in the view I have taken the status of Sitaram was not that of a tenant and, therefore, no question of the avoidance of the alleged transfer arises for determination, consequently, Kaliram who held the land as a maintenance grantee for life and enjoyed the usufruct or profits of the land, had no proprietary interest therein and the surrender by him of his right to enjoy the profits of the land as per Exhibit P-6 to Dhanaram would not affect the right of reversion which Sitaram and his heirs had to the land.

In this view of the case, none of the questions about the lapsing of the tenancy right by loss of remedy, or by lapse of time under section 94 or of statutory forfeiture under section 35 of the Central Provinces Tenancy Act which had been ably argued on both sides at all call for any adjudication. Dhanaram could not, behind the back of Sitaram or his heirs, bring into existence a new state of things, namely, of taking a surrender from Kaliram, and of clothing himself with a so-called right which, however, could not be higher than that what Kaliram himself possessed as against Sitaram and his heirs, and by granting a *patta* to plaintiff he could not raise his status to that of a tenant under himself, and thus acquire for himself the status of a landlord in respect of the very same land regarding which it was being stoutly denied and the denial whereof was upheld in the previous litigation. Much less could the Settlement Officer confer the status of a tenant on plaintiff in regard to the land in suit as per Exhibit P-1. It is an admitted fact that Kaliram who, according to the defendant, was only a grantee for life of a right to enjoy the usufruct of the land, is now dead. Whether he was dead or alive at the date when the defendant dispossessed plaintiff is, therefore, now immaterial, because, even apart from the grantor's reservation of right in virtue of which the defendant seeks to justify her possession, she is entitled to defend her own possession by challenging the plaintiff's right to sue, this being an ejectment suit. The burden was on plaintiff to prove his title, and he having failed to establish it, the suit was liable to be and has been rightly dismissed.

The appeal is dismissed with costs. Costs of the Courts below will be paid as already ordered.

G. R. D. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 592 OF 1921.

January 18, 1924.

Present:—Mr. Justice Odgers.

CHOCKALINGAM PILLAI—PLAINTIFF-APPELLANT

versus

SAMI BATTAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 112 and 114—Presumption of marriage, when arises—Absence of evidence—Ligitimacy, whether can be presumed.

The presumption of marriage under section 114 of the Evidence Act arises from the fact either that the persons have lived together for a length of time or that they have been recognised as husband and wife by a certain number of persons. But there is no general presumption in favour of legitimacy without laying the foundation for it under section 112 of the Act.

Where there is no evidence at all, legitimacy of a person cannot be taken as proved.

Appeal against the decree of the Court of the Additional Subordinate Judge, Madura, in A. S. No. 29 of 1920 (A. S. No. 367 of 1919, Madura District Court) preferred against the decree of the Court of the Principal District Munsif, Madura in O. S. No. 313 of 1918.

Mr. *K. N. Sesha Iyangar*, for the Appellant.

Mr. *A. V. Viswanatha Sastriar*, for the Respondents.

CHOCKALINGAM PILLAI *v.* SAMI BATTAR

JUDGMENT.—In this second appeal it is contended that the Additional Subordinate Judge has not dealt in the right way with the first issue which was,

"Is the plaintiff a legitimate son of the deceased Veerabhadra Pillai ?"

Under ordinary circmstances, one would say that the finding of both the learned District Munsif and of the Subordinate Judge were questions of fact on the evidence. But Mr. Sesha Iyengar for the appellant has raised a point with regard to the decision of this first issue in that he says that what the Subordinate Judge has done is really to throw the *onus of* proving legitimacy on his client instead of starting with the presumption of legitimacy in his favour. The learned District Munsif found the legitimacy of the plaintiff by reason of certain evidence, Ex. E Series, which it is not contended can be legitimately used; so that the ground on which the District Munsif decided has now definitely gone. The Subordinate Judge has come to a contrary decision on a consideration partly of the evidence on this issue and partly on the evidence of the second point in the case as to the plaintiff's right to a portion of a certain house to which he would be entitled, if he were the legitimate son of Veerabhadra Pillai and, therefore, the legitimate brother of the second defendant. With regard to this, although Mr. Sesha Aiyengar did not press the second point, *i.e.*, as to what portion of the house the plaintiff was entitled, I am satisfied that at no time up to the present has the plaintiff been in possession of this house. That this is so appears from the order of the District Munisif, dated 25 July 1918, which is the order on the obstruction of the first defendant in consequence of which the plaintiff brought the present suit. The order was made on an application by the judgment-creditor-decree-holder for the delivery of possession of the house in question. The learned District Munsif found that there had been a previous litigation, namely, O. S. No. 15 of 1896, followed by O. S. No. 278 of 1898, wherein this question of legitimacy was apparently directly raised, and the matter was compromised. But the learned District Munsif says that it did not recognise the respondent's right to a half share in the house but merely provided that in consideration of the respondent No. 1 paying Rs. 300 to the decree-holder he should take a half share. In the compromise decree the respondent's *status* as Veerabhadra Pillai's second wife's son is not admitted. He also adds that at the time of the suit the respondent was not living in the plaint house. Now it should be noted that Veerabhadra Pillai was admittedly the father of both the plaintiff and the first defendant. So at the time he is said to have married the plaintiff's mother he was a married man with a son. It is said that the law raises a presumption in favour of marriage under section 114 of the Evidence Act. That presumption arises from the fact either that the persons have lived to gather for length of time or that they have been recognised as husband and wife by a certain number of persons. It cannot be said that there is a general presumption in favour of legitimacy without laying the fundation for it either under section 112 or a presumption that a valid marriage had taken place between the father and mother of the person in question; so that I think the Subordinate Judge in this case was not wrong when he refused to take P. W. 2's evidence as necessarily establishing the legitimacy of the plaintiff. It is said that there is no evidence on the other side, and, therefore, the legitimacy of the plaintiff must be taken as proved. But I do not think that that is the law, as one can see from the case cited for the respondents in *Ma Wun Di* v. *Ma. Kin*, (1). In *Sastry Valaider Aronegary* v. *Sembecutty Vaigalie* (2), cited by Mr. Sesha Aiyengar, a form of marriage was gone through. As far as I can see, in this case there is no evidence of any form of marriage being gone through except that of P. W. 2 whose evidence is disbelived with regard to the second point, namely, that the plaintiff was ever living in the southern portion of the house and, therefore, I consider that the Subordinate Judge was justified in summing up the evidence of P. W. 2 in this way :

Then there is the evidence of P. W. 2 in the present suit who says that the plaintiff and the second defendant are sons of the deceased Veerabhadra Pillai. It may perhaps be that the plaintiff is an illegitimate

(1) 35 C. 232 ; 12 C. W. N. 220 : 10 Bom. L. R. 41 ; 3 M. L. T. 93 ; 18 M. L. J. 3 ; 7 C. L. J. 112 ; 5 A. L J; 63 ; 14 Bur. L. R. 3 ; 4 L. B.B. 175 (P. C)

(2) (1881) 6 App. Cas. 364 : 50 L. J. P. C. 28 ; 44 L. T. 895.

son of Veerabhadra Pillai. This witness does not speak to any marriage between Veerabhadra Pillai and the mother of the present plaintiff." As a matter of fact, he does speak to a marriage having taken place. But I have been referred to his evidence and it is prefectly clear that he knows nothing personally of the matter: He was not present at the marriage. Although, perhaps, the Subordinate Judge was in error when he said that the witness did not speak of any marriage, I think that, for the reasons given, he was justified in coming to the conclusion he did on the evidence of P. W. 2. I, therefore, hold that he was not wrong in his estimation of the evidence, nor did he go wrong on the question of presumption of legitimacy. It follows that the second appeal should be dismissed with costs.

V. N. V. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 345-B OF 1923.

March 4, 1924.

Present :—Mr. Kinkhede, A. J. C.

Sheikh GANI—PLAINTIFF—APPELLANT
versus
SITARAM—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Mala-fide transfer—Intention to prefer one creditor—Transfer, whether enforceable.

A transfer entered in bad faith with the intention to defraud one creditor and to give preference to another creditor of the vendor is not enforceable in law.

Bhagwant Appaji v. *Kedari Kashinath*, 25 B. 202 ; 2 Bom. L. R. 986, not followed.

Chidambaram Chettiar v. *Sami Aiyar*, 30 M. 6 ; 16 M. L. J. 427 ; 1 M. L. T. 351 ; *Chidambaram Chettiar* v. *Srinivasa Sastrial*, 23 Ind. Cas. 714 ; 37 M. 227 ; 26 M. L. J. 473 ; 18 C. W. N. 811 ; 16 M. L. T. 286 ; 20 C. L. J. 571 ; (1914) M. W. N. 751 ; 16 Bom. L. R. 783 ; 1 L. W. 963 (P. C.), relied on.

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 92 of 1923, dated the 8th September 1923.

Mr. *B. V. Pradhan*, for the Appellant.

Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—In this case the defendant sued his debtors, Rajaram and Vishram, for the recovery of the debt due from them on 2nd March 1922. He asked for attachment before judgment on the same day but it took time to actually effect the attachment, which was made on 11th March 1922. There was another creditor of Vishram by name Punjaji, P. W. 3, and Rs. 125 were payable to him. Vishram and his nephew Motia executed a sale-deed in favour of plaintiff in respect of their two houses for an apparent consideration of Rs. 300 on 2nd March 1922. Out of this Rs. 125 are stated to have been received at home and Rs. 175 to be received before the Sub-Registrar. At the time of the execution of the document and before it was registered, it is in evidence that plaintiff and Vishram were informed of the institution of the suit and of the fact that the Court had passed an order for attachment before judgment of the said houses. Not minding this warning, the plaintiff pushed his transaction through and got the deed registered hurriedly. The plaintiff apparently did not need the houses for personal occupation or residence because we find the very next day both the houses were leased out, one to the vendor and another to Tukaram Wadi (P. W. 1), as per Exhibits P-2 and P-3. The Court of Appeal entertained grave doubts as to the payment of Rs. 125 at home as stated in the sale-deed. Punjaji (P. W. 3) admits having received Rs.125 and returned the promissory-note, but I have not got it before me. I have before me no proof of the existence of debt although there is proof of a payment of Rs. 125 to Punjaji.

The plaintiff has not gone into the box to give his version as to why he did not produce the promissory-note which P. W. 2 says was returned to Vishram and to plaintiff. He has not also given us any opportunity to test his veracity particularly in connection with the haste with which payment of Rs. 175 was made before Sub-Registrar and whether he realized any rent There is absolutely no evidence to show what has become of Rs. 175 paid before the Sub-Registrar. With knowledge of the fact that the defendant was one of the creditors whose debt was outstanding

and that he had not only sued but had actually taken steps to attach the property covered by the sale-deed, it is very likely that the plaintiff would go through the farce of merely paying the major portion of the consideration into the hands of the vendor before the Sub-Registrar. He could very well have got the vendors to agree to his (vendee's) undertaking to pay plaintiff out of Rs. 175, if it had been intended to take a real sale and to recite that the sale was being made to satisfy creditors. The Courts are naturally inclined, in view of suspicious circumstances, to insist upon a greater degree of scrutiny of the evidence relating to the reality as also *bona fides* of the transfer.

The lower Appellate Court has expressed grave doubts as to the reality of the transaction and has come to the conclusion that plaintiff was fully aware of the debtor's intention to defraud and defeat the defendant. Under such circumstances the parties to the transaction cannot be said to be acting *bona fide*. A slight evidence of the want of good faith ought to be sufficient to non-suit the plaintiff in such cases. The sale, even if real, is nothing short of an attempt to convert tangible immoveable property into cash and the fact that the whole of the apparent consideration has gone into the hands of the ostensible vendor clearly shows that the transaction was brought about either to throw a nominal cloak over the property or to help the vendor to retain to himself a secret benefit out of the transaction. The transaction, on the face of it, is wanting in good faith as the intention of the parties has been clearly found to be to defraud the defendant and to secure a secret benefit to the debtor.

It is argued before me that this is a case in which the evidence at the most shows that the transfer in question was entered into with the fraudulent intention of defeating a particular creditor or execution, and to give preference to some one of the several creditors of the vendor, but that this is not sufficient to make the transfer unenforceable in law. I am, therefore, asked to apply the principle underlying the case reported in *Bhagwant Appaji* v. *Kedari Kashinath* (1) and uphold the transaction as valid. I am not prepared to do so, in view of the other principle which, in my opinion, more fittingly applies to this case and which is laid down in *Chidambaram Chettiar* v. *Sami Aiyar* (2), recently affirmed by the Privy Council in *Chidambaram Chettiar* v. *Srinivasa Sastrial* (3). Here, to my mind, the positive finding by the lower Appellate Court that the transaction was not made in good faith, is fatal to the case. For these reasons I do not see any valid ground for differing from the view taken by the lower Appellate Court of the facts of the case.

A question as to the non-liability of Motia's undivided interest in the property to the extent of half is sought to be argued before me for the first time. The respondent very rightly objects to this new point being raised for the first time at this late stage of second appeal. I, therefore, uphold the contention of the respondent and refuse to go into it.

The result is that the appeal stands dismissed with costs. The costs in the lower Courts will be paid as already ordered.

G. R. D.
K. S. D. *Appeal dismissed.*

(1) 25 B. 202 ; 2 Bom. L. R. 986.

(2) 30 M. 6 ; 16 M. L. J. 427 ; 1 M. L. T. 351.
(3) 23 Ind Cas. 714 ; 37 M. 227 ; 26 M. L. J. 473; 18 C. W. N. 841 ; 16 M. L. T. 286 ; 20 C. L. J. 571 ; (1914) M. W. N. 754 ; 16 Bom. L. R. 733 ; 1 L. W. 963 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 393 AND 394 OF 1922.

November 26, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAM CHARAN LAL—PLAINTIFF —APPELLANT
versus
DHARAM SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Construction of document—Sale-deed — Agreement to re-convey—Mortgage by conditional sale—Pre-emption.

JAIKRISHNA *v.* SAVITRI

Certain property was conveyed by a sale-deed, and a contemporaneous agreement was executed between the parties which recited that the sale-deed was subject to the condition that if the vendor re-paid the amount of the purchase-money within a certain period, the property would be re-conveyed to him. Both documents were presented for registration at the same time :

Held (1) that the sale-deed and the agreement formed part of the same transaction ;

(2) that the transaction was a mortgage by conditional sale within the meaning of section 58 (*c*) of the Transfer of Property Act and was not, therefore, liable to pre-emption.

Appeal from the decree of the District Judge, Shahjahanpur, dated the 21st December 1921.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—These two appeals are connected and are plaintiff's appeals arising out of two suits for pre-emption based on two separate sale-deeds.

On the 1st of December 1919, two sale-deeds of two separate properties were executed in favour of the same vendee, and on the same date two agreements were executed by the vendee in favour of the vendor promising to re-transfer the properties conveyed, for the amounts of the purchase-money, if they were paid between the years 1340 and 1345 *Fasli*. The plaintiffs treated both these transactions as separate transactions and brought the suits for pre-emption on the ground that the property had been sold away.

On behalf of the defendants the existence of the alleged custom was denied and it was further pleaded that the custom, even if it existed in the village, would not apply to such a transaction. Both the Courts below have held that the custom of pre-emption exists in the village but that the transactions in question being only mortgages by conditional sale, they were not liable to pre-emption.

The existence of the custom has not been challenged in appeal. The only point, therefore, which we have to consider is, whether the Courts below were right in holding that these two sets of transactions were in reality mortgages by conditional sale and not out and out sale transactions. It is to be noted that the two sets of documents were executed on one and the same date and were presented for registration at the same time. It is also noteworthy that the agreements contain in clear terms recitals that the sale-deeds were executed subject to the condition that the property would be re-conveyed if the purchase monies were paid within the years 1340 and 1345, *Fasli*, that is to say, the recitals in the deeds of agreement themselves show that the transactions were not separate transactions but formed part and parcel of the same transaction. The properties were, therefore, transferred to the vendee subject to the condition that they would have to be re-conveyed if the amounts were paid within a certain time fixed. The transactions, therefore, clearly come within the definition of a mortgage by conditional sale as given in section 58, sub-clause (*c*), of the Transfer of Property Act.

The circumstances of the case as well as the cross-references are such that the Courts below have drawn the presumption that the transactions were really mortgages. We have had the documents read to us and we are satisfied that there is really no ground for differing from the view taken by the Courts below. The result is that these appeals fail and are dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 382-B OF 1921.

November 30, 1923.

Present :—Mr. Kinkhede, A. J. C.

JAIKRISHNA—DEFENDANT—APPELLANT
versus
Mt. SAVITRI—PLAINTIFF—RESPONDENT.

Hindu Law—Widow, death of—Suit for possession by reversioner—Property of husband—Accretions—Burden of proof—Transaction standing in name of wife—Husband's transaction—Presumption.

JAIKRISHNA *v.* SAVITRI

In a suit by a reversioner to claim property in the possession of a Hindu widow, the onus lie on the plaintiff to show that the property claimed vested in the husband and if such property is claimed on the ground that it was an addition to the husband's estate, made with the help of savings from the income of such estate, to show that the widow did intend to make the acquisitions part and parcel of the parent estate. [p. 629,col. 2.]

Diwan Ran Bijai Bahadur Singh v. *Indarpal Singh*, 26 C. 871; 26 I. A. 226; 4 C. W. N. 1; 2 Bom. L. R. 1 ; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158 (P. C.); *Soodamini Dasi* v. *The Administrator-General of Bengal*, 20 C. 433 at p. 442; 20 I. A 12; 6 Sar. P. C. J. 272; 17 Ind. Jur. 223; 10 Ind. Dec (N. S.) 293 (P. C.): *Akkamma* v. *Venkayya*, 25 M. 351 at p. 359 ; 12 M. L. J 5, followed.

There is no presumption that transactions which stand in the name of the wife are husband's transactions. [p. 629, col. 2]

Manada Sundari Debi v. *Muhammed Sarnokar*, 2 C W. N. 367, followed.

Appeal against the decree of the District Judge, Amraoti, dated the 19th July 1921, in Civil Appeal No. 147 of 1921.

Messrs. *M. R. Bobde* and *R. N. Padhye*, for the Appellant.

Messrs. *V. Bose* and *S. Y. Deshmukh*, for the Respondent.

JUDGMENT.—One Kashiba, who died more than 22 years ago, left at his death two widows, by name, Gangu and Savitri, but no children. Gangu died on 28th May 1917. Before her death she made a Will dated the 23rd April 1917 (Exh. P. 1) in respect of the following amongst other property in favour of the defendant :—

(1) One buffalo and a buffalo calf, worth Rs. 100 ;		
(2) Brass and copper utensils, worth Rs. 50;	Rs. 308	Total Rs. 1,271-12-0
(3) Gold ornaments, worth Rs. 138 ;		
(4) Silver Patlis, worth Rs. 20 ;		
and		
(5) rights under two mortgage-deeds, dated 19th February 1912 for Rs. 250 ; and dated 20th February 1915 for Rs. 500 ; valued at Rs. 963 12-0.		

The plaintiff, who is the surviving co-widow, claims to recover the property from the defendant on the ground that it was property inherited by Gangu from Kashiba and, therefore, the Will was void. The defence was that the property in suit was not inherited property in Gangu's hands but was her own self-acquisition. The plaintiff's right was thus denied.

The plaintiff, in reply, alleged that the property was partly inherited and partly acquired with the help of income derived from inherited property and partook of the same character and on this ground also Gangu could not make any bequest in respect of it. Plaintiff succeeded in getting a decree in both the lower Courts. The defendant has come up in second appeal.

It is contended that the Courts below did not properly appreciate the position of Gangu and the nature of the interest she held in the moveable property which she purported to Will away in its relation to each item of the property in dispute and also with reference to the surrounding circumstances including the important circumstance that Kashiba, her husband, was a leper and died nearly 22 years ago, and that his fields were taken possession of by his brother Tukaram soon after his death, so as to leave practically nothing for Gangu to succeed to as his widow. It is also complained that the Courts below have proceeded upon an erroneous assumption that the property in the possession of a Hindu widow is her husband's property and that, consequent on such assumption, the Courts below failed to approach the merits of this case from a right point of view. It is pointed out that the Courts mistook the intention of Gangu as manifested by her dealings with the estate and that it erroneously held that she had no such interest in the property bequeathed as could be Willed away by her at her own sweet will. The finding of the lower Courts that the property in suit was property which came to Gangu by inheritance from Kashiba or was acquired out of the savings of such property is thus challenged as being vitiated by reason of such erroneous assumptions. I think every one of these contentions is right and must be upheld. The way in which the case has been dealt with in the Courts below clearly discloses

a lack of proper appreciation of the law applicable to the case. Consequently, the facts to be found have not been properly considered in the light of the true principles of law governing such cases. I, therefore, deem it necessary to point out what their Lordships of the Privy Council have laid down as the law governing such cases.

In *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (1) their Lordships of the Privy Council have laid down the law as follows:—

> "It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor who has died leaving a widow, to show that the property claimed in the suit, and found in her possession, has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death must have been included in that which belonged to him unless she shows that she obtained the property from another source."

Similarly, with reference to the contention raised in the case that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate, their Lordships observed as follows, in *Saodamini Dasi* v. *The Administrator-General of Bengal* (2).

> "Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow, but was taken by Shamcharan Mullick under the Will, and the income to which the widow succeeded was separated from it, and became and was dealt with, as an entirely separate fund.....She did nothing to indicate an intention to make the fund received or the interest on it, part of her husband's estate, which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs ..... The fund in question was not in any sense received by Badam Kumari (the widow) as capital or capitalized income of her husband's estate, but was received as income which, under the arrangement with Shamcharan Mullick, was her own absolute property, and she never indicated any intention to make the same part of her husband's estate for the benefit of his heirs"

quoted with approval in *Akkanna* v. *Venkayya* (3).

These two Privy Council decisions clearly lay the onus of proof on the person who comes into Court to claim the property found in the possession of a Hindu widow, to show that the property vested in the husband, and if such property is claimed on the ground that it was an addition to the husband's estate, made with the help of savings from the income of such estate, to show that the widow did intend to make the after-acquisitions part and parcel of the parent estate. Looking at this case in the light of the law as to onus of proof laid down in those cases, and in the numerous cases in which they have been followed, I think the lower Court's decision must be upset and the case remanded for a second decision on the merits in the light of these remarks.

I may here point out that it was held in *Manada Sundari Debi* v. *Mahanand Sarnokar* (4), that there is no presumption that transactions which stand in the name of the wife are husband's transactions. The very nature of some of the items of moveable property which form the subject of the testamentary disposition will show that they must not have come down from the time of Kashiba. As, for example, the she-buffalo and buffalo-calf, the ornaments and cash. After the lapse of so many years it would be difficult to prove the identity of the moveables in suit with those handed down from

(1) 26 C. 871; 26 I A. 226; 4 C.W.N. 1; 2 Bom. L. R. 1; 7 Sar. P.C J. 578; 13 Ind. Dec. (N.S.) 1158 (P.C.).
(2) 20 C. 433 at p. 442; 20 I. A. 12; 6 Sar. P.C.J. 272; 17 Ind. Jur. 223; 10 Ind. Dec. (N.S.) 293 (P.C.).
(3) 25 M. 351 at p. 359; 12 M. L. J. 5.
(4) 2 C. W. N. 367.

Kashiba's lifetime, but with that, sitting as a second Appellate Court, I am not concerned. It is the lookout of the plaintiff to see how best she can prove her claim. How far the evidence of P. W. 4 and P. W. 9 is believable is also a matter entirely within the province of the first Appellate Court to consider. I do not, therefore, want to express any opinion upon the evidence either oral or documentary adduced in the case.

In passing, I may remark that if, in the opinion of the lower Appellate Court, there be not sufficient material on record to enable it to give a proper finding, and it thinks fit to remand the case to the Court of first instance, it is open to it to do so and direct that Court to decide the case after taking proper pleadings of the parties and framing proper issues and giving them ample opportunity to substantiate their respective cases.

For the above reasons, I allow the appeal and set aside the decree of the lower Appellate Court and remand the case for a second decision on the merits with advertence to the above remarks. As the case has been approached by the lower Courts from a wrong standpoint I allow a refund of Court-fee paid on the memorandum of appeal to this Court. The appellant will get his other costs of this appeal from the respondent. The costs of the lower Courts will abide the event.

G. R. D. *Appeal allowed.*
K. S. D. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 548 OF 1922.

November 22, 1923.

Present :—Mr Justice Lindsay and
Mr. Justice Sulaiman.

NANDAN SINGH—DEFENDANT—APPELLANT
versus
GUPTAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Pre-emption—Custom, proof of—*Zamima Khewat, *entry in, value of—History of village—*Wajib-ul-arz.

Particular value attaches to a record of custom in the *Zamima Khewat* of 1885 of villages in the Gorakhpur District.

The early history of a village in the Gorakhpur District deduced from the *Kaifyat serishta nizamat* showed that the first Settlement of the village was made in 1838 and that up to 1813 there was no *Zemindar* or *mustajir* recorded as being in possession. A custom of pre-emption was, however, recorded in the *wajib-ul-arz* of 1860 and the *Zamima Khewat* of 1885, although the categories into which the pre-emptors were divided were slightly different in the *Zamima Khewat* from those laid down in the *wajib-ul-arz*, the former being probably an amplification of the latter:

Held, (1) that the early history of the village was not sufficient to overturn the presumption attaching to the entries in the *wajib-ul-arz* and the *Zamima Khewat*;

(2) that a custom of pre-emption prevailed in the village.

Appeal from the decree of the Second Additional Judge, Gorakhpur, dated the 23rd December 1923.

Messrs. *Iqbal Ahmad* and *Sinha*, for the Appellant.

Mr. *Upadhiya*, for the Respondents.

JUDGMENT.—The sole question for determination in this appeal is whether the lower Appellate Court was right in holding that the custom of pre-emption alleged by the plaintiff was established.

The two pieces of evidence which were relied upon for the purpose of establishing custom were the *wajib-ul-arz* of 1860 and the *zamima khewat* of 1885. The case is from the Gorakhpur District. We may also notice that the *kaifiat serishta nizamat* was also in evidence for the purpose of showing the history of the village.

It is important to notice in connection with the *zamima khewat* of 1885 that the document is of peculiar weight having regard to the circumstances in which this record was framed at the time of the Settlement of Gorakhpur in or about the year 1885. We have it stated at page 210 of Mr. Agarwala's Commentary on the Land Revenue Act, 5th Edition, (page 210), that in the month of August 1886 certain directions were issued to the Settlement Officer of Gorakhpur with

regard to the preparation of the record which had hitherto been known as the *wajib-ul-arz*.

The Settlement Officers were directed to make particular note regarding any custom of pre-emption. The instructions laid down that a custom of pre-emption should be recorded when the proprietors expressly demand that it be noted and it is proved conclusively that the custom exists. This direction was given with regard to *mahals* belonging to other than Muhammadan proprietors.

It is clear, therefore, that in dealing with the question of the existence of the custom in this case we are entitled to lay particular stress upon the *zamima khewat* of 1885 for we must assume that it was prepared in the manner directed by the Board of Revenue, that is to say, it must be taken that the proprietors must be other than Muhammadans and expressly desired to have the custom of pre-emption recorded, and must have adduced proof before the Settlement Officer, conclusive, to show that the custom existed.

The *wajib-ul-arz* of 1860 also shows that a custom is recorded.

It was argued in the Court below that the existence of the custom had not been established in view of the early history of the village as deduced from the *kaifiyat serishta nizamat*.

From that document it appeared that the first Settlement of this village was made in the year 1245 *Fasli* corresponding roughly to 1838. That Settlement must have been the first Regular Settlement made under the Regulation of 1833.

It is also shown from the *kaifiat* that up to the year 1220, *Fasli*, corresponding to 1813 A. D. there was no *zemindar* or *mustajir* recorded as being in possession.

It is not, however, to be assumed from these facts that there were no owners of this village prior to the year 1838 when the Settlement was made. It is quite possible that for a long period the Government may have refused Settlement to the *zemindars* or have refused to farm the property out to the owners for various reasons. The Judge was, we think, right in saying that this part of the evidence would not be sufficient to overturn the presumption attaching to the *wajib-ul-arz* of 1860 and attaching still more strongly to the *zamima khewat* of 1885.

The other attempt which was made in order to show that the record was not one of custom was in the direction of showing that the two records were in conflict, and, that being so, neither of them could properly be regarded as a record of custom.

We find in the *wajib-ul-arz* of 1860 that the pre-emptors are divided into three categories:—

(1) *hissedar karib*,
(2) *digar hissedar thok*, and
(3) *dusre thok ke hissedar*.

In the *zamima khewat* of 1885 we find four categories :—

(1) *rishtedar karib*,
(2) *rishtedar baeed*,
(3) *shurkai baeed*, and
(4) *shurkai tahte nambardari*.

Mr. Iqbal Ahmad has argued that two completely new categories are introduced in this later record, namely, those of near and distant relations, (categories 1 and 2) and, according to his argument, the record now means that a relation without being a co-sharer is entitled to pre-emption.

At first sight this argument seems to be a plausible one, but, on the other hand, we think Mr. Upadhia is probably right in contending that the second record is nothing more than an amplification of the earlier record, the reason being, that more particular enquiries were made during the Settlement of 1885-86 which led to the disclosure that preference in the matter of pre-emption was given in the first instance with reference to nearness of degree in relationship. And we are also inclined to believe that the word "*rishtedar*" in the record of 1885 really means a person who is at the same time a sharer and a relation. We arrive at this conclusion having regard to the whole context because we find in the four categories mentioned in the second record that the 3rd and 4th consist of persons who are co sharers in the *patti* and then persons who are co-sharers in same *nambardari*. The third and fourth categories correspond, in our opinion, to the second and third categories of the earlier *wajib ul-arz* and it is reasonable to assume, therefore, that the first and second categories in the second record are really a sub division of the first category in the earlier record. At any rate, this is a possible interpretation, and we are not prepared to say

that the decision arrived at by the learned Judge is erroneous

No other question arises for disposal.

The appeal fails and we dismiss it with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 132 OF 1922.

October 5, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Odgers.

THAYUMAN PILLAI—APPELLANT
versus
RAMASWAMI CHETTIAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI r. 44—Attachment before appointment of Receiver—Subsequent sale without leave of Court, whether valid.

Though an attachment is on property before the appointment of a Receiver, the sale of the property subsequent to the appointment of the Receiver without leave of Court is invalid and is liable to be cancelled at the discretion of the Court.

Levenia Ashton v. *Madhabmoni Dassi*, 5 Ind. Cas. 390; 11 C. L. J. 489; 14 C. W. N. 560; *Fraser* v. *Krishnasami Ayyar*, 71 Ind.Cas. 293; 43 M. L. J. 211; 16 L. W. 322; 31 M. L. T. 290; (1922) M. W. N. 745; (1923) A. I. R. (M.) 144, followed.

Appeal against the order of the Court of the Subordinote Judge, Madura, dated the 1st December 1920, in E. A. No. 310 of 1920 in E. P. No. 38 of 1919, in O. S. No. 67 of 1918.

Messrs. *A. Krishnaswami Iyer* and *M. Patanjali Sastry*, for the Appellant.

Messrs. *K. V. Krishnaswami Iyer* and *T. M. Ramaswami Iyer*, for the Respondents.

JUDGMENT.—The two points taken in this case are that Ramasami Chetty was appointed Receiver only of the crops and not of the corpus of the property, and that as the property had been already attached the sale in pursuance of such attachment without leave of the Court appointing the Receiver was not vitiated.

Both these points are covered by the ruling in *Levenia Ashton* v. *Madhabmoni Dasi* which has been followed in *Fraser* v. *Krishnaswami Iyer*, and which we are also prepared to follow. We are of opinion that the Receiver was appointed in the present case for the property itself though the object of the appointment was to collect the rents and profits of the land. It is significant that the point now raised was not raised in the lower Court.

On the second point, as observed by Mookerjee, J. on page 439 of 11, C.L.J.,—

> "The general rule is well settled that property in the hands of a Reciever is exempt from judicial process except of course to the extent permitted by the appointing Court."

Then English cases are cited for that position which is not disputed before us. Further, the learned Judge says :

> "It has even been affirmed that though an attachment was levied on property before the appointment of the Reciever it is within the sound discretion of the appointing Court to refuse to permit a sale of the property thereunder."

A purchaser in Court auction without previous leave to sell buys at his peril, for the sale may be cancelled.

Following these views, we agree with the lower Court that the sale was properly set aside in this case and we dismiss the Civil Miscellaneous Appeal with costs. One set to be divided between the respondents.

V. N. V. *Appeal dismissed.*

K. S. D.

(1) 5 Ind. Cas. 390 ; 11 C. L. J. 489 ; 14 C. W. N. 560.

(2) 71 Ind. Cas. 293 ; 43 M. L. J. 211 ; 162 W. 322 ; 31 M. L. T. 290 ; (1922) M. W. N. 745 ; (1923) A. I. R. (M.) 144.

THAKUR KALLUSINGH *v.* BHURAJI

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 561 OF 1922.

December 12, 1923.

Present :—Mr. Baker, J C.

THAKUR KALLUSINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BHURAJI—PLAINTIFF—RESPONDENT.

Hindu Law—Widow's estate—Income, power over.

A Hindu widow has absolute control over the income of the estate of her deceased husband.

N, a Hindu widow employed the plaintiff to look after an engine which she had purchased for the construction of a *ghat*. After the completion of the *ghat* the engine was utilisedifor driving an oil mill. On the death the widow the plaintiff sued her reversioners to recover his wages :

Held (1) that the widow was perfectly justified in buying the engine out of the income and employing a competent man to look after it ;

(2) that there was nothing wrong in her applying the engine to another useful purpose after the completion of the *ghat* ;

(3) that the plaintiff was, therefore, entitled to recover his wage from the reversioners.

Mc. Laren Morrison v. *Verschoyle*, 6 C. W. N. 429 at p. 458 ; *Kadiri Kana Abdur cheman* v. *Kochipalli*, 53 Ind. Cas. 262; 42 M. 761 at p. 768 ; 10 L. W. 201; 26 M. L. T. 195 ; 37 M. L. J. 316 ; (1919) M. W. N. 600, distinguished.

Appeal against the decree of the District Judge, Hoshangabad, in Civil Appeal No. 31 of 1922, dated the 8th September 1922.

Mr. *J. Sen*, for the Appellants.

Mr. *P. C. Dutt*, for the Respondent.

JUDGMENT.—The facts of this case are simple. The defendants are reversioners of the late Mt. Narbadi Thakurani and the plaintiff, who was an Engineer, employed by her to look after an engine, sued to recover Rs. 1,200 as wages due. Both the Courts below have decided in his favour and the defendants make this second appeal on the ground that plaintiff's wages are not a charge on the estate.

The only point raised is that the widow inherited an agricultural estate and was not authorised to start any business and any liabilities incurred therein cannot be enforced against the estate.

The appellant relies on *Laren Morrison* v. *Verschoyle*, (1)

It is argued that the widow can pledge her credit for the ancestral business only, cf. *Abdur cheman* v. *Kochipalli* (2) *Bhogaraju* v. *Adapalli* (3), *Hurry Mohun Rai* v. *Ganesh Chunder Doss* (4), *Ganapat* v. *Subbi* (5), *Sahabhai* v. *Maganlal* (6), *Jhitibhai* v. *Tejmal* (7). The cases quoted, however, do not apply to the facts of the present case. There is no question here of the widow setting up a business and incurring liabilities which it is sought to enforce on the estate. The lower Courts have found that the Engine was purchased for the construction of a *ghat* on the Narbada which was a chapitable and religious act within the widow's authority. An Engineer was necessary to look after it. After the construction of the *ghat* was completed the widow caused the engine to be removed to Itarsi and re-erected by the plaintiff and it was utilised for driving an oil mill.

It has been argued that she should have then sold the engine. There is no evidence that any loss was caused to the estate. On the contrary, the Courts below have found that the income derived from the mill was utilised for the repair of the *ghat* and in litigation for the estate and, therefore, was of benefit to the estate. It is to be remembered that the engine, which is worth Rs. 2,500, is an asset of the estate and is in possession of the defendants and unless it had been looked after by the plaintiff, who is a certificated Engineer, it

(1) 6 C. W. N. 429 at p. 458.
(2) 53 Ind. Cas. 262 ; 42 M. 761 ; at p. 768; 10 L. W. 204 ; 26 M. L. T. 195 ; 37 M. L. J. 316 ; (1919) M. W. N. 600.
(3) 12 Ind. Cas. 123 ; 35 ; M. 560 ; 10 M L. T. 179.
(4) 10 C. 828 at p. p. 829, 830 ; 5 Ind. Dec. (N. S.) 551.
(5) 32 B. 577 at p. 579 ; 10 Bom. L. R. 927.
(6) 26 B. 206 ; 3 Bom. L. R. 738.
(7) 41 Ind. Cas. 85 ; 13 N. L. R. 109.

would have rapidly deteriorated and depreciated in value. A Hindu widow has absolute control over the income of the estate. This is not a case in which any portion of the estate has been charged, or alienated to meet the expenses of a speculative business. The widow was perfectly justified in buying the engine out of the income and employing a competent man to look after it and when the work for which it was purchased was completed, I cannot see that there was anything wrong in her applying the engine to another useful purpose which did not entail any loss to the estate, instead of trying to dispose of it. It would be another matter if she had borrowed money in order to carry on the business of an oil mill, but this is not the case.

In these circumstances, I am of opinion that the decree of the lower Appellate Court is correct and must be confirmed and the appeal dismissed with costs.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 633 OF 1922.

December 5, 1923.

Present :—Mr. Justice Stuart and
Mr. Justice Mukerji.

BABU RAM—PLAINTIFF—APPELLANT
versus
Musammat KOKLA—DEFENDANT—
RESPONDENT.

Restitution of conjugal rights, suit for—Wife expelled by husband—Maintenance, order for—Restitution, whether ought to be decreed.

A husband turned his wife out of doors stating that he suspected her chastity. The wife then applied for and obtained a maintenance order under section 488 of the Criminal Procedure Code, which she sought to execute by the arrest of the husband Even during the maintenance proceedings the husband refused to take the wife back into his house. In order to get rid of the maintenance order, however, the husband brought a suit for restitution of conjugal rights;

Held, that, under the circumstances, the wife would have a reasonable apprehension of bodily injury if she returned to her husband, and the latter's suit was, therefore, liable to dismissal

Appeal from the decree of the District Judge, Pilibhit, dated the 28th February 1922.

Mr. *S. N. Sen*, for the Appellant.

JUDGMENT.—This is an appeal by a husband whose suit for restitution of conjugal rights has been dismissed by the lower Appellate Court. The learned District Judge not having decided certain points we propose to decide them ourselves under the provisions of section 103 of the Code of Civil Procedure. These are the facts as we find them The appellant is a Brahman. Many years ago he turned his wife out of doors stating that he suspected her chastity. The woman went to live with her uncle who supported her. She then applied to the Criminal Court for a maintenance order under section 488 of the Code of Criminal Procedure and she obtained an order awarding her sufficient maintenance. It is to be noted that under the law she could not have recieved maitenance if without sufficient reason she refused to live with her husband or if they were living separately by mutual consent. The plaintiff has admitted that when the maintenance proceedings were in progress before the Magistrate he even then refused to take his wife back stating that at the time he suspected her chastity. When the woman endeavoured to obtain the money that was due to her the husband refused to pay it and she had to attach his property and to arrest him and place him in custody to execute the order. At the end of this he has applied for restitution of conjugal rights against her and has advanced the somewhat amazing suggestion that although he has suspected her chastity for 20 years, now that she has claimed an order of maintenance against him, his suspicion has been allayed. It is perfectly clear why he has brought this suit If he succeeds he will be able to go to the Criminal Court and say that his wife is refusing to live with him without sufficient reason and the order of maintenance will then be cancelled. But what will become of the woman? She will be deprived of maintenance and will then be compelled to return and live with her husband sooner or later. In the circumstances, we

have no hesitation in saying that she will have a reasonable apprehension of bodily injury if she returns to her husband. We consider that the suit was rightly dismissed and dismiss this appeal. The appellant will pay his own costs. The other side being unrepresented, will pay her own costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 797 OF 1922.

October 11, 1923.

Present :—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

MAUTINA RAMACHANDRA RAJU AND ANOTHER—DEFENDANTS—PETITIONERS

versus

SRI RAJAH MAUTIPRAGADA BUJANGA BAHADUR, ZAMINDAR GARU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 12—Decree for possession—Execution, application for—Dismissal in default—Application for ascertainment of mesne profits, whether barred.

A Preliminary decree for possession of immoveable property awarded mesne profits subsequent to suit and the plaintiff applied, under O. XX, r. 12 of the Civil Procedure Code, for ascertainment of these profits. It appears that the plaintiff had already filed several petitions seeking to execute the decree so far as it was capable of execution and praying in addition for ascertainment of mesne profits. These petitions had been dismissed either for default or for some other reason but there had been no judicial determination in either of these petitions of the plaintiff's right to mesne profits.

Held, (1) that the Court had no jurisdiction to entertain what were termed execution applications for ascertainment of mesne profits ;

(2) that the Court did not purport to decide nor did it decide the plaintiff's right to recover mesne profits ;

(3) that the dismissal of the previous applications did not, under the circumstances, result in the dismissal of the suit itself ;

(4) that as there had been no decision on the merits the application for ascertainment of mesne profits was not barred.

Upendra Chandra v. *Sakhi Chand*, 15 Ind. Cas. 709; 16 C. L. J. 3; *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah*, 69 Ind. Cas. 366; 42 M. L. J. 51; (1222) M. W. N. 11; 30 M. L. T. 228; (1922) A. I. R. (M) 65; 16 L. W. 198, distinguished.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Cocanada, dated the 13th October 1922 in I. A. No. 646 of 1922 in O. S. No. 23 of 1919.

Messrs. *S. Varadachariar* and *C. Rama Rao*, for the Petitioners.

Messrs. *A. Krishnaswmi Iyer* and *K. Kamanna*, for the Respondent.

JUDGMENT.— The preliminary decree which was for the possession of immoveable property awarded mesne profits subsequent to suit, and the plaintiff applied under O. XX, r. 12, Civil Procedure Code, for ascertainment of profits. The learned Subordinate Judge made an order in the plaintiff's favour and the defendants have filed this Civil Revision Petition assailing this order.

The defendants object that the plaintiff was precluded from making the application in question by reason of the fact that he made previous applications in order to get the same relief and those applications were rejected. The material facts with reference to which this contention is advanced are these. The plaintiff filed an Execution Petition and he sought to execute the decree so far as it was capable of execution, but in addition prayed for ascertainment of mesne profits under erroneous impression that profits were to be ascertained in execution. As the Execution Petition was not accompanied by a copy of the decree, time was granted for its production and as the copy was not produced within the time granted, the petition was rejected. The plaintiff again applied in execution for ascertainment of profits and this application was not pressed and was dismissed. This was followed by another Execution Petition which again included a prayer for ascertainment of mesne profits. This relief was, however, not pressed, but the other prayer for attachment was granted, properties were attached and proclaimed for sale. So far the plaintiff applied in execution for ascertainment of profits and there was no judicial determination of his right in respect thereto. But

plaintiff apparently realising that his previous applications were misconceived filed the petition in question under O. XX, r. 12, praying for an inquiry as to mesne profits due to him, and the question to be decided is whether, by reason of the dismissal of the previous applications, the present application is barred. It is not suggested that it is barred by limitation; but the argument appears to be that the dismissal of the previous applications is tantamount to the dismissal of the suit itself; and that, therefore, a fresh application, which is in the nature of a fresh suit, cannot be maintained, the previous dismissal operating as a bar to the maintainability of the present application. First, it is to be observed that the Court had no jurisdiction to entertain what were termed execution applications for ascertainment of mesne profits. Secondly, the Court did not purport to decide nor did it decide the plaintiff's right to recover mesne profits. The rule of *res judicata* cannot, therefore, obviously apply.

On what ground then can the dismissal of an application operate as a bar to a fresh application? In *Upendra Chandra* v. *Sakhi Chand* (1) in somewhat similar circumstance, it was held that the dismissal of an application for assessment of mesne profits was equivalent to the dismissal of the suit itself and that a fresh application would not lie. This case is distinguishable on the ground that the order which was sought to have the effect of *res judicata* was that "the case be dismissed for default on behalf of the plaintiff. The order in those terms was said to have been made on account of the laches of the plaintiff in that suit. We, however, fail to see how, after the passing of a preliminary decree, the dismissal of an application, not on the merits, but owing to, say, non-appearance of the plaintiff, or laches on his part, can result in the dismissal of the suit itself. The dismissal of the suit would involve the obliterating of the preliminary decree, that is, taking the present case and giving effect to the arguments strictly, the dismissal of the application for ascertainment of mesne profits would lead to the dismissal of the suit, that is, the suit which was *inter alia* for the recovery of the immoveable property, although a decree had already been passed for the possession of that property. This will indeed be a stratling result. The provisions of O. IX have no application to such cases. Take, for instance, O. IX, r. 3, which runs thus:—

"When neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed." If, after the passing of a preliminary decree, this rule is to be applied the suit has to be dismissed and the decree already passed becomes vacated. The rule does not say that the decree shall become vacated and the obvious inference, therefore, is that O. IX has no application in circumstances like the present. Therefore, we have to fall back upon the general principle of *res judicata* and so long as the merits of an application have not been decided, we see no ground for disallowing a subsequent application. The petitioners also relied upon *Mummadi Venkatiah* v. *Boganatham Venkatasubbiah* (2). That was a suit upon a mortgage and no portion of the preliminary decree was executable, and on this ground it is distinguishable. But it has been argued that the principle underlying that ruling is equally applicable here For the reasons we have given, we are not prepared, at any rate, to extend the application of the principle given effect to in that decision and, in our opinion, the Subordinate Judge has correctly decided the point, and the Civil Revision is accordingly dismissed with costs.

K. S. D. *Revision dismissed.*

(1) 15 Ind. Cas. 709; 16 C. L. J. 3.

(2) 69 Ind. Cas. 366; 42 M. L. J. 51; (1922) M. W. N. 11; 30 M. L. T. 228; (1922) A. I. R. (M.) 65; 16 L. W. 198

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 39-B OF 1923.

April 11, 1924.

Present: —Mr. Kinkhede, A. J. C.

SUNDERBAI AND ANOTHER—DEFENDANTS —APPELLANTS

versus

SHRIKISHAN RAMDHAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 144—Sale in execution set aside—Restitution of property—

SUNDERBAI *v.* SHRIKISHAN RAMDHAN

Auction-purchaser position of—Order awarding profits to judgment-debtor—Appeal, whether competent.

An order awarding profits to the judgment-debtor as against the auction-purchaser in connection with proceedings for restitution of property which had been sold by auction but owing to the auction-sale being set aside was ordered to be re-delivered into the possession of the judgment-debtor from that of the auction-purchaser to whom it was in the meantime delivered, is an appealable order.

Veyindramuthu Pillai v. *Maya Nadan*, 54 Ind. Cas. 209; 43 M. 107 (F. B.); (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32, followed.

For the purposes of section 47, of the Civil Procedure Code, an auction-purchaser is the representative of the decree-holder.

Appeal against the decree of the Second Additional District Judge, Amraoti, in Miscellaneous Judicial Case No. 70 of 1921, dated the 20th April 1922.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Appellants.

Mr. *K. V. Deoskar*, for the Respondent.

JUDGMENT.—In this appeal the only point pressed is about the rate of interest to be allowed on profits decreed in favour of the judgment-debtor. The auction-purchaser who is the respondent raised a preliminary objection that no appeal lay against the order. Two questions have, therefore, to be considered :—

(1) Whether an order awarding profits to the judgment-debtor as against the auction-purchaser in connection with proceedings for restitution of property which had been sold by auction but owing to the auction sale being set aside was ordered to be re-delivered into the possession of the judgment-debtor from that of the auction-purchaser to whom it was in the meantime delivered, is an appealable order ; and

(2) whether interest should be allowed on profits and, if so, at what rate.

The learned Advocate who argued the appeal relied on *Veyindramuthi Pillai* v. *Maya Nadan* (1), and particularly the observations of Abdur Rahim, C. J., at pages 115 and 116 in support of his contention that an appeal lay against the order under section 47, Civil Procedure Code. The auction-purchaser respondent relies on *Shrikisan* v. *Sunderbai*, (2) in support of his contention.

The case in *Shrikisan* v. *Sunderbai* (2) is this very case in which this Court upon an appeal by the auction-purchaser confirmed the order granting possession and held that a Court had power under section 151, Civil Procedure Code to order the auction-purchaser to restore possession of the property to the judgment-debtor.

The present order for profits is only a completion of the restitution to be made. It has been held in *Mt. Radha* v. *Mt. Sakhu*, (3) by Sir Henry Drake-Brockman, Judicial Commisioner, that the Courts have inherent power to order restitution in cases not covered by section 141, Civil Procedure Code, 1908, and that a claim for mesne profits within the meaning of sections 141 and 144, Civil Procedure Code, need not be made in the application for reinstatement in possession and O. II, r. 2 of the First Schedule in the Code is no bar to such claim. In my opinion if on the former occasion the appeal was entertained against the order granting restitution and the present order is also a further step towards fully granting the relief of restitution, I do not find any distinction in principle between the former appeal and the present appeal in point of the right of appeal against such orders for restitution. A party to a proceeding cannot at a subsequent stage of a proceeding take up an inconsistent position. If this objection was open to either party it was open against the present respondent also as regards his own appeal. But I need not rule his objection out on this technical point.

Mt. Radha v. *Mt. Saku* (3), is a very similar case in which also an appeal and a second appeal was entertained under very similar circumstances relating to restitution proceedings without objection. The same was the case in *Jai Berhma* v. *Kedar Nath* (4), which was also a case where the

(1) 54 Ind. Cas. 209 ; 43 M. 107 (F. B.) ; (1919) M. W. N. 881 ; 26 M. L. T. 391 ; 38 M. L. J. 32.

(2) 64 Ind. Cas. 732 ; 18 N. L. R. 24 ; (1922) A. I. R. (N.) 82.

(3) 54 Ind. Cas. 664 ; 17 N. L. R. 62,

(4) 69 Ind. Cas. 278 ; 2 Pat. 10 at p. 12 ; (1922) A. I. R. (P. C.) 269 ; 4 P. L. T. 61 ; 32 M. L. T. 10 ; 37 C. L. J. 351 ; 27 C. W. N. 582 ; 44 M. L. J. 735 ; 21 A. L. J. 490 ; 25 Bom. L. R. 613 ; (1923) M. W. N. 368 ; 18 L. W. 802 ; (P. C.).

conflicting interests of the judgment-debtor and the auction-purchaser were adjudicated in connection with prcceedings for restitution upon the sale being set aside as in this case

The objection of the respondent is argued on these lines. Against an order passed under section 151, Civil Procedure Code, there is no appeal expressly provided for and as the order does not purport to be one under section 47 or 144, Civil Procedure Code, and as an auction-purchaser is a representative of the judgment-debtor and not of the decree holder, the Code does not contemplate that there should be any right of appeal against orders passed as between a party and his own representatives, and not between a party and his opponent. The question, therefore, on which the decision of this point hinges is whether any order of adjudication between a judgment-debtor and an auction-purchaser in the course of execution proceedings comes within the purview of section 47, Civil Procedure Code, and whether the auction-purchaser is necessarily and in every case the representative of the judgment-debtor or he has any individual interest of his own or of the decree-holder to protect in virtue of which at least, he could be regarded as the opponent of the judgment-debtor for the purpose of the present proceedings.

It is contended that the auction-purchaser is neither the representative of the decree-holder nor of the judgment-debtor and that consequently section 47, Civil Procedure Code, would not apply Reliance is placed on *Krishna Satapati* v. *Sarasvatula Sambasiva Row* (5) *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai*, (6) *Anandi Kunwari* v. *Ajudhia Nath*, (7) *Maganlal Mulji* v. *Doshi Mulji* (8) for the former on *Narayana Iyengar* v. *Veerabhadra Pillai* (6) and *Narsinbhat* v. *Bandu Krishna Kulkarni* (9) for the latter proposition. The question, therefore, which I have to decide is whether the auction-purchaser is the representative of the decree-holder or the judgment-debtor or whether he is the representative of neither, for the purpose of section 47, Civil Procedure Code. The question is not quite free from difficulty, as the authorities seem to be conflicting. The learned Advocate argues that the decision of this question must depend upon or vary according to, the facts of each case or according to the nature of the conflict between them.

The celebrated case of *Prosunno Kumar* v. *Kali Das* (10) ns also the case reported in *Sita Ram* v. *Janki Ram* (11) and *Bindeshri Prasad Tewasc* v, *Badal Singh* (12) have been cited in support of the contention that the appeal is competent. I am also asked to treat the memo of appeal as a petition for revision in case I were to hold that no appeal lay against the order.

Most of the cases on which reliance is placed on behalf of the respondent have been discussed in the Full Bench case of the Madras High Court reported in *Veyindramuthu Pillai* v. *Maya Nadan* (1) and the position seems to be clearly and very properly explained by the Chief Justice in his observations at pages 115 and 116 and 124 which have my entire concurrence.

The interests of the judgment-debtor and of the auction-purchaser are conflicting and, therefore, for the purposes of an adjudication they may be ranged as opponents. Naturally, in trying to ward off the claim of the judgment-debtor for possession as well as for profits, he is asserting his rights derived as it were from the decree-holder, because he thereby affirms the validity of the decree-holder's auction of selling the property and wants to maintain that he was rightly put into possession. In this respect he can be classed as the representative of the decree-holder for the purpose of working out his own rights as against the judgment-debtor. I, therefore, hold that the case comes under section 47, Civil Procedure Code, and the appeal could validly lie.

Now, as to the merits of the case very little need be said. The decree makes the

(5) 31 M. 177 ; 3 M. L. T. 306.
(6) 8 Ind. Cas. 429 ; 34 M. 417 ; (1910) M. W. N. 662 ; 9 M. L. T. 152 ; 21 M. L. J. 928.
(7) 30 A. 370 ; A. W. N. (1908) 157 ; 5 A. L. J. 557.
(8) 25 B. 631 at P. 635 ; 3 Bom. L. R. 255.
(9) 46 Ind. Cas. 113 ; 42 B. 411 ; 20 Bom. L. R. 495.
(10) 19 C. 683 at P. 689 (P. C.) ; 19 I. A. 166 ; 6 Sar. P. C. J. 209 ; 9 Ind. Dec. (N. S.) 898.
(11) 65 Ind. Cas. 813 ; 44 A. 266 (F. B.) ; 20 A. L. J. 105 ; (1922) A. I. R. (A) 200.
(12) 74 Ind. Cas. 873 : 21 A. L. J. 228 ; (1923) A. I. R. (A) 394 ; 45 A. 369.

judgment-debtor liable for payment of interest at the rate of Rs. 1-8-0 per cent per mensem to the decree-holder. It is but just and proper that the auction-purchaser who has, by taking possession in the meantime, deprived the judgment-debtor of the actual cultivating profits of the property, should compensate the latter for the loss of the income from the same, which he would otherwise have enjoyed. To my mind the prayer for awarding interest at twlve annas per cent. per mensem on the amount of the profits for each year from the dates mentioned in the petition of the judgment-debtor, namely, 31st March 1919 and 1st March 1920, respectively, until satisfaction appears reasonable.

The appeal succeeds, but as the success is partial I direct that each party shall bear his or her own costs in this Court. The costs in the lower Court will be paid as already ordered by that Court.

K. S. D. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 98 OF 1923.

December 6, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

DAMINI DASI AND ANOTHER—OPPOSITE PARTY—APPELLANTS

versus

FATUMANI DASI—PETITIONER—RESPONDENT.

Succession Certificate Act (*VII of* 1889), *s.* 18 (4)—*Succession certificate, revocation of—Schedule misleading—Concealment of facts.*

Where it is discovered that the schedule of debts attached to an application for the grant of a succession certificate was misleading and that material facts where concealed from the Court in obtaining the certificate, the Court has power to revoke the certificate under section 18 (1) of the Succession Certificate Act.

Appeal from an order of the District Judge, Manbhum, dated the 24th January 1923.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Appellants.

Mr. *Hassan Inam* and *S. C. Muzumdar*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Manbhum revoking a succession certificate granted to the appellants. The facts are these. One Khudiram Gorain died in 1909 leaving Bidhumukhi Dasi, his widow, and two daughters born of her, Damini Dasi and Manumoyee, Dasi, and also one Fulamoni Dasi, another widow, and a daughter, Futumoni Dasi, born of a third wife Pryaballa Dasi who had predeceased him. By Will executed on the 13th August 1909 he had left all his property to Bidhumukhi with an allowance for life and for marriage expense to Futumoni. Budhumukhi applied for letters of administation. An objection was raised, but on the terms set forth in the petition of compromise filed on the 27th July 1910, the objection was withdrawn and letters of administration with the Will annexed were granted to Bichumukhi, Bidhumukhi died on the 2nd of April 1921, and on the 5th August 1921 an application for succession certificate was made by Damini Dasi and Manumoyee Dasi, the appellants. A certificate was granted, but on the application of Futumoni was subsequently revoked by the District Judge by an order dated the 24th January 1923 which has given rise to this appeal.

Three substantial misstatements in the application for succession certificate are set forth in the petition for revocation: (*i*) that the said Bidhumukhi had left no other heirs or near relations except these two applicants."

(2) " that the said Bidhumukhi had been in possession of the property left by her husband under the Will, dated the 28th Sraban, 1316 B. S., and that letters of administration with the copy of the said Will annexed had been obtained by her and that she had been in possession of the property in absolute right;"

(3) " that the applicants, now opposite party, had become entitled to the properties after her death." Reference is also made to the schedule annexed to the petition for succession certificate and it is pointed out that it includes items of commission which accrued due in part after the death of Bidhumukhi. The learned District Judge revoked the certificate under section 18 (*b*) of the Succession Certificate Act on the ground that the certificate was obtained by the concealment from the Court of something material to the case, namely, the existence of the co-widow and the third daughter.

The learned Vakil for the appellants contends that none of the grounds set forth in the petition for revocation justified the revocation of the certificate. It is contended that even if the names of the co-widow and of the third daughter had been set out and they had been cited, the appellants would still have been entitled to the certificate. With regard to the title under the compromise it is contended that this is a question which the Court would not go into in dealing with an application for a succession certificate. And as to the alleged error in the schedule of debts it is said that the succession certificate will necessarily be confined in its effect to the debts that actually accrued due before the death of Bidhumukhi. It is, therefore, contended that the certificate should not have been revoked and that at the most the Court should make a declaration under section 19 that the appellants are entitled to a certificate, and that terms as to security for the share, if any, of the respondent should be imposed. Mr. Hasan Imam, for the respondent, refers to the petition of compromise and especially to the following passage : "the petitioner hereby further directs that after her death the three daughters will get all the properties left by her in equal shares," and contends that this Court should not declare under section 19 that the appellants are entitled to the certificate. It seems that difficult questions may arise on the construction of this petition of compromise, but it is not necessary to discuss these questions now. It is sufficient to say that the certificate that has been granted is not a proper certificate because of the misleading nature of the schedule annexed. The debts specified in the certificate must be partly debts which the certificate should not cover. It cannot be disputed that the respondent ought to have been cited and the failure to cite her as a party to the proceedings has resulted in this erroneous certificate being given, material facts having been concealed from the Court.

The learned District Judge, therefore, was fully entitled to revoke the certificate and, I do not think that his order should be interfered with. I would dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 891 OF 1922.

December 3, 1923.

Present :—Justice Sir Kanhaiya Lal.

BINDESHWARI PRASAD TIWARI—
DEFENDANT—APPELLANT
versus
HANUMAN PRASAD TIWARI—PLAINTIFF
—RESPONDENT.

Defamation—Complaint to public servant—Good faith, absence of—Privilege.

Communications addressed in good faith to persons in public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals, are privileged, provided the subject-matter is within the competence of the person addressed; where, however, the communication is not made in good faith and is unfounded, malice in law must be presumed and the privilege disappears. The person complained against is, in such a case, entitled to sue the person making the communication for damages for slander.

Obiter.—Even where a complaint is filed in a Criminal Court and is afterwards dismissed, a suit for damages for malicious prosecution is in certain circumstances maintainable, because the privilege is qualified and not absolute, and there is no protection unless the case comes within the qualification attached to the privilege.

Appeal against the decree of the District Judge, Gorakhpur, dated the 27th February 1922.

Mr. *Kamuda Prasad*, for the Appellant.

Mr. *Hashi Narain Malaviya*, for the Respondent.

JUDGMENT.—This was a suit for damages for slander. The parties to the suit are residents and *zemindars* of the village Jamni. In November 1920 the Sub-Divisional Officer visited that village and met the parties. The defendant Bindeshwari Prasad told him that the plaintiff Hanuman Prasad was in the habit of causing the crops of other persons to be reaped and getting them grazed by cattle, and that he was a constant source of trouble and worry to the people of the nighbourhood. It appears that the name of the plaintiff was at one time in the history sheet and had been

subsequently removed. The Sub-Divisional Officer told Hanuman Prasad that he should not behave in a manner calculated to give rise to complaints against him and the matter there ended

The allegation of Hanuman Prasad was that the object of Bindeshwari Prasad in making that statement was to get him implicated in a proceeding under section 110 of the Code of Criminal Procedure and that he made that statement falsely and maliciously to injure him. The Courts below found that the defendant-appellant had made the statement imputed to him and that the statement was unfounded, and, if acted upon by the Sub-Divisional Officer, might have brought the plaintiff into serious trouble. They further found that the defendant-appellant had failed to make out that he believed in good faith that what he had said was true. It is urged on behalf of the defendant that the occasion was privileged and reliance is placed in support of that contention on *Chunni Lal* v. *Narsingh Das* (1). But, as stated by Pollock, "communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals, are privileged, provided the subject-matter is within the competence of the person addressed" (Pollock on Torts, 11th edition, page 272). The finding in this case is that the communication was not addressed in good faith and was unfounded. In such circumstances malice in law must be presumed and the privilege disappears. Even where a complaint is filed in a Criminal Court and is afterwards dismissed, a suit for damages for malicious prosecution is, in certain circumstances, maintainable, because the privilege is qualified and not absolute, and there is no protection unless the case comes within the qualification attached to the privilege. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 45 Ind. Cas. 540 ; 40 A. 341 ; 16 A. L. J. 360.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 39 OF 1923.

March 11, 1924.

Present :—Mr. Kinkhede, A. J. C.

PITAIN AND ANOTHER—APPLICANTS—APPELLANTS

versus

BABOOSINGH AND OTHERS—NON-APPLICANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 45—Expert opinion, when admissible—Examination in Court necessary.

Expert evidence must be tested by examination and cross-examination in open Court and does not of itself become evidence in the case. [p. 643, col. 2.]

The report of a Finger Print Expert based upon a comparison of finger impressions is not admissible under section 45 of the Evidence Act unless the finger print with which the comparison is made is admitted or proved beyond doubt to be that of the person alleged and the comparison is made in open Court in the presence of such person and the expert is cross-examined as to the grounds of his opinion about the result of the comparison. [p. 643, col. 1.]

Appeal against the decision of the District Judge, Jubbulpore, in Miscellaneous Case No. 118 of 1921, dated the 31st August 1922.

Mr. *J. C. Ghosh*, for the Appellants

Mr. *H. A. Palit*, for the Respondents.

JUDGMENT.—This is a miscellaneous appeal against the order, dated 31st August 1922, passed by the District Judge, Jubbulpore, in Miscellaneous Judicial Case No. 118 of 1921. The present appellants and two more, Ramlal and Kamta, petitioned to the District Judge, Jubbulpore, under section 62 of the Probate and Administration Act, V of 1881, for the grant of probate of the registered Will of one Bhola Kumbar, dated 8th May 1919. Bhola died on 6th January 1920. The appellants claim to be two of three executors named in the Will, the third executor was one *Mt.* Lachia, the daughter of the testator's predeceased brother and mother of the appellants. She was, however, dead when the application was made on 15th December 1921. Baboo Singh Debidin and Baldeo Prasad, who are mentioned as *panchas* in Bhola's Will filed objections on 23rd February 1922. On 3rd March

PITAIN *v.* BABOOSINGH

1922 Mulloo, Bhaiyalal, Barelal and Munda entered caveats objecting to the grant of probate. The three objectors did not challenge the genuineness of the Will but simply questioned the fitness of the applicants to be appointed administrators of the estate. They in fact admitted the genuineness of the Will and asked for Letters of Administration or Probate of the Will being granted to themselves on their furnishing security. The only defence of the caveators relevant to this case was that they did not admit the execution and the genuineness of the Will filed as that of Bhola Kumbar. They set up a prior Will, dated 13th March 1917. There is not even so much as a challenge so as to arouse the suspicion of the Court and to call for a minute scrutiny of the evidence about the execution of the Will. The point for determination with which we are concerned is:

> Has Bhola left a valid Will in writing and, if so, which is it?

On 25th April 1922 two witnesses for the applicants were examined and the following order was made in the order sheet of that date:

> "The case (is) rests on the genuineness of the Will and the parties agree to its being sent to thumb expert. I have asked them to file few more specimens of Bhola's thumb impression."

On 7th July 1922 the non-applicants represented by Mr. Palit filed what purported to be a registered *mukhtyarnama* bearing Bhola's thumb impressions but which is described by the Judge as a bond The Judge marked the two thumb impressions on it with crossing in blue pencil and ordered these two impressions to be compared with that purporting to be Bhola's in the Will similarly marked. The non-applicants were ordered to deposit the necessary fees to meet the fee of the Bureau at Nagpur and the case stood adjourned to await the receipt of the report from Nagpur. The letter to the Superintendent, Government Finger Print Bureau, Nagpur, was sent with the two documents on 27th July 1922 and the Superintendent was requested to compare the three impressions marked A, B, C, respectively, and to let the Judge know whether all the three thumb impressions tallied with each other. The Officer in-charge of the Finger Print Bureau in his letter No. 305, dated 1st August 1922, informed the Court that the prints marked A and B were different while print C was blurred and that definite opinion could not be given regarding it. This report was received and put up on 3rd August 1922. It was ordered to be put on 25th August 1922. On 25th August 1922 certain statements were recorded and the case was adjourned for orders for 31st August 1922. In his oral statement on 25th August 1922 the appellant Pitain maintained that Bhola executed the Will and put his thumb mark, marked A, in his presence to the Will. Mr. Palit for the caveators pressed for the dismissal of the application and did not ask for Letters of Administration to issue to them. The Court, considering the oral evidence unsatisfactory and relying on the report from the Nagpur Bureau that the Thumb mark A on the Will did not tally with the thumb mark B on the *makhtyarnama*, which was sent to the Bureau for comparison, refused to grant probate.

The applicants moved this Court in appeal against the order of refusal to grant probate. The appellants had originally filed the appeal against the objectors, Baboo Singh, Debidin and Baldeo Prasad. The four caveators, Mullo, Bhaiyalal, Barelal and Munda have since been joined as persons interested in the result of the appeal by a special order of this Court. It is argued that the lower Court's refusal to grant probate was based upon the wholly inadmissible report of Thumb Impression Expert, who was not examined in the case and that the applicants should have been given further opportunity to prove that the Will was genuine.

The fact that the instrument of the Will was executed several months before Bhola's death; that Bhola attended the Registration office and himself presented the document for registration on 3rd January 1920, and was not then ill, and that he put his thumb impression on the Will below the Sub-Registrar's endorsement after due identification by Gangaprasad, son of Murlidhar, Malguzar and Chinkoo Kumbar, coupled with the circumstance that the document is attested by two literate persons, are relied on by the appellants as strong circumstances supporting the genuineness of the Will. On the other hand, the circumstance that Bhola died within three days of the registration of the Will, and that the report

PITAIN *v.* BABOOSINGI

that the thumb impression on the back of the Will does not tally with the impression B on the *mukhtyarnama* are relied on to disprove its genuineness. I do not want to express any opinion of the relative value or preponderance of evidence one way or the other. But I can say that I doubt whether the Court would have discarded the circumstances supporting the genuineness and gone against them if the Finger Print Expert's report had not come before it. It is this legally inadmissible report which to my mind appears to have clearly prejudiced the mind of the District Judge against the genuineness of the Will. It has been held in *Mt. Padma Priya Debya* v. *Dharma Das Deb Sarma* (1), that if a Government expert in handwriting is not called as a witness and subjected to cross-examination in open Court his opinion is inadmissible in evidence.

There are several other cases which lay down that expert evidence has to be and is given in open Court : compare *Suresh Chandra Sanyal* v. *Emperor* (2), *In re* v. *Venkata Row* (3) and *Emperor* v. *Sheikh Abdul* (4). It is thus necessary for the admission of the evidence of a handwriting expert under section 45 of the Evidence Act, that the writing with which the comparison is made should be admitted or proved beyond doubt to be that of the person alleged and that the comparison should be made in open Court in the presence of such person. That this principle applies with equal propriety to the finger print expert's evidence also, and that the comparison also has to be made in open Court, is clear from *Emperor* v. *Sahdeo.* (5). The case of *Granade Venkata Ratnam* v. *The Corporation of Calcutta* (6) contemplates examination on oath and cross-examination of expert witnesses in open Court. In a case where the Court could not make up its mind to believe the witnesses of either party sent the document which was the subject-matter of the dispute to the Thumb Impression Bureau and on the receipt of this report of the said Bureau proceeded to decide the appeal with reference to such report, it was held that the procedure was unwarranted by law, see *Chhajju* v. *Ayub Ahmed* (7). This is what has practically happened in the present case. The case of *Sarwar Khan* v. *Emperor* (8) shows that the Finger Print Expert can be cross-examined in open Court as to the grounds of his opinion and as to the tests to which he had put particular finger print. This, again, affiirms the same principle that expert evidence must be tested by examination and cross-examination in open Court and it does not of itself become evidence in the case.

It was argued on behalf of the respondent that the parties had agreed to treat merely the report of the Finger Print Bureau as evidence decisive of the point of the genuineness of the Will. I, however, do not see anything in the record to support this broad assertion. All that I find is that the parties had agreed to the sending of the Will for comparison of its thumb impression with the thumb impression of Bhola on some other document. The thumb impression on the *mukhtyarnama* was not formally proved. Under such circumstances neither party can be said to have waived this right to test the correctness of the result of comparison of the impressions by examination and cross-examination in open Court. Even if it be conceded that the parties had agreed to this, I dare say, that such an agreement would not either preclude the Court from refusing to act upon inadmissible evidence, or compel it to decide the case on its basis. Here the findings have received their deep colouring from the report of the Finger Print Bureau and are, therefore, vitiated and cannot be accepted as binding on this Court. Moreover, the report as it stands does not necessarily mean that the impression is forged. It is just possible that the differentiating element which prevents the two impressions from tallying was due to the impression on the *mukhtyarnama* itself being defective for aught we know. This shows there was need for further scrutiny.

(1) 10 Ind. Cas. 965 ; 15 C. W. N. 728 at p. 730.
(2) 14 Ind. Cas. 753 ; 39 C. 606 ; 16 C. W. N. 812 ; 13 Cr. L. J. 289.
(3) 14 Ind. Cas. 418 ; 36 M. 159 ; 11 M. L. T. 93 ; 22 M. L. J. 270 ; (1912) M. W. N. 125 ; 13 C. R. L. J. 226.
(4) 33 Ind. Cas. 825 ; 43 C. 11 28 at pp. 1137, 1138 ; 17 Cr. L. J. 185; 20 C. W. N. 725.
(5) 3 N. L. R. 1 ; 5 Cr. L. J. 220.
(6) 46 Ind. Cas. 593 ; 22 C. W. N. 745 ; 28 C. L. J. 32 ; 19 Cr. L. J. 753.
(7) 28 Ind. Cas. 132.
(8) 55 Ind. Cas. 273 ; 21 Cr. L. J. 257.

AMJAD HOSAIN *v.* UMMATUL ASKARI

For all these reasons I hold that the decision of the lower Court is unsupportable and liable to be set aside. I accordingly set aside the decision and remand the case for futher trial of the issue as to the genuineness of the will. The parties will be at liberty to call such additional evidence as they may have to adduce in support of their respective allegations. The Finger Print Bureau will be requested by the lower Court to depute one of its skilled finger print experts to examine and give evidence about the thumb impressions in open Court. I may suggest that, with a view to have definite evidence about the identity of thumb impressions on the Will and the *mukhtyarnama* the Registration Muharrir may be summoned to produce the Registers in the Registration Office in which similar thumb inpressions simultaneously taken under the rules against serial No. 97 of 1917, dated 8th September 1917 (relating to the *mukhtyarnama)* and serial No. 2 of 1920, dated 3rd January 1920 (relating to the Will in question) and the thumb impressions contained in the Registers may be put to the expert witness for comparison with the disputed thumb impression.

The case is remanded for disposal with advertence to the above remarks. The respondents will pay the appellants' costs in this Court and bear their own. The costs in the lower Court will abide the result.

G. R. D. *Appeal Allowed.*
K. S. D. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 43 OF 1922.

Present:—Mr. Kanhaiya Lal, J. C.

February 23, 1923.

Syed AMJAD HOSAIN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Mt. UMMATUL ASKARI AND OTHERS—PLAINTIFF:—RESPONDENTS.

Muhammadan Law—Dower—Reasonable amount—Oudh Laws Act (XVIII of 1876), s. 5—Means of the husband.

Where the amount of dower settled at the time of a Muhammadan marriage was Rs. 70,000, while the assets left by the deceased husband who had died issueless, amounted to Rs. 11,465:

Held, that under section 5 of he Oudh Laws Act the sum of Rs. 4,000 would be a reasonable amount of dower to grant to the widow.

Appeal against the decree of the Subordinats Judge, Rae Bareli, dated the 8th August 1922.

Messrs. *Niamat Ullah* and *Radha Kishan*, for the Appellants.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for dower, and the only question for consideration is what is the proper amount which should be awarded to the plaintiffs. The suit was originally brought by *Mt.* Umme Salma, who was married to Akhtar Husain. Akhtar Husain died soon after the marriage, leaving his widow, *Mt.* Umme Salma, and two brothers, the present defendants-appellants surviving him. Her claim was resisted by these two brothers on various grounds, some of which were disposed of on appeal by this Court on the 18th May 1922. The suit was then remanded for the determination of the remaining questions, namely, what was the amount of dower settled at the time of the marriage of *Mt.* Umme Salma with Akhtar Husain, and what was the value of the assets left by the latter.

The learned Subordinate Judge found, that the assets amounted to Rs. 16,676-5-0. He awarded Rs. 5,000 accordingly to the plaintiffs-respondents, who are the heirs of *Mt.* Umme Salma, who had died during the pendency of the previous appeal to this Court. The learned Subordinate Judge included in the above amount a mortgage effected by Lal Basant Singh in favour of Safdar Husain, the father of Akhtar Husain, and the defendants-appellants, for Rs. 12,000 on the 14th January 1902 (Ex. 28). That mortgage was registered at Salon in the district of Rae Bareli; but the only property belonging to that district, which was included in that mortgage was plot No. 585 *khasra* with a mango and a mahua tree situated in the village Rajapur. It was held in another case between the same parties on the 8th September 1920, that the said plot did

not belong to the mortgagor (Exts. A1 and A2). The defendants-appellants were, therefore, justified in saying that the validity of the registration of the mortgage aforesaid was open to question, and that the money due on the mortgage should not be taken into account in the determination of the assests left by the deceased.

The learned Subordinate Judge has also included certain deeds of mortgage held by Safdar Husain, the valuation of which amounts Rs. 3,633. The allegation of the defendants-appellants was that the money due on those mortgages had been realized in the life time of Akhtar Husain. The plaintiff, *Mt.* Umme Salma, or her legal representatives, produced no evidence to prove that those mortgages were subsisting on the date of the death of Akhtar Husain. The valuation of those mortgages should also, therefore, be excluded from the account.

The value of the assests of Akhtar Husain, after deducting his one-third share of the said mortgages, thus amounts to Rs. 11,465-5-0. The amount of dower settled at the time of the marriage was Rs. 70,000 and two *dinars*. Having regard to the means of the husband and the status of the wife, and the fact that they left no children, it would be desirable to award the plaintiffs under section 5 of the Oudh Laws Act (XVIII of 1876) about one-third of that amount, or, roughly, Rs. 4,000. The conduct of the defendants-appellants in refusing to recognise the rights of *Mt.* Umme Salma to a reasonable amount of dower, and in raising frivolous pleas in opposing her claim has led to the prolongation of the suit, which has been pending since 1917. The lady died before she could get a decree. If the claimants are now her heirs and not the lady, the fault is that of the defendants who resisted her lawful rights and put her and her heirs to considerable expense. Their conduct disentitles them to any further consideration. The cross-objection filed by the plaintiffs-respondents is untenable.

The appeal filed by the defendants is, therefore, allowed in so far that the amount of dower decreed will be reduced to Rs. 4,000 which will be recoverable by the plaintiff from the assets of Akhtar Husain, deceased, with proportionate costs here and hitherto. The cross-objection is disallowed. The parties shall get and pay costs in proportion to their success and failure in this appeal and the cross-objection. Except as above, the defendants-appellants will bear their own costs throughout.

G. H. *Appeal allowed.*
Cross-objection disallowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 378 OF 1922.

November 21, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

PURAN SINGH—PLAINTIFF—APPELLANT
versus
DAT RAM AND OTHERS—DEFENDANTS RESPONDENTS.

Pre-emption—Sir *plots, interest in, nature of*—*Custom*—Wajib-ul-arz, *construction of*—

The interest of an owner in *sir* plots is a proprietary interest and a transfer of *sir* plots is, therefore, a transfer of proprietary interest.

The *wajib-ul-arz* of a village provided that a right of pre-emption would accrue whenever a proprietor transfers his *haqiat*. Certain *sir* plots in the village lying within the *Zemindari* of the vendor were sold and a suit was brought to pre-empt the sale;

Held, that the sale was subject to pre-emption under the terms of the *wajib-ul-arz*.

Hazari Lal v. *Ugra Rai*, A. W N. (1884) 103, dissented from.

Sital Prasad v *Amtul Bibi*, 7 A. 633; A. W. N.(1885) 185; 4 Ind. Dec. (N. S.) 754; *Safdar Ali* v. *Dost Muhammad*, 12 A. 426; A. W. N. (1890) 117; 6 Ind. Dec. (N. S.) 1016, followed.

Appeal from the decree of the District Judge, Shahjahanpur, dated the 14th December 1921.

Mr. *S. P. Sinha*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. Under a

sale-deed dated the 1st of March 1920 certain plots described therein as *sir* plots within the *Zemindari* of the executant were sold to the vendee. A suit was brought to pre-empt the sale by enforcement of the right of pre-emption. Various pleas were taken in the written statement but at the time when issues were framed by the first Court the denial of the existence of custom does not seem to have been pressed, with the result that there was no issue framed as regards the existence or non-existence of a custom of pre-emption. The learned Munsif in his judgment did not deal with this matter at all. The suit was decreed. On appeal, the defendants raised before the lower Appellate Court the point, that the *wajib-ul-arz* on which reliance was placed by the plaintiff, did not relate to the sale in question. The learned District Judge, relying on the cases of this Court reported in *Saheb Ram* v. *Kishen Singh* (1) and *Hazari Lal* v. *Ugra Rai* (2), came to the conclusion that the transfer of the *sir* plots was not such a transfer of the share in the *Zemindari* as would let in the right of pre-emption in favour of a co-sharer. In this view of the matter he dismissed the suit.

The plaintiff has come up in appeal and challenges the finding of the lower Appellate Court. Unfortunately, the *khewat* of this village is not on the record, but the sale-deed, as well as the admitted facts, show *prima facie* that these *sir* plots are within the *Zemindari* of the co parceners. There is nothing to suggest that they are isolated plots and lie outside the 16-annas share. The point was not seriously pressed at all and was raised for the first time before the learned District Judge. We may also note that the case in *Hazari Lal* v. *Ugra Rai* (2), relied on by him was overruled by a Full Bench case reported in *Sital Prasad* v. *Amtul Bibi* (3), and also by another Full Bench case. *Safdar Ali* v. *Dost Muhammad* (4). It is clear that the interest of an owner in *sir* plots is a proprietary interest and the transfer of the *sir* plots is in fact a transfer of his proprietary interest. Under the clause of the *wajib-ul-arz*, whenever a proprietor transfers his *haqiat* (property) a right of pre-emption accrues. We, therefore, think the suit should not have been dismissed on the ground above mentioned. The result is that this appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance is restored with costs including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

(1) A. W. N. (1882) 192.
(2) A. W. N. (1884) 103.
(3) 7 A. 633 ; A. W. N. (1885) 185 ; 4 Ind. Dec. (N. S.) 754.
(4) 12 A. 426 ; A. W. N. (1890) 117 ; 6 Ind. Dec. (N. S.) 1016.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1745 OF 1922.

January 15, 1924.

Present :—Mr. Justice Krishnan.

BODU ANNA NAIDU—APPELLANT
versus
VARADA JAGGU NAIDU AND OTHERS—RESPONDENTS.

Hindu Law—Co-widows, rights of—Surrender of estate by one, whether valid.

Under the Hindu Law, one co-widow, without the conjunction of the other co-widow, cannot surrender the estate of their husband at all because both the widows have equal rights in their husband's estate and without both joining there can be no surrender of that estate, as surrender requires that the whole of the estate should be dealt with in the matter of surrender

Appeal against the decree of the Court of the Subordinate Judge, Vizagapatam, in A. S. No. 223 of 1920, preferred against the decree of the Court of the District Munsif, Rajam, in O. S. No. 661 of 1918.

Mr. *P. Somasundaram*, for the Appellant.

Mr. *P. Narayanamurthy*, for the Respondents.

JUDGMENT.—This was a suit brought by one Varada Jaggu Naidu, son of Narama Naidu, for recovery of a one-third share in the plaint property which had been alienated by the widow Gaviramma in favour of one Sanyasi the father of the first defendant. He based his claim on the ground that he was one of the three reversioners entitled to the estate of one,

BODU ANNA NAIDU *v.* VARADA JAGGU NAIDU

Venkata Appala Naidu whose widow Gaviramma was. The other two reversioners are the third defendant, son of Musali Naidu, and the second defendant, the plaintiff's brother, also a son of Naranna Naidu. The relationship of the parties is shown in the pedigree given by the Appellate Judge in his judgment. Venkata Appala Naidu died, leaving two widows Gaviramma and Achamma and they were in enjoyment of the properties of the deceased as his brothers were divided from him. Gaviramma seems to have alienated the property in question in this suit to one Sanyasi whose son the first defendant is. The plaintiff claims that this alienation is invalid and that it did not pass any property beyond the life-time of Gaviramma and that he is, therefore, entitled to recover his share of the property from the alienee. The pleas raised by the first defendant, who was the only contesting defendant, were one of limitation based upon the ground that Gaviramma died more than 12 years before the date of the suit and the other of estoppel based on a compromise decree passed in O. S. No. 500 of 1881 in a suit brought by Musali Naidu the father of the third defendant. The question of limitation is not raised in the second appeal now, as it has been concluded by a finding of fact that Gaviramma died only in January 1910. As regards the question of estoppel, the facts are these: Musali Naidu brought a suit against Gaviramma and Sanyasi to have it declared that the alienation by Gaviramma to Sanyasi was not valid and binding on the reversioners. To that suit there were no other parties except these three persons. That suit ended in a compromise entered into between Musali Naidu and the defendants therein and the compromise decree is Ex. II. It is contended that that compromise is binding not only on Musali Naidu who was a party to the suit but also upon the other reversioners including the present plaintiff and that the plaintiff is estopped from claiming his share in the property on account of the compromise. The compromise provides for a certain property being taken by the plaintiff in that suit. Musali Naidu for himself and the two other reversioners who were then alive, namely, Naranna Naidu and Bangari Naidu and also for the reversioners recognising the alienation to Sanyasi and leaving certain properties with the widow Gaviramma and further provides that if the reversioners were to sue Atchamma, her co-widow, for her properties, the defendants in the suit should raise no difficulty in their way. It is contended that this amounted to a surrender by the widow to the next reversioner and as such surrender it was a valid transaction binding on the reversioners and, therefore, that none of the reversioners can impeach it though they were not themselves parties to the compromise. It seems to me that this is a difficult proposition to maintain. In the first place, one co-widow without the conjunction of the other co-widow cannot, in my opinion, surrender the estate of their husband at all because both the widows have equal rights in their husband's estate and without the two widows joining there can be no surrender of that estate as the surrender requires that the whole of the estate should be dealt with in the matter of surrender. In the second place, the attempts made by the first defendant failed in his attempt to show that though Bangari Naidu and Naranna Naidu were not parties to the compromise decree which is supposed to have effected the surrender, they were bound by that decree because they took advantage of the arrangement under that decree and enjoyed the lands in separate shares. This is found against by the Appellate Court and is a question of fact on which I must accept its finding.

For both these reasons, the lower Appellate Court was right in holding that the compromise decree, Ex. II, is not binding on them. As both the defences failed, the appeal fails and must be dismissed with costs.

There is a memorandum of objections filed in the case as regards mesne profits subsequent to the date of the suit. It is not necessary to pass any special orders on this matter for when the application for stay of execution pending the second appeal came up it was agreed to by the first defendant's learned Vakil that, as a condition for stay, his clients would undertake to pay mesne profits on these properties at the rate decreed for the period subsequent to date of the suit, that is, at Rs. 50 a year. It will be perhaps conducive to clearness if that order is embodied here and a decree is drawn up not only for past profits but for future profits at the same rate till the date when possession is given. I do not think that the respondent is entitled to

costs on the memorandum of objections in view of the agreement that had already been entered into between the parties before the memorandum was filed. The memorandum of objections is allowed but without costs.

V. N. V. *Appeal dismissed.*
Cross-objections allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2452 OF 1921.

March 6, 1924.

Present :—Mr. Justice M. N. Mukerji.

MUHAMMAD SULAIMAN KHAN—APPELLANT
versus
UMA CHARAN SIL—RESPONDENT.

Landlord and tenant—Character of tenancy, how determined—Lease, construction of—Lease on printed form—Words used, effect of—Bengal Tenancy Act (VIII of 1885), ss. 41, 47—Tenant holding over—Second lease, execution of—Ejectment suit, whether maintainable.

In order to determine the character of a tenancy, the Court has to look to the intrinsic evidence afforded by the documents themselves and also, if necessary, to the surrounding circumstances and the conduct of the parties. [p. 649, col. 2.]

Hedayet Ali v. *Kamalanand Singh*, 20 Ind. Cas. 832; 17 C. L. J. 411; *Mahananda Chakravarti* v. *Mongala Kealani*, 31 C. 987 ; 8 C. W. N. 804 ; *Nidhi Krishna Bose* v. *Ramdas Sen*, 20 W. R. 341 ; *Harendra Kumar Ray Chowdhury* v. *Hara Kishore Pal*, 70 Ind. Cas. 166; 26 C.W.N. 389 ; (1922) A. I. R. (C.) 201, distinguished.

In case of leases on printed forms indiscriminately used, much reliance cannot be placed on words and expressions used therein. [p. 649, col. 1.]

Where a large portion of the area of a tenancy was covered by a tank and there was no mention in the leases that the tenancy was being created for purposes of agriculture or horticulture but the documents mentioned that the rent would be increased proportionately as the lands became cultivable, and that the tenant would be liable to damages if the productive power of the lands be diminished through his negligence.

Held, that the tenancy was governed by the Bengal Tenancy Act and not by the Transfer of Property Act. [p. 650, col. 2.]

In a suit for ejectment under section 44 of the Bengal Tenancy Act on the ground that the term of the lease had expired, section 47 of the Act would be a bar if it is found that the defendant held over for about eleven months after the expiration of the first lease and previous to the execution of the second lease after the expiry of which the suit is brought. [p. 651, col. 1.]

Rajani Kant Mukerjee v. *Yusuf Ali*, 34 Ind. Cas. 92; 21 C. W. N. 188, distinguished.

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 18th August 1921, affirming the decree of the Munsif of Coxe's Bazar, dated the 22nd June 1920.

Babu *Narendra Kumar Das*, for the Appellant.

Babu *Gopendra Nath Das*, for Babu *Chandra Sekhar Sen*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was one for ejectment of the defendant on the expiry of a lease, dated the 22nd *Falgun* 1321 B. S. the term of which expired on the 30th *Chait* 1325. The plaintiff was unsuccessful in both the Courts below and he has preferred this appeal to this Court.

Two contentions have been put forward in this appeal on behalf of the appellant. The first is that the tenancy is governed not by the provisions of the Bengal Tenancy Act but by those of the Transfer of Property Act : and the second is that, assuming for the sake of argument, that the tenancy is governed by the Bengal Tenancy Act, the Courts below have erred in law in holding that the provisions of section 47 of that Act stand in the way of the plaintiff's recovering a decree.

In support of the first contention, the learned Vakil for the appellant has drawn my attention to the conditions of leases Exs. A and B executed respectively in 1908 and 1915. He has referred to the description of the subject-matter of the lease, Ex. B, and has urged that, inasmuch as the three plots which are covered by that lease are (1) 17 *gundas* and odd which is said to be the bank of a tank, (2) 14 *gundas* and odd which is described as the watery portion, and (3) 2 *gundas* and odd which is said to be *Muddat* or waste land, a large portion of the tenancy is in respect of a tank and his contention is that it should be held that the tenancy is not for

agricultural or horticultural purposes. He has also referred to the terms of the two leases aforesaid and has contended that, inasmuch as there is no specific mention in those leases that they were being executed for the purpose of agriculture or horticulture, the tenancy created thereby is to be regulated by the provisions of the Transfer of Property Act, and not by those of the Bengal Tenancy Act. On behalf of the respondent it is urged, so far as this contention is concerned that the documents in question on the face of them appear to be in respect of a tenancy in favour of a non-occupancy *raiyat* and, therefore, the plaintiff is precluded from questioning the status of the *raiyat* and the character of the tenancy, the latter having derived his interest from the Court of Wards who executed those documents. With regard to this matter, I may say at once that I am not prepared to place much reliance upon the words and expressions used in these documents, specially as they appear to have been executed on printed forms which have been prescribed by the Board of Revenue for use in cases of tenants who are non-occupancy *raiyats*. In my experience, I have come across cases where these forms have been indiscriminately used with regard to tenancies for which they were never meant at all. As an instance, I may refer to the lease which formed the subject-matter of the case of *Gokul Mandar* v. *Padmanund Singh*. (1) It will be seen that in that case the lease which was on a printed form spoke of the tenant as a *raiyat* and, in spite of that, it was held by this Court that the tenant was not a *raiyat* but a tenure-holder and that judgment was affirmed by the Judicial Committee on appeal from the decision of this Court. Nor am I prepared to accept the argument which is put forward on behalf of the respondent that the plaintiff is precluded from questioning the status of the tenant or the character of the tenancy simply because his predecessor had described the lease as a lease in respect of a non-occupancy *raiyat*. It seems there is considerable divergence of judicial opinion on the question as to whether the description in the lease is to be taken as binding with regard to the status of the tenant or the character of the tenancy as between the contracting parties or their successors. As an instance, I may refer to the case of *Rajani Kant Mukerji* v. *Yusuf Ali* (2). However that may be, the fact that the Court of Wards, presumably through its responsible officers chose to have those documents executed on forms which had been prescribed for use in cases of non-occupancy *raiyats* is a matter which, in my opinion, cannot altogether be ignored. In order to determine the character of the tenancy, the Court has to look to the intrinsic evidence afforded by the documents themselves and, if the terms are vague or ambiguous, the Court is entitled also to look to the surrounding circumstances and the conduct of the parties.

Before dealing with this matter, it is just necessary to refer to a few authorities to which my attention has been drawn by the learned Vakil appearing on behalf of the appellant. The first case relied upon by him is the case of *Hedayet Ali* v. *Kamalanand Singh* (3). That was a case where the question arose as to whether a lease for grazing purposes was to be treated as a lease for the purpose of agriculture and it was held therein that "the mere circumstance that a considerable portion of the land comprised in the tenancy was let out for the purpose of grazing is not conclusive upon the question whether the lessee has or has not acquired the status of a *raiyat*." A further question arose in that case and it was to the effect as to whether, by the inclusion of a piece of garden land in the tenancy in question in that case, the tenancy created was one for the purpose of horticulture, and it was held with regard to this question that "the term 'horticulture' means the cultivation of a garden or the science of cultivating or managing a garden including growing flowers, fruits and vegetables. If a lease is for the purpose of gathering fruits from the trees on the land, the lease is not for horticultural purposes." The second case to which my attention was drawn by the learned Vakil for the appellant was the case of *Nidhi Krishna Bose* v. *Ramdas Sen* (4), where it was held a right of occupancy is not acquired in "a tank except under certain circumstances. Where land is let for cultivation and there

(1) 29 C. 707 ; 29 I. A. 196 ; 6 C. W. N. 825 ; 4 Bom. L. R. 793 ; 8 Sar. P. C. J. 328 (P. C.).

(2) 34 Ind. Cas. 92 ; 21 C. W. N. 188.
(3) 20 Ind. Cas. 332 ; 17 C. L. J. 411.
(4) 20 W. R. 341.

is a tank upon it, the tank would go with the land ; and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land." The next case relied upon was the case of *Mahananda Chakravarti* v. *Mangala Keotani* (5), in which it was decided that a suit for recovery of arrears of rent of a tank which was not a part of an agricultural holding but was used for rearing or preserving fish was not maintainable in a Revenue Court, the provisions of Act X of 1859 not being applicable to such a suit and that the term "land" in section 6 of that Act means cultivated land and does not include a tank regarded as land covered with water. The last of the cases upon which reliance was placed with reference to these contentions of the appellant was the case of *Harendra Kumar Roy Chowdhury* v. *Hara Kisore Pal* (6). That was a case where a *raiyat* transferred his homestead portion out of a non-transferable occupancy holding in respect of which he was the tenant to a pleader who purchased it for the purpose of residence and for carrying on his profession as a pleader and the question arose as to whether the pleader by his purchase of that portion of the non-transferable occupancy holding had himself become a tenant with rights which appertained to a non-transferable occupancy holding and it was held upon the circumstances of that case that the pleader had obtained a new tenancy and those rights had not accrued to him. These cases, therefore, do not assist us in any way in the determination of the question as to the character of the tenancy or the status of the tenant, and, as I have said before, the Court must look to the terms of the documents themselves and also, if necessary, to the surrounding circumstances and the conduct of the parties.

Now, as to the terms of the documents referred to above, it is true, as urged on behalf of the appellant, that a large portion of the area covered by the tenancy is tank. It is true also that in those documents there is no specific mention of the fact that the tenancy was being created for the purpose of agriculture or horticulture. But, on the other hand, the documents in question speak of conditions to the effect that the rent would be increased proportionately as the lands become cultivable and also that the tenant would be liable to damages if the productive power of the lands be diminished in consequence of negligence on the part of the tenant. Then, again, it is to be observed that in the second of those documents, namely, in Ex. B, all these plots are mentioned as *Hasila*. Furthermore, it has been found by the learned Subordinate Judge that from the defendant's evidence it appeared that during his possession commencing from before the term of Ex. B the lands were paddy lands and that there were mango trees on the banks the fruits of which he enjoyed. Nextly, we find that the plaintiff himself has framed his suit as a suit for ejectment of a tenant under the provisions of the Bengal Tenancy Act. Lastly, the lands were recorded in the Cadastral Survey proceedings under the Bengal Tanancy Act. Taking all these facts together, it is impossible to doubt the conclusion at which the Courts below have arrived that the tenancy is one which is to be governed by the provisions of the Bengal Tenancy Act and not by those of the Transfer of Property Act. The first contention put forward on behalf of the appellant, therefore, in my opinion, fails.

With regard to the second contention, it has been urged that, inasmuch as there was a lease of 1908 under which the defendant was holding for a period of seven years and then on the expiry of that lease as a fresh lease was executed in 1915 for a period of five years, and inasmuch as the suit for ejectment was instituted on the expiry of the second lease, it could not be said that the provisions of section 47 of the Bengal Tenancy Act would apply to the case. In support of this contention, reference has been made to the case of *Rajanikant Mukerji* v. *Yusuf Ali* (2). In my opinion, that decision does not lay down any principle which may be of any use in the present case so far as this point is concerned. In the present case, the finding of the learned Subordinate Judge is that, after the expiry of the term of the lease Ex. A, the defendant held over for about eleven months after which the lease Ex. B was executed. Consequently, in my judgment, it is clear that the defendant was not admitted to occupation under the

(5) 31 C. 937 ; 8 C. W. N. 804.
(6) 70 Ind. Cas. 166; 26 C. W. N. 389 ; (1922) A. I. R. (C) 201.

lease Ex. B but that he had been in occupation of the land and the lease Ex. B was executed with a view to the continuance of that occupation. He is, therefore, not to be deemed to have been admitted to occupation by the lease Ex. B and, inasmuch as the suit for ejectment had been brought under the provisions of section 44 of the Bengal Tenancy Act for ejectment of the defendant on the ground that the term of that lease had expired, the plaintiff was not entitled to the relief he sought for in the present suit. The second contention also, in my opinion, therefore, fails.

The result, therefore, is that the appeal is dismissed with costs.

M. B. *Appeal dismissed.*
N. H.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 907, 908 AND 909 OF 1922.

September 10, 1923.

Present:—Mr. Justice Kumaraswamy Sastri.

GOPALAKRISHNA PILLAI AND OTHERS —PETITIONERS
versus
KUNJITHAPATHAM PILLAI AND OTHERS —RESPONDENTS.

Court, act of—Election petition—Deposit of money—Delay in payment—Unforeseen cause—Limitation Act (IX of 1908), s. 5, application of.

Where a person who is bound to pay money produces the money in Court and complies with the rule which requires him to take out *challan* and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the *challan* obtained. [p. 653, cols. 1 & 2.]

The rule of law that nobody should be prejudiced by an act of Court or of its officers is one of universal application and does not depend upon section 5 or any other provision of the Limitation Act. [p. 654, col. 1.]

Arunachela Ayyar v. *Subbaramiah*, 68 Ind. Cas. 971; 46 M. 60; (1922) M. W. N. 600; 31 M. L. T. 257; 16 L. W. 583; 43 M. L. J. 632; (1923) A. I. R. (M.) 63; *Krishnaji Reddiar* v. *Muthuveera Reddiar*, 72 Ind. Cas. 449; 44 M. L. J. 344; (1923) M. W. N 199; 18 L. W. 299; (1923) A. I. R. (M.) 490; *Koilpillai Samban* v. *Sapparimuthu Samban*, 72 Ind. Cas. 220; 17 L. W. 187; 44 M. L. J. 247; (1923) A. I. R. (M.) 254, considered.

The election to a Taluk Board was held on 9th May 1922. The Court was closed for the vacation on 14th May and re-opened on 17th July. The period of 14 days allowed for presentation of election petitions expired during the vacation and the petitions were presented on 17th July, the re-opening day, with the necessary Lodgement Schedule for the requisite deposit. The *challans* were issued late in the day. The Treasury Officer was at that time absent from his place and it was too late to make the payment to the Bank. The next day on account of a *jutka* accident and a delay of an hour by the Treasury Officer, the money could not be paid. The money was, however, paid on the 19th:

Held, that, in the absence of any negligence on the part of the petitioner, the payment must be held to have been made in time.

Petitions under sections 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge, Cuddalore, in O. P. Nos. 10, 11 and 13 of 1922, dated the 2nd October 1922.

Messrs. *T. R. Ramachandra Iyer* and *S. Ramaswamy Aiyar*, for the Petitioners.

Messrs. *S. Muthiah Mudaliar*, *C. Padmanabha Iyengar*, *S. Srinvasa Aiyar* and *V. Subramania Iyer*, for the Respondents.

JUDGMENT.—The facts in these cases are not disputed and the only question is whether on the facts the Subordinate Judge was right in dismissing the applications.

The election to the Taluk Board in question was held on the 9th of May 1922. The Subordinate Judge's Court was closed for the summer recess on the 14th of May 1922 and re-opened on the 17th of July. The period of 14 days allowed for the presentation of the election petitions expired during the vacation and these petitions were presented on the 17th of July the date when the Court re-opened. The case for the petitioners is that they had with them the sum of Rs. 200 each which had to be deposited and that these sums were produced before the Subordinate Judge.

GOPALAKRISHNA PILLAI *v.* KUNJITHAPATHAM PILLAI

Rule 131 of the Civil Rules of Practice requires a person desirous of paying money into Court to bring into Court a Lodgment Schedule in the form prescribed by the rules and containing the various particulars mentioned therein. Thereupon an order for lodgment and counterfoil receipt are to be issued to the payer. Rule 132 states that the payer shall deliver the money and the order and the counterfoil receipt to the Bank or Treasury Officer mentioned therein who is to retain the order and return the receipt duly signed by him to the payer which receipt the payer should return to the Court. Rule 133 provides that if the Bank or the Treasury is closed, the money may, with the leave of the Judge, be paid to the officer of the Court and the officer of the Court will send it to the Bank the next day. As the bank was open at the time of the presentation of the petitions the Vakil in pursuance of the Rules of Practice obtained a Lodgment Schedule. The judge on receipt of the petition, passed an order for the issue of *challans* and *challans* were issued on that day. As there is a branch of the Imperial Bank of India at Cuddalore, the *challan* issued by the Court had to be taken to the officer in charge of the Treasury, checked by him and then taken to the branch of the Imperial Bank. The *challans* were issued at about five minutes to three and they were taken at once to the Treasury but the Treasury Officer was not there. As the Bank would not receive the money after 3 o'clock it was impossible to pay the money into the Bank on that day. The money was returned to the Vakil for the petitioners. He and the members of his family were then staying at Tiruvendipuram about four miles from the Court House and the Treasury Office and he took the money with him in order that it may be paid the next morning. The money was sent the next day from Tiruvendipuram to the Treasury Officer with the *challans* and the Treasury Officer returned the *challans* at about 2·40. As the Bank was about 2½ miles from the Treasury Office, the person taking the *challans* and the money to the Bank arrived at the Bank at 5 minutes after 3, but the Bank would not receive the money and it was therefore paid the next day. On the 18th the person taking the money to the Treasury Officer went in a *jutka*. There was an accident to the horse and it was, therefore, about 1-50, P. M. when the person reached the Treasury Officer. There would have been, however, ample time to have gone to the Bank if the Treasury Officer had not taken nearly an hour to return the *challans* to the person who brought the money. The Subordinate Judge is of opinion that, so far as the 17th is concerned, the delay was unavoidable but thinks that the delay on the 18th has not been properly explained.

There can be little doubt that if there was no accident to the horse, there would not have been a delay of five minutes on the 18th and that the money would have been received by the Bank. The trouble was that owing to the delay the person who had the money reached the Bank at 3·5 while, according to the rules of the Bank, no money would be received after 3 P. M. I do not think that the view taken by the Subordinate Judge is correct. It is not reasonable to hold that a person is guilty of negligence when he would, in the ordinary course of things, have arrived in time for payment and the delay of 5 minutes was due to an accident which he could, by no means, have foreseen. In this connection I need refer to the judgment of the Chief Justice in *Arunachela Ayar* v. *Subbaramiah* (1). The learned Chief Justice observes "The question to be considered by the Court is not whether by some human possibility, being wise after the event, he could have got there in time, and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was, in no way, responsible, it is the duty of the Court, in my judgment, to set aside the judgment, muleting in proper cases, the delinquent man in costs." It is no argument to say that where a man leaves in time and would, in the ordinary course, have reached the Bank in time, he would, in spite of the accident, have reached before the Bank was closed if he had started earlier, or if the *jutka* horse had run faster. The question remains for consideration as to whether even in cases where there is no negligence and where the applicant has complied with the rules, the application should

(1) 68 Ind. Cas. 971 ; 46 M. 60 ; (1922) M. W. N. 600 ; 31 M. L. T. 257 ; 16 L. W. 583 ; 43 M. L. J. 63 ; (1923) A. I. R. (M.) 63.

GOPALAKRISHNA PILLAI v. KUNJITHAPATHAM PILLAI

be dismissed because the money was not paid into Court with the application whatever the reason may be.

Rule 4 of the Election Rules framed by the Government under the Madras Local Boards Act enacts that the amount should be deposited at the time of the presentation of the the petition and that if it is not deposited the petition should be dismissed. The contention of the respondents is that in such cases money should be paid in and that even if the *challans* had been taken and the money paid into the Bank a few minutes later, the petition would still have to be dismissed as the presentation of the petition and the payment of the money were not simultaneous. This construction, so far as I can see, has nowhere been placed on the rules. In *Krishnaji Reddiar* v. *Muthuveera Reddiar* (2) Krishnan, J., though he held that no question would arise as to the Court excusing the delay the provision in the rule being mandatory, took the view that if the failure to pay the money was due to any action taken by the Court, the petition would be proper. The Rules of Practice are binding on all Civil Courts and where the rules provide that a *challan* must be obtained and money paid into the Bank unless at the time of making the application to receive the money the Bank is closed, it is difficult to see how the Court could receive the money in violation of the Rules of Practice which have the force of law and are binding on all Civil Courts. The Subordinate Judge in paragraph 12 of his judgment observes that the Vakil was perfectly justified in putting in a Lodgment Schedule and taking out the *challan* without tendering the money to the Judge. It cannot, therefore, be said that the petition ought to be dismissed because the money was not paid to the Judge in cash. It is argued that, although the Vakil produced the money before the Judge, he did not formally ask the Judge to receive the money ; but it seems to me that no object would be gained by making a request which, under the Rules of Practice, the Judge is bound to refuse. I am of opinion that where a person who is bound to pay money produces the money in Court and complies with the rule which requires him to take out a *challan* and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the *challan* obtained. To hold otherwise would be to penalise a party for events beyond his control. In *Koil pillai Samban* v. *Sapparimuthu Samban* (3) which was a case under section 17 of the Provincial Small Cause Courts Act, the provisions of which have been held to be mandatory, Ramesam, J , observes as follows :—"I hold that when the party has applied for a *challan* and the delay in issuing the *challan* is the delay of the officers of the Court and after the issue of the *challan* he deposited the money immediately the maxim *nune protune* applies and the application for *challan* (in such circumstances) is equivalent to the deposit." With these remarks I entirely agree. Whether the payment is to be made under the Small Cause Courts Act or under the Election Rules it will, in my opinion, be contrary to all principles of justice to require a man to comply with the rules which insist on the taking out of a *challan* and paying the money to a different officer and then to dismiss the application on the ground that the money ought to have been paid to the Judge himself or to hold that the payment to the officer contemplated by the rules would not be equivalent to the compliance with the rules where the delay in payment is entirely due to causes beyond the person taking out the *challan*. The Subordinate Judge finds that if the money had been paid on the 18th of July, *i. e.*, the next day, the delay would have been justified but he thinks that because it was not paid on the 18th owing to the accident which happened to the *jutka* which caused the person making the payment to be five minutes late in the Bank, there was no ground for excusing the payment the very next day. I have already given my reasons for holding that the accident was one which the person could not have foreseen and that there was no negligence on the part of the person making the payment.

It has been argued that the provision of section 5 of the Limitation Act would not apply

(2) 72 Ind. Cas. 449 ; 44 M. L. J. 344 ; (1923) M.W. N. 199 ; 18 L.W. 299 ; (1923) A. I. R. (M) 490.

(3) 72 Ind. Cas. 220 ; 17 L. W. 187 ; 44 M. L. J. 247 ; (1923) A. I. R. (M.) 354.

and that consequently the Court has no power to excuse the delay. The question is not one of excusing any delay. The question is whether in the present case the rule of law that nobody should be prejudiced by the acts of the Court or of its Officers is one of universal application. It does not depend upon any of the provisions of the Limitation Act and this rule is applied to cases under O. XXI, r. 89 of the Civil Procedure Code to set aside sales depositing the money into Court.

In the result, I set aside the order of the Subordinate Judge and direct him to restore the petitions to his file and dispose of them according to law. The respondents will pay the petitioners their costs of these petitions in this Court.

V. N. V. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 61 AND 62 OF 1922.

Present :—Messrs. Dalal, A. J. C., and Simpson, A J. C.

In Appeal No. 61.

DUBER AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SAHAI—PLAINTIFF AND MUHAMMAD HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

In Appeal No. 62.

RAM SAHAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

S. MUHAMMAD HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior mortgagee, suit by—Subsequent mortgagee impleaded as party—Omission to redeem prior mortgage—Subsequent suit to redeem, whether maintainable—Prior mortgage—Mesne incumbrance—Puisne mortgagee, right of, to redeem—Right to redeem, nature of—Transfer of Property Act (IV of 1882) s. 89, nature of.

If a subsequent mortgagee, on being impleaded in a suit upon the prior mortgage, omits to set up his mortgage and claim to redeem the prior mortgage when he has an opportunity to do so, he cannot afterwards sue for that purpose on the mortgage he omits to plead. [p. 856, col. 2.]

Sri Gopal v. *Pirthi Singh*, 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118; 8 Sar. P. C. J. 293 (P. C.); *Nattu Krishnamachariar* v. *Annangara Chariar*, 30 M. 353; 2 M. L. T. 330; 17 M. L. J. 301, relied on.

A puisne mortgagee can redeem a prior mortgage even when there is a mesne incumbrance. But this is not an absolute right and arises when he comes in Court to obtain his remedy for his own mortgage.

The true construction of section 89 of the Transfer of Property Act is that when a final decree is passed, the security is extinguished and is re-placed by the decree.

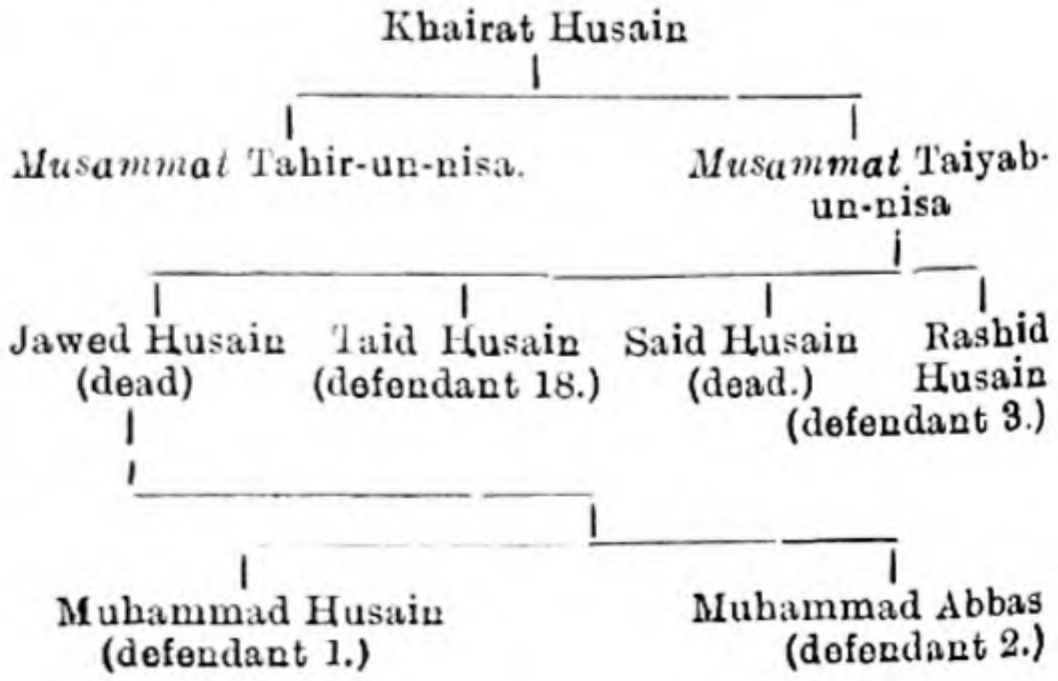
Het Ram v. *Shadi Ram*, 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.), relied on.

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 25th August 1921.

Messrs. *Bisheshwar Nath* and *Niamatulla*, for the Appellants.

Messrs. *S. M. Ahmad*, *H. Husain*, *Ganesh Prasad*, *M. A. Khan* and *Basudeo Lal*, for the Respondents.

JUDGMENT.—These are two first appeals, one by the plaintiffs and the other by some of the defendants from a decree of the Subordinate Judge of Bara Banki. Saiyed Khairat Husain, the names of whose descendants are given in the following pedigree, owned villages Murliganj, Garhi Rakhmau and Rasulabad.



DUBER *v.* RAM SAHAI

Musammat Taiyab-un-nisa had one daughter also but it is not necessary to mention her name because she never claimed any share in the property of Khairat Husain. Jawed Husain owned in reality only a two-annas share in the three villages, but he appears to have put himself forward as the owner of the entire property.

On 23rd December 1895 he mortgaged all the three villages to the Raja of Jahangirabad (Exhibit D1) for Rs. 25,000 by a deed which was attested by his brothers Taid Husain and Rashid Husain. The terms of the deed were those of a simple mortgage for ten years with a right given to the mortgagee to take possession as a usufructuary mortgagee on non-payment of interest at the end of that period.

On 15th May 1896 Jawed Husain mortgaged these villages to Ram Dayal and Sukhai Lal for Rs. 1,500 (Exhibit D10).

On 11th July 1905 he mortgaged the same property to Ram Dayal alone for Rs. 1,750 (Exhibit 1) and paid off the amount due to Ram Dayal on the mortgagee of 1896 out of part of the consideration.

In 1908 litigation commenced on foot of the various bonds. On 13th August 1908 the Raja brought a suit for sale of a six-annas share of the three villages against Jawed Husain, Taid Husain and Rashid Husain and obtained a compromise decree on 28th October of the same year. The conditions were that sale was to take place after four years and the separate shares of the three brothers were to be sold one after another, Jawed's first, Taid's next and Rashid's last. Neither of the subsequent mortgagees, Ram Dayal or Sukhai Lal, was made a party to this suit. On 20th March 1914 Jawed Husain's two-annas share was put up to sale and purchased by defendants Nos. 4 to 7; defendants Nos. 4 to 6 paid Rs. 17,000 for Murliganj and Garhi Rakhmau while the defendant No. 7 paid Rs. 925 for Rasulabad village. Taid's share was purchased at the same time by defendants Nos. 8 and 9. As the full amount of the decree was satisfied Rashid Husain's share was not sold.

On 14th May 1910 Sukhai Lal sued the sons of Jawed Hussin (Jawed Husain having died before them) and obtained a decree for sale of 2-annas share of Jawed Husain on 9th September 1910 (Exhibits D11, D12 and D 13). To this suit Ram Dayal's nephew and widow were made parties as subsequent mortgagees. In para. 6 it was stated that Ram Dayal's representatives-in interest were made parties to the suit as subsequent mortgagees. Ram Sahai, nephew of Ram Dayal, who was made a party to the suit, is plaintiff here A copy of the proceedings of that suit (Exhibit DI2) shows that the pleader for Ram Sahai objected to Ram Sahai being made a party on the ground that he had no interest left in the property. The names of Ram Sahai and of Ram Dayal's widow were, therefore, struck off from the list of parties and their names do not appear in the decree passed in favour of Sukhai Lal. The two-annas share of Jawed Husain in all the three villages was put up to sale and purchased by Sukhai Lal on 21st July 1913 for Rs. 1,500. It may be noted that this sale was prior in date to the sale in execution of the decree in favour of the Raja

The auction-purchasers, defendants Nos. 4 to 7 of this suit, were not able to obtain possession of the property purchased by them and their suit against Sukhai Lal was dismissed on 31st March 1915. They thereupon purchased the property from Sukhai Lal on 29th June 1915 and took possession.

The present suit was instituted by Ram Sahai as representative-in-interest of Ram Dayal on foot of the mortgage of 11th July 1905 asking for two reliefs,—

(1) of redemption of six-annas share in three villages which were mortgaged to the Raja on payment of Rs. 25,000 on the ground that Ram Sahai was not a party to the Raja's suit ; possession was desired of the property in accordance with the terms of the Raja's mortgage which became usufructuary at the end of 10 years on non-payment of interest ;

(2) in the alternative, for sale of the property to recover Rs. 8,139-15-6 due on the mortgage of Ram Dayal.

Defendants Nos. 1 to 9 and 18 have already been indicated. Defendants Nos. 10 to 15 are subsequent transferees and defendants Nos. 16 and 17 are mortgagees of groves situated on the property.

DUBER *v.* RAM SAHAI

The learned Subordinate Judge refused to grant possession to the plaintiff but granted him a decree in the following terms :—

(1) that he should first redeem two-annas share of villages on payment of one-third of Rs. 25,456-6-0 (the amount of the decree in favour of the Raja) to defendants Nos. 4 to 7 within six months of the date of the decree, otherwise his suit would be dismissed.

(2) if such payment was made within the time specified he could add his own claim to that amount and unless defendants Nos. 4 to 7 and 15 to 17 paid off this consolidated amount, he could bring the property to sale to recover the amount.

It is not clear from the judgment how the intermediate mortgage of Sukhai Lal of 15th May 1896 was squeezed out.

The grounds of appeal of defendants Nos. 4 to 7 are, —

(1) That the plaintiff's suit should fail because he did not redeem Sukhai Lal's mortgage when he had the opportunity to do so during proceedings in Sukhai Lal's suit in 1910.

(2) That at all events Sukhai Lal's mortgage should be redeemed by the plaintiff before he could bring the property to sale.

(3) That the decree was at variance with the reliefs applied for in the plaint.

(4) That redemption ought to have been ordered of the entire decree of the Raja and not only of two-annas share.

(5) That the appellants were entitled to a larger amount than that fixed by the lower Court for redemption of the Raja's mortgage.

The first ground of appeal must prevail. The defendants Nos. 4 to 7 are in possession of the two-annas share of Jawed Husain in the properties in suit in virtue of Sukhai Lal's mortgage as much as in virtue of the Raja's mortgage. If the plaintiff has lost his right to redeem Sukhai Lal's mortgage he cannot bring to sale the property, at present in possession of defendants Nos. 4 to 7.

As noticed above, the plaintiff was made a party to Sukhai Lal's suit as subsequent mortgagee and pleaded at that time that he had no interest in the property. It was his duty to offer to redeem Sukhai Lal and when he failed to do so, he is not entitled to another opportunity. The Privy Council ruling in the case of *Sri Gopal* v. *Pirthi Singh* (1) exactly covers this point. The head-note says : "If a person being a party to a suit on a mortgage prior to his own, omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he omits to plead." The facts are somewhat involved and may be stated. Ishur Das, predecessor-in-interest of the plaintiff Srigopal of that suit, had three mortgages on the property of the following dates :—

21st July 1871 ;

7th February 1874 ;

16th July 1874.

The defendants Murli Singh and Sarnam Singh had an intermediate mortgage of 30th August 1872. Murli Singh and Sarnam Singh brought a suit to redeem the mortgage of 21st July 1871 and obtained a decree. In that suit Srigopal, who was a party, did not plead his subsequent mortgages of 1874 and did not offer to redeem Murli Singh and Sarnam Singh. Subsequently, when Srigopal sued on the basis of his bonds of 1874 to redeem Murli Singh and Sarnam Singh, the Privy Council held that he could not do so because he had failed to set up these mortgages in the previous suit brought by Murli Singh and Sarnam Singh. In the suit of Murli Singh and Sarnam Singh the subsequent mortgages of Srigopal were not even mentioned and yet the Privy Council held that it was the duty of Srigopal to set them up. The present case before us is stronger, because Sukhai Lal in 1920 specifically mentioned in his plaint that Ram Dayal was subsequent mortgagee and that was why Ram Sahai, plaintiff of the suit before us, was made a party, to give him an opportunity to redeem. Ram Sahai, however, asked to be exempted from the suit and was exempted. The lower Court is wrong in thinking that it was the duty of Sukhai Lal to take the matter up in appeal. Sukhai Lal had performed his duty by making Ram Sahai a party, and if Ram Sahai did not choose to take advantage of his own mortgage, it was his business and not that of Sukhai Lal. It is not necessary to quote Indian rulings in support of a ruling of the

(1) 24 A. 429; 4 Bom. L. R. 827 ; 6 C. W. N. 889; 29 I A. 118 ; 8 Sar. P. C. J. 293 ; (P. C.).

Privy Council. We may, however, mention the case of *Nattu Krishnama Chariar* v. *Annangar Chariar* (2), where a mortgagee, who omitted to set up his mortgage when he had an opportunity to do so in a suit upon a prior mortgage, was held to be barred from suing on his own mortgage when, in cosequence of his omission, the property was ordered to be sold free from the mortgage which had not been pleaded.

The plaintiff is entitled to redeem the Raja's mortgage because he was not a party to the Raja's suit. The provisions of section 74 would seem to indicate that a mortgagee can redeem only the next prior mortgage and not those higher up. Section 75, however, enacts that every second or every subsequent mortgagee has, so far as regards redemption of the mortgaged property, the same rights against the prior mortgagees as his mortgagor has as against such prior mortgagees. The law, therefore, is, that a puisne mortgagee can redeem a prior even where there is a mesne encumbrance. In the present case, however, such a privilege would not help the plaintiff because he could not briug to sale the property of Jawed Husain which is in the possession of defendants Nos. 4 to 7 as purchasers on foot of Sukhai Lal's mortgage. If, nominally, the plaintiff is given a decree to redeem the mortgage of the Raja on payment of a certain sum, no tangible result will follow because on repayment of the same sum defendants Nos. 4 to 7, the representatives-in-interst of Sukhi Lal, can redeem the plaintiff. As Sukhai Lal's mortgage is prior to that of Ram Dayal the plaintiff cannot tack on his own claim to the Raja's and cannot call upon Sukhai Lal's representatives to redeem plaintiff's own mortgage. It was argued by the plaintiff-respondent's learned pleader that the Privy Council ruling in *Srigopal* v. *Pirthi Singh* (1) was based on the principles of *res judicata* while in the present suit no such question arose because the plaintiff's name was struck out of the array of parties in Sukhai Lal's suit under O. I, r. 10 (2). This is not correct. In the Privy Council case the plaintiff failed because it was necessary that parties should escape a shocking multiplication of actions (p. 438 of the report, and of para. 3).

(2) 30 M. 353 ; 2 M. L. T. 330 ; 17 M. L. T. 301.

The learned Counsel's next argument was that the plaintiff could redeem the Raja's mortgage as co-mortgagee with Sukhai Lal of the mortgage of 15th May 1896. That mortgage has not been mentioned in the plaint and this is not a case where the plaintiff is attacked and may make use of a prior mortgage as a shield. The circumstances abundantly prove that Ram Dayal did not keep his right in the 1896 mortgage alive. In Sukhai Lal's suit Sukhai Lal specifically mentioned that Ram Dayal's half share was paid off by a subsequent mortgage and the plaintiff accepted that position. There was no intermeditae mortgage between the one of 1896 and that of 1905 ; so there could be no object in keeping the 1896 lien alive. We hold that the plaintiff has no existing right in the mortgage of 1896.

As the plaintiff's suit must fail on the first ground it is not necessary to decide the other grounds of appeal.

The plaintiff's appeal (in the main) is not entitled to succeed in any case. It was first argued that he was entitled to possession of the property according to the terms of the Raja's mortgage. There are several reasons why this contention should not prevail. The right of a puisne mortgagee to redeem is not an absolute right but arises when he comes in Court to obtain his remedy for his own mortgage. He redeems a prior mortgage in order either to foreclose or to bring the property to sale on foot of his own mortgage. The question of redemption, therefore, of a prior mortgage cannot be considered independently of the plaintiff's remedy on his own mortgage. Secondly, the right to possession under the Raja's mortgage accrued on non-payment of interest, but it is obvious that no interest remains unpaid on that mortgage. The mortgage has already been satisfied. Under the circumstances, even the terms of the Raja's mortgage do not give the plaintiff a right to possession. Thirdly, the puisne mortgagee does not acquire any higher rights than those of the mortgagee whom he redeems. The Raja had chosen his remedy of sale and the plaintiff is not entitled to the alternative right of possession. Finally, as pointed out by the plaintiff's learned Counsel himself, while arguing another point, the decree in favour of the Raja was passed under section 88, Transfer

of Property Act, and so the final decree will be governed by the provisions of section 89 of the Act. It was laid down in *Het Ram* v. *Shadi Ram* (3), that when such a decree was passed the security was extinguished and was replaced by the decree. The plaintiff cannot, therefore, take advantage of the conditions of the Raja's security relating to possession on non-payment of interest.

Ground of appeal No. 2 was abandoned and as regards No. 5 the lower Court has ordered sale on non-payment of money by the defendant. Ground No. 3 relates to costs which are properly apportioned because the mortgagee is entitled to his costs under O. 34, r. 7 (*a*), Civil Procedure Code in a suit like the persent.

Future interest the plaintiff was entitled to after redemption till realization of his money. As his suit fails no order is passed in that matter.

Some of the representatives-in-interest of defendant No. 15 have filed cross-objections as to costs by way of appeal to the plaintiff's appeal. It is not necessary to decide this question separately. Suitable orders as to costs will be passed at the conclusion of our judgment.

In appeal No. 61 it is ordered that the appeal be decreed and the suit of the plaintiff be dismissed with costs of both Courts, and in appeal No. 62 that the appeal be dismissed with costs. In this Court the defendants Nos. 4 to 7 will receive from the plaintiff full costs of their appeal, but none in the appeal of the plaintiff because the arguments were parctically the same. In the appeal by the plaintiff, defendants Nos. 3, 8, 10, 11, 12, 13, 14, 16 and 17 will receive $\frac{1}{4}$ costs and $\frac{1}{4}$ costs shall be divided equally between defendants Nos. 9 and 15.

As regards costs of the lower Court defendants Nos. 4 to 7, who were the principal defendants attacked, will receive costs and the balance of costs will be divided equally between the other defendants who put up separate defences.

N. K. *Appeal No.* 61 *allowed.*
Appeal No. 62 *dismissed.*

(3) 45 Ind. Cas. 798 ; 40 A. 407 ; 5 P. L. W. 88 ; 16 A. L. J. 607 ; 35 M. L. J. 1 ; 24 M. L. T. 92 ; 28 C. L. J. 188 ; (1918) M. W. N. 518 ; 20 Bom. L. R. 798 ; 22 C. W. N. 1033 ; 9 L. W. 550 ; 12 Bur. L. T. 73 ; 45 I. A. 130 (P.C.).

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3881 OF 1923.

December 14, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Ramesam.

THAVASAMUTHU NADAR—PETITIONER—APPELLANT

versus

BALAGURUSWAMY NADAR AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Trusts Act (*II of* 1882), *ss.* 88, 90—*Joint business winding up,— Receiver, appointment of — Member, whether can compete with Receiver—Injunction.*

Where a business of any kind is being wound up by the Court or otherwise, the business being the property of more than one person carried on as partners, co-owners, members of a joint family or otherwise, during the winding-up persons who were the members of the concern are not allowed to enter into a competition so as to interfere with the successful winding up of the concern.

Clegg v. *Fishwick*, (1849) 1 Mac & G. 294 ; 41 E. R. 1278 ; 1 H. & T. 300 ; 19 L. G. Ch. 49 ; 13 Jur. 993 ; 84 R. R. 61 ; *Fox* v. *Mackerth*, *Pitt* v. *Mackerth*, (1789-91) 2 Wh. and T. L. C. (7th Ed.) 709; 2 Cox 158 ; 2 Br. C. C. 400 ; 4 Bro. P. C. 253 ; 2 R. R. 55 ; 29 E. R. 224, followed.

A Hindu joint family carried on a large *abkari* business and, as part of it, it had for many years the *abkari* monopoly in certain places. The joint family became divided in status. A partition suit was brought and Receivers were appointed for getting in all the assets of the family affairs. In the course of the winding-up, the Receivers applied for a renewal of the monopoly of the *abkari* contract. The members of the family also entered into competition with the Receivers to obtain the contract. On an application by the Receivers for an injunction restraining the members of the family from entering into competition :

Held, that the action of the respondents was a direct interference with the Receivers and was directly contrary to the interests of the family as a whole, and that, therefore, the injuction prayed for must issue.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an injunction restraining the first respondent or any

other parties to the suit from dealing individually in respect of Arrack and Toddy contracts in Travancore and Cochin States, pending disposal of the appeal preferred against the order of Mr. Justice Devadoss, dated the 26th November 1923, and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in O. S. No. 655 of 1921.

Messrs. *C. Madhavan Nair*, *Vere Mockett* and *O. T. Govindan Nambiar*, for the Appellant.

Messrs. *R. N. Aingar*, *T. Richmond*, *M. Subbaroya Aiyar*, *V. Radhakrishnayya* and *M. Damodaram Naidu*, for the Respondents.

ORDER.—In my judgment, the injunction applied for ought to have been granted as prayed and must be granted pending the appeal. The principle is a principle of general application that, where a business of any kind is being wound up by the Court or otherwise, the business being the property of more than one person carried on as partners, co-owners, members of a joint family or otherwise, during the winding up persons who were the members of the concern are not allowed to enter into a competition so as to interfere with the successful winding up of the concern. That is the principle of the English law to be found enunciated in *Clegg* v. *Fishwick* (1), and the leading case of *Fox* v. *Mackreth*, *Pitt* v. *Mackreth* (2) and it is fully discussed in Lindley on Partnership, p. 370, and is recognised in sections 88 and 90 of the Indian Trusts Act. In this case the joint family owned, among other things, a very large *Abkari* business and, as part of that business, the family had for many years had what he described as the *Abkari* monopoly in Travancore and Cochin. The joint family became divided in status and a partition suit was brought, and Messrs. Fraser and Ross were appointed Receivers for getting in all the assets of the family and the winding up of the family affairs. In the course of the winding up, they thought fit as being in the interest of the family to apply for a renewal of the *Abkari* contract with the Travancore and Cochin States. The first defendant, who has not been to any greate'xtent assisting the Receivers and has quite definitely and frankly taken up his stand in saying that he is not going to allow his name tc be used by the Receivers, or to help the Receivers in any way in getting the contract renewed, because he proposes to apply in his own name, and attempt to get it for himself. That is a direct interference with the Receivers. It is directly contrary to the interests of the family as a whole. He is supported in his attitude by his younger brothers. They are not, as he is, in the employment of the Receivers or of the business, but they say, too, that they desire to enter into competition with the Receivers in attempting to obtain this contract. In my judgment, that cannot be allowed. If, as is submitted on their behalf, the Receivers are unnecessarily, in the winding up, prolonging the carrying on of the contract, and if it is not desirable in the winding up that they should obtain and carry out one or other of the contracts, the members of the family have got their rights to make a proper application to the Court. But the Court in this case having considered the question has come to the conclusion that it was a proper step in the winding up of the concern, for Messrs. Fraser and Ross as Receivers to apply for a renewal of these contracts. I see no reason for interfering with the decision of the Court on the point. That being so, it must follow that the injunction asked for to restrain interference with them in getting the contracts must be granted. I would point out that there is no difference in law in this matter between the granting of an injunction and the taking of steps after the contract has been obtained by ordering the transfer of the contract from the late member of the concern to the Receivers, whereas in the case where the intention is clear on the part of the defendants, as has been in this case, the Courts can restrain by injunction. The principle on which the Court acts is the same in both the cases. If, while this Receivership lasts, the first defendant or other defendants who are supporting him had obtained this contract in their name, it would have been clear that they held it for the Receivers.

The appeal will be admitted and the printing dispensed with. There will be an interim

(1) (1849) 1 Mac. and G. 294; 41 E. R. 1278 ; 1 H. and T. 390; 19 L. J. Ch. 49; 13 Jur. 993; 84 R. R. 61.

(2) (1789-91) 2 Wh & T. L. C. (7th Ed.) 709; 2 Cox. 158 ; 2 Br. C. C. 400 ; 4 Bro. P. C. 258; 2 R. R. 55 ; 29 E. R. 224.

injunction pending the appeal on the same terms, and on the same grounds as if we had reversed the learned Judge's judgment. Costs of this application will be costs of this appeal.

Ramesam, J.—I agree. I would only add that in respect of the second and third respondents for whom Mr. Radhakrishnayya appears, though section 88 of the Indian Trusts Act may not apply, because they are not agents or servants of the concern, section 90 applies because they are co-owners. It might at first appear, as urged by Mr. Radhakrishnayya, that it is somewhat unfair to prevent the second and third respondents from trying their own luck with the Travancore and Cochin States, but they had the advantage of being born in a rich family and the disability which the law imposes is merely a compensating disadvantage.

V. N. V. *Application allowed.*
K. S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 65 OF 1923.

February 7, 1924.

Present :—Mr. Kendall, A. J. C.

ASHARFI LAL—PLAINTIFF—APPELLANT
versus
THE DEPUTY COMMISSIONER, GONDA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Ex parte decision—Res judicata.

For the application of the rule of *res judicata*, an *ex parte* decree and a decree made after contest stand on the same footing.

Appeal against the decree of the Additional Subordinate Judge, Gonda, dated the 7th November 1922, in C. A. No. 206 of 1922, reversing the decree of the Probationary Munsif, Gonda, dated the 21st December 1920, in O. S. No. 132 of 1920.

Mr. *Bishambhar Nath Sirivastava*, for the Appellant.

Rai *N. N. Ghoshal Bahadur*, for the Respondent.

JUDGMENT.—The appellant had been the defendant in a suit in the Rent Courts by which a decree was given to the respondent under section 127 of the Oudh Rent Act. The appellant thereupon filed a suit in the Civil Courts for a declaration that the decree for arrears of rent had been obtained through concealment amounting to fraud and was invalid, and ineffectual against him. The first Court decreed his suit, the lower Appellate Court reversed this finding and dismissed the suit.

The case for the appellant is that the doctrine of *res judicata* set forth in section 11, Civil Procedure Code, does not apply on account of the fraud, which he claims has been practised by the respondent, and he relies on a decision of this Court which is printed in *Sarup Narain* v. *Sheo Shanker Lal* (1) that is a decision of 1917, and it was held therein by the learned Judicial Commissoiner that the making of a deliberately false statement of fact in a plaint and the obtaining of a decree which the Court wuold not have passed had it not been deceived by the false allegation amounts to an act of fraud, which entitles the defendant against whom the decree is passed to have it set aside, and which debars the plaintiff who has got it from pleading the rule of *res judicata*. The respondent, on the other hand, relies on a later decision of this Court reported in *Ajudhia Prasad* v. *Gur Dayal* (2), in which the learned Judicial Commissioner, after considering the decision of 1917, ruled that a Court's decision cannot be called in question by a mere allegation of fraud in the pleading or evidence, when the Judge, after giving full opportunities to the parties to produce their evidence, has decided rightly or wrongly in favour of one set of facts. In the course of this latter judgment it was held that it must be shown that the plaintiff was prevented from putting his case before the Court or that some trickery or deceit was practised in connection with the proceedings. It is evident that the learned Judicial Commissioner who delivered the judgment of 1919 differed in some respects

(1) 42 Ind. Cas. 416 ; 4 O. L. J. 522.
(2) 52 Ind. Cas. 101; 22 O.C. 60; 1 U.P.L.R. (O) 78.

from his predecessor in his view of the law on the subject, and he remarked: "Where, owing to the fraud of a party, there has been no proper adjudication, the rule of *res judicata* cannot apply. Where, on the other hand, the parties have or had the opportunity of putting their respective cases fully before the Court, and the Judge rightly or wrongly has decided that one set of facts is true and another set false, the parties cannot go behind that decision by merely alleging fraud either in the averments, in the pleadings or in the evidence produced. In the present case the plaintiff-appellant claimed that he was a *Pukhtadar* in the village in suit, that the fact was totally concealed on behalf of the respondent, that no mention was made of a judgment of the Judicial Commissioner of Oudh which proved that he was a *Pukhtadar*, and that this act of the respondent was tantamount to fraud practised on the Court. It is proved that the appellant put in an appearance in the Rent Court, but that on the date fixed for hearing he obtained an adjournment to produce his evidence. On the next date of hearing he failed to appear, and the case was decreed *ex parte*. This *ex parte* decree he tried unsuccessfully to have set aside.

Now, it has not been suggested that there was a deliberately false statement in the plaint in the Rent Courts. All that is claimed is that the respondent did not inform the Rent Courts that the appellant was a *Pukhtadar*. It has been pointed out in argument in this Court that there was a decree of the Judicial Commissioner's which proved that the appellant was a *Pukhtadar* in the village, and it is argued that the respondent had been a party to these proceedings and knew all about the decree. A copy of the decree, which is Ex. 4 in the record of the case, showns that the appellant was an under-proprietor of a seven-annas nine-pies share in one-quarter of the village. In these circumstances, it may be correct to argue that the appellant must necessarily have been an under-proprietor in the particular plots which were the subject of the suit, but it does not follow that the respondent was necessarily aware of this or that he intentionally misled the Court. The question between the parties may have been an arguable one. It does not seem to me, therefore, that the respondent was under any obligation to make the admission that the appellant was an under-porprietor. Still less does it appear that he acted fraudulently in concealing the fact. It was a point that was to be determined by evidence, and that evidence was not produced by the appellant. It is true that there are some points of resemblance between the present suit and the one referred to in the decision of 1917, but in that case it was definitely shown that the defendant in the declaratory suit would have had no case at all if he had admitted that *Must.* Gulaba was alive, that he knew that *Must.* Gulaba was alive, and that he willfully and falsely stated in the plaint that she was dead. Even if it were to be admitted that the view of the law taken in the decision of 1917 is to be followed, and that it is possible to re-open the evidence in a suit in which there has already been a final judicial decision, it is clear that the present case is not nearly such a strong one as the one that was then before the Court. It has been suggested in argument that the fact that the decree of the Rent Courts was an *ex parte* one, prevents the decision of those Courts from being so final as it would have been if evidence had been heard on both sides. This argument, however, is fully disposed of in the Oudh decision of 1919. Finally, it has been suggested that there has been no decision such as is contemplated in section 11 Civil Procedure Code, because the Rent Courts were not competent to decide a suit for declaration, and, therefore, the question substantially at issue between the parties has not been decided by a competent Court. This argument, however, is worthless. The point substantially at issue between the parties is one of rent. It is this question which it is sought to re-open by the present allegation of fraud, and it is this question that has been decided by a competent Court.

I agree, therefore, with the conclusions of the lower Appellate Court, and dismiss this appeal with costs.

G. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 202 OF 1923.

April 8, 1924.

Present:—Mr. Hallifax, A. J. C.

Haji UMAR SHARIF—PLAINTIFF—APPELLANT

versus

JWALA PRASAD—DEFENDANT—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 28, 29, scope of—Suit against insolvent—Permission of Insolvency Court not obtained—Permission to continue suit, grant of—Civil Court, power of.

Section 28 of the Provincial Insolvency Act does not contemplate the grant of permission by the Insolvency Court to continue a civil suit filed against an insolvent without such permission. Section 29 of the Act, however, contemplates not only a suit filed before an order of adjudication has been made, but also one filed after the order but in real ignorance of it.

Therefore, when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without obtaining the permission of the Insolvency Court, the plaintiff cannot obtain permission of the Insolvency Court to continue the suit under section 28 of the Provincial Insolvency Act, but the Civil Court can, under section 29 of the Act, either stay the suit or allow it to continue on such terms as it might impose.

Appeal against the decree of the District Judge, Bhandara, in Civil Appeal No. 5 of 1923, dated the 28th February 1923.

Mr. *P. A. Pandit*, for the Appellant.

Mr. *Atmaram Bhagwant*, for the Respondents.

JUDGMENT.—The ground may be cleared by first disposing of the case against the second defendant Munna Bai. The plaintiff-appellant sued her as surety for the price of the goods he supplied to the first defendant, her son, stating that she had agreed to this when he began supplying the goods, In both the Courts below it has been found on an examination of the evidence that she never made any such promise, and that finding cannot be questioned now. The appeal as against her must, therefore, be dismissed and the appellant must pay the costs she has incurred.

The matters for consideration in the case against the first defendant, Jwala Prasad, are these. He was adjudicated an insolvent on the 24th of April 1922. The plaintiff filed the present suit on the 19th of June 1922 in ignorance of that order, as his name had not been included in the list of creditors and no notice had been given to him of the proceedings, though the defendant admitted from the beginning of this suit that he was indebted to him. Jwala Prasad mentioned his insolvency at a very late stage in the case, after practically all the witnesses had been examined, obviously having concealed it intentionally till then.

The plaintiff did not ask for the suit to be stayed till he could apply for permission to the Insolvency Court to continue the suit, and it seems clear that he could not have been given any such permission. The Act of 1907 certainly did not provide for any such permission being given, as it referred only to permission to "commence" a suit, as was explained in *Trimbak* v. *Sheoram* (1), and the Act of 1920 apparently made no change in this respect. It seems also clear, however, that section 29 of the later Act contemplated not only a suit filed before an order of adjudication has been made, but also one filed after the order but in real ignorance of it.

It was, therefore, for the Court in this case either to stay the suit or to allow it to continue on such terms as it might impose. This both the Courts below were asked to do, but it was held that it was impossible. The judgment of the lower Appellate Court says: "The plaintiff did not take any steps to move the Insolvency Court to permit him to continue the suit. The result was that on 9th December the Court had no option left but to dismiss the suit as, under the Insolvency law, no proceeding against an insolvent can be started or continued without the permission of the Insolvency Court, *vide* section 28 of the Provincial Insolvency Act."

The fundamental mistake in this is the importation of the word "continue" into the section mentioned. It is not there, and section 29 very clearly contemplates the "continuance" of a suit without the permis-

(1) 65 Ind. Cas. 941; 19 N. L. R. 126; 5 N. L. J. 144; (1922) A. I. R. (N.) 108.

sion of the Insolvency Court; it provides for the case of a suit which was properly instituted but is checked by discovery of the fact that an order of adjudication had been passed.

The learned Judge of the lower Appellate Court regarded the stay of proceedings mentioned in section 29 as intended for the purpose of allowing the plaintiff time to apply to the Insolvency Court for permission to continue his suit. This is clearly brought out in his judgment where he says: "As yet, the plaintiff has not secured the permission of the Insolvency Court and I, therefore, see no reason to keep the appeal pending for the purpose of allowing the plaintiff time to obtain such a permission. The plaintiff had ample time to move the Insolvency Court from the date that the copy of the adjudication was produced in Court in the month of October last and as he missed this oppportunity and lost all these months, I cannot help him now."

That the stay of proceedings could not be for that purpose is beyond doubt from the fact that the section goes on immediately to allow the Court itself to grant the permission, on terms or unconditionally. The stay would be presumably for the purpose of allowing the plaintiff to lay his claim in the Insolvency Court as a creditor if he thought fit. But he would have the option of doing that or asking the Court itself to allow him to continue his suit.

In the circumstances, the plaintiff ought clearly to have been allowed to continue his suit, which had practically been tried out by the time the order of adjudication was mentioned. There seem also to be no terms which it was necessary to impose on him. The condition that he could not execute any decree he might get except through the Insolvency Court while the order of adjudication stood was imposed automatically. I hold, therefore, that the order dismissing the plaintiff's suit on the ground that it was barred by any provision of the Provincial Insolvency Act is wrong and must be set aside.

As there is no finding in respect of the amount due by Jwala Prasad to the plaintiff the appeal must go back for a fresh decision on the merits. All the costs of both appeals, except those incurred by the respondent Munna Bai, will be paid by the respondent Jwala Prasad.

N. H. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 189 OF 1922.

August 27, 1923.

Present:—Mr. Dalal, J. C.

BASHIRUDDIN KHAN—DEFENDANT—APPELLANTS
versus
MAHADEO SINGH AND ANOTHER—PLAINTIFFS AND RAJ BAKHSH SINGH—DEFENDANT—RESPONDENTS.

Hindu law—Joint family—Alienation by father—Necessity—Burden of proof—Evidence Act (I of 1872,) s. 65—Secondary evidence admitted by lower Appellate Court — Appeal, second — Objection, whether can be taken.

Once secondary evidence of the contents of a document has been admitted by the lower Appellate Court, the High Court, sitting in second appeal, cannot reject it.

When a purchaser of joint family property from a Hindu father proves that the sale was effected for a purpose which would constitute valid necessity for the transfer, the burden shifts on those who repudiate the transaction to prove that such necessity could have been satisfied by ways other then the sale of joint family property.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 4th March 1922, upholding the decree of the Munsif, Musafir Khana, dated the 3rd September 1921.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *N. N. Ghoshal*, for the Respondents.

JUDGMENT.—Two sons of a Hindu father sued for the recovery of possession of two groves sold by the father under separate sale-deeds. Admittedly, the sons and the father are members of a joint Hindu family and the property is joint property of the family. The plots in dispute are Nos. 323 and 824|1. The Court of first instance decreed possession to the plaintiffs of both the plots and the appeal of B. Bashiruddin, son of the purchaser B. Ewaz Ali Khan, was dismissed by the Court of the Subordinate Judge of Sultanpur. This is a second appeal by B. Bashiruddin.

BASHIRUDDIN KHAN *v.* MAHADEO SINGH

As regards grove No. 323 it was admitted by the appellant's learned Counsel that no legal necessity for the sale has been proved. His argument with respect to that grove was that the property had ceased to have the character of a grove and, therefore, the land had reverted to the *Zemindar*, who happens to be the defendant-appellant himself. I shall, however, not inquire into this question in second appeal. The lower Appellate Court has held that the property still retains the character of a grove and the finding is one of fact.

As regards grove No. 824/1 the appeal must succeed. There are two points to be considered. The grove was sold by a sale-deed, dated 28th May, 1908. The first Court held that the sale deed was not proved and that the transfer was not made for any legal necessity or for the payment of an antecedent debt. The Appellate Court disagreed on the first point and agreed on the second. In my opinion, the Appellate Court was correct in admitting the copy of the sale-deed produced. The appellant is a son of the original purchaser and only one of his heirs. He did not happen to obtain possession of the deed and is on bad terms with his elder brother, Yar Muhammad Khan, who may be persumed to have possession of the deed. This fact is deposed to by a witness, Murtaza Khan. It is true that the appellant did not persist in issuing process to Yar Muhammad Khan to produce the deed, but the first Court ought to have given him time to issue a second summons when the first was not served on Yar Muhammad Khan. The deed is a registered document and there is no doubt as to Ex. B. 2 being a correct copy thereof. Another point is that when secondary evidence has once been admitted by the lower Appellate Court this Court sitting in second appeal cannot reject it. The question next is whether legal necessity for the transfer has been proved or not. The sale was made for a consideration of Rs. 140 and, excepting a small item of Rs. 8 odd, the money was borrowed for the payment of arrears of rent. This is proved both by the recital of the deed and the testimony of a witness Rahimdad, a servant of B. Ewaz Ali Khan. This witness was not cross-examined on behalf of the plaintiff. The learned Judge of the lower Appellate Court laid it down that this proof was not sufficient, and it lay on the purchaser to prove further that it was not possible for the father to pay the rent otherwise than by sale of ancestral property. Every case, however, must depend upon its own facts. There is absolutely no evidence for the defence to raise a suspicion that the father could have paid the rent otherwise than by sale of this property. Neither of the plaintiffs came forward to give evidence as to the existence of any source out of which the rent could have been paid. One of the plaintiffs was a major and 22 at the time of the institution of the suit in 1921. The learned Counsel for the appellant quoted the reasoning of a case of the Allahabad High Court reported in *Pearilal* v. *Sundar Singh* (1). When the purchaser proved that the sale was effected for a purpose which would constitute valid necessity for the transfer, the burden shifted on those who repudiated the transaction to prove that such necessity could have been satisfied by ways other than the sale of joint family property. The creditor satisfied himself that money was borrowed for legal necessity and it would not be in his power to inquire further whether the vendor had any money put away in the house out of which the necessity could be satisfied. Such evidence would be with the control of the plaintiff's sons and has not been produced by them. The presumption is that no such evidence existed. I hold that the transfer of plot No. 824/1 was made for legal necessity.

In the result, I decree the appeal for plot No. 824/1 with proportionate costs of all the Courts and dismiss the rest of the appeal with proportionate costs of all the Courts.

Z. K. *Appeal allowed in part.*

(1) 68 Ind. Cas. 805 ; 20 A. L. J. 658; (1922) A. I. R. (A.) 436 ; 44 A. 756.

SRI KANTOO SINGH *v.* IMDAD ALI

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1509 OF 1922.

February 28, 1924.

Present :—Mr. Justice Daniels.

SRI KANTOO SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
IMDAD ALI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 36, scope of—Agreement to pay specified rent, how far enforceable.

There is nothing in section 36 of the U. P. Land Revenue Act to prevent the parties agreeing upon a rent which is not above the legal maximum nor is there any reason why such rent, if agreed upon by the parties, should not be recoverable in the Courts.

Jahangira v. *Karrar Hussain*, 44 Ind. Cas. 513 ; 16 A. L. J. 212, distinguished.

Appeal against the decree of the District Judge of Benares, dated the 25th August 1922.

Dr. *M. L. Agarwala* and Dr. *K. N. Katju*, for the Appellants.

Mr. *Harendra Krishna Mukerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for arrears of rent under a *kabuliat*. The plots in dispute are apparently ex proprietary land though there is some dispute about this. The Court below has dismissed the suit on the ground that the rent was not fixed in accordance with the provisions of section 36 of the Land Revenue Act and section 10 of the Tenancy Act. Two points have been urged in appeal,—

1. That the lease included the *zemindari* share as well as *sir* plots and, therefore, rent should have been decreed in respect of the former.

2. That the Court below has not found that the rent reserved under the lease is in excess of the rate payable by an ex-proprietary tenant and that the suit should not have been decided without a finding on this point.

On the first point there is a definite finding of the Court below that the plaintiffs leased to the defendants the whole of the *zemindari* including *sir* at a rent of upwards of Rs. 90 per annum.

On the latter point the Court below held that it was immaterial whether the rent agreed upon was in excess of the statutory rate or not. The learned Judge has relied on a dictum of a Single Judge in a case not officially reported. *Jahangira* v. *Karrar Husain* (1) that such an agreement could not be the foundation of a suit for rent. The point did not really arise, as in that case the rent had been fixed under section 36 of the Land Revenue Act. On the other hand, all that has been laid down on the subject in the reported case of *Pirag* v. *Sital Parsad* (2), is that an agreement to pay rent in excess of the statutory rate is void. The same view seems to have been held in a subsequent Letters Patent Appeal, *Munsa Ram* v. *Ganga Ram* (3), where it was said that if the rent agreed upon was not in excess of the statutory rate the *zemindar* ought to have pleaded this as an answer to the defence. The duty of fixing the rent under section 36 of the Land Revenue Act is laid, in the first instance, not on the parties but on the mutation Court, though a right is reserved to the parties to apply subsequently if the Revenue Court omits to make an order. I can find nothing in this to prevent the parties agreeing upon a rent which is not above the legal maximum nor do I see any reason why such rent, if agreed upon by the parties, should not be recoverable in the Courts. I accordingly remit the following issue to the Court belowunder O. XLI, r. 25:—

Was the rent agreed on in the *kabuliat* in suit in respect of the *sir* plots in excess of the statutory rate or not ?

The *kabuliat* is not on the record ; it is said that at the time of filing the suit it had been filed in some other case. The Court below will, therefore, allow the *kabuliat* to be produced and, in case of its not being admitted, to be proved. In other respects the issue will be decided on the evidence already on the record, as the *kabuliat* is not on the record there is nothing to show whether rent in respect of

(1) 44 Ind. Cas. 513; 16 A. L. J. 212.
(2) 22 Ind. Cas. 965 ; 36 A. 155; 12 A. L. J. 136.
(3) 55 Ind. Cas. 889 ; 18 A. L. J. 282; 42 A. 334 ; 2 U. P. L. R. (A.) 71.

the *sir* plots was separately specified. If there is no specifiction but a conbined rent was fixed for the *zemindari* and the ex-proprietary tenancy, it may be impossible for the Court below to record a fiding on the issue, in which case it should report to this effect. The finding should be submitted within six weeks Ten days from the date of the finding are allowed for objections. Costs will abide the result.

K. S. D.

Issue remitted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 157 OF 1922.

December 11, 1922.

Present :—Mr. Daniels, A. J. C.

OUDH BEHARI LAL AND ANOTHER —DEFENDANTS—APPELLANTS

versus

DAL SINGH—PLAINTIFF— RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Unnecessary finding—Res judicata—*Hindu Law—Alienation by father—After-born son, right of—Fresh cause of action—Limitation Act (IX of 1908), Sch. I, Art. 126—Limitation, starting point of.*

A finding in a judgment cannot operate as *res judicata* if it was not necessary to the relief granted by the decree.

Daudbhai Allibhai v. *Daya Rama*, 51 Ind. Cas. 100; 43 B 568; 21 Bom. L. R. 363, relied on.

Under the Hindu Law a son born after an alienation does not acquire a fresh cause of action to contest the alienation by birth but he is entitled to take advantage of an existing cause of action if he is born before the title of the transferee becomes absolute.

Under Article 126 of the Limitation Act the fact which starts limitation running is the ouster of the Hindu father and son from the actual enjoyment of the property transferred. Therefore, in the case of a simple mortgage by the father, there is no necesssity for the son to take any action. He can wait till the mortgagee seeks to enforce the mortgage and then plead his own right in answer to it.

Appeal from the decree of the District Judge, Haridoi, dated the 6th February 1922, upholding the decree of the Munsif, Sandila, dated the 22nd March 1921.

Messrs. *Bisheshwar Nath* and *Haidar Husain*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a usufructuary mortgage of 14th June 1875 executed by Jawahir Singh and Ratan Singh in favour of the predecessors-in-interest of the defendants for a sum of Rs. 200. Jawahir Singh and Ratan Singh were joint and the plaintiffs are the sons of Ratan Singh. There were originally two plaintiffs, Raghubir and Dal Singh, but Raghubir Singh died during the pendency of the appeal to the Court below and Dal Singh is the sole respondent. The principal defence was that the mortgage in suit had been redeemed and was no longer subsisting. It was pleaded that the plaintiffs were precluded from disputing this fact by the principle of *res judicata*.

On the 21st June 1886, Jawahir Singh being still alive, Ratan Singh alone executed a mortgage for Rs. 600 in favour of the same mortgagees. Part of the consideration for this mortgage was the Rs. 200 due under the mortgage of 1875. This mortgage was also usufructuary. On 31st August 1894 a third mortgage in respect of a part of the property and some additional plots was executed by Ratan Singh in favour of one Thakur Singh. The defendants purchased the rights of Thakur Singh under this mortgage. In this suit the defendants asked for mortgagee possession of the 14 *bighas* not covered by the earlier mortgage, and as regards property which was covered by the deed of 1886 they asked for a declaration that they were in possession of the property under the deed of 1894 *also*. This is treated by the defendants as implying a prayer for a declaration of their possession under the deed of 1886. At the time of this litigation the plaintiffs were minors. Their certificated guardian admitted on their behalf that the mortgagees were in possession under the deed of 1886. The defendants-appellants rely on this litigation as constituting *res judicata*.

They produced copies of the plaint and written statement but did not file any copy of the judgment in the suit. They have produced in this Court a certified copy which shows that their entire suit was dismissed, as regards

the deed of 1894 on the ground that their title as assignees was not established and as regards the deed of 1886 on the ground that any claim under that deed was time-barred. It is clear on these facts that the plea of *res judicata* cannot be substantiated. It is well established that no finding can operate as *res judicata* which is not necessary to the relief granted by the decree—*Daudbhai Allibhai* v. *Daya Rama* (1), is an instance. In this case as any claim based on the mortgage of 1886 was found to be time-barred it was unnecessary to go into the question of the validity of that mortgage.

Three other pleas are urged in support of the appeal,—

(*a*) that the plaintiffs are now barred by lapse of time from disputing the validity of the mortgage of 1886 ;

(*b*) that even if the mortgage was originally invalidated it has become binding by the operation of section 43 of the Transfer of Property Act ;

(*c*) that Ratan Singh as one of two co-mortgagors was entitled to redeem and did redeem the mortgage in suit.

The second of these pleas was not taken in either of the Courts below and no issue was framed on it. It was not taken in the grounds of appeal to this Court. It depends upon a question of fact. It has been found that Jawahir Singh was alive and was joint with Ratan Singh at the time of the execution of the deed of 1886. Section 43 could only operate if Jawahir Singh had died and Ratan Singh become sole owner of the property before either of the present plaintiffs was born. The Trial Court found that Jawahir Singh died only seven or eight years ago. The Appellate Court came to no finding as to the exact date of his death because, as the case was argued before it, it was only necessary to determine whether Jawahir Singh was alive in 1886 or not. It is not open to the appellants in second appeal to put forward a new plea depending on a question of fact and I decline to entertain this plea.

Plea (*a*) was also not taken in the Courts below and though the appellants contend that it is implied in their fourth ground of appeal to this Court the language of that plea is certainly not calculated to give notice to the respondent that it was intended to raise a plea of limitation. The appellants contend, however, that it is apparent on the face of the record. Their case is that the cause of action to set aside this deed arose in 1886 and, therefore, came to an end in 1898. Under the rulings of this Court in *Chokhey Singh* v *Hardeo Singh* (2) and *Ranodip Singh* v. *Ramesher Prasad* (3) a son born after an alienation does not acquire a fresh cause of action by birth but is entitled to take advantage of the existing cause of action if he is born before the title of the transferees becomes absolute. Therefore, the right to question the deed came to an end either in 1898 or at the latest when the younger of the two plaintiffs attained majority. As the age of the plaintiffs given in the plaint was 25 and 23 years respectively they both attained majority more than three years before the suit was brought. To this the respondent replies that the cause of action under Article 126 of the Limitation Act only arises when possession of property is taken by the transferee. In this case, though the deed of 1886 was called usufructuary, the possession was already with the mortgagee and no fresh possession was taken. It was, therefore, unnecessary for Jawahir Singh to take any action to challenge the invalid deed executed by his brother. On consideration, this reasoning appears to be correct. The fact which starts limitation running is the ouster of father and sons from the actual enjoyment of the property. This is a definite act which forms a starting point for adverse possession. If the mortgage executed by the father is a simple mortgage there is no need for the sons to take any action at all. They can wait till the mortgagee seeks to enforce the mortgage and then plead their own rights in answer to it. In this case there was no overt act of possession following on the execution of the mortgage of 1886. The mortgagee held lawful possession under a valid mortgage and the fact that the father might subsequently execute other deeds which were not valid would not alter the fact that

(1) 51 Ind. Cas. 109 ; 43 B. 568; 21 Bom. L. R. 363.

(2) 64 Ind. Cas. 757 ; 24 O. C. 330 ; 8 O. L. J. 667; 4 U. P. L. R. O. 10.

(3) 66 Ind. Cas. 938 ; 9 O. L. J. 45 ; (1923) A. I. R. (O.) 52.

the mortgagee had a valid title to retain possession. I, therefore, accept the respondent's contention on this issue.

The third point was taken in the Court below. The argument is ingenious but I agree with the Court below that it is unsound It is not disputed that one co-mortgagor is entitled to redeem a mortgage. The question is whether there was any real redemption in this case. The original mortgage was for a term of three years. What Ratan Singh did was to borrow another Rs. 400, convert the mortgage for three years into a mortgage for fifty years with a provision that if it was not redeemed within one year of that date it should become a sale-deed and include the amount of the earlier mortgage in the amount for which this much more onerous deed was executed. The later deed was, as a mortgage, invalid. Suppose the mortgagees had sought to enforce it and it had been challenged by the sons, all that the mortgagees could have claimed to do was to fall back on the earlier mortgage of 1875 now in suit and to plead that, so far as this mortgage was embodied in the later deed, it was binding on the sons. They could not have claimed to impose on the sons the more onerous terms contained in the later deed. That is precisely the result which has been reached in the present litigation.

For these reasons the appeal fails and it is accordingly dismissed with costs.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 256 OF 1923.

April 24, 1924.

Present:—Mr. Baker, J. C., and Mr. Prideaux A. J. C.

KRISHNARAO AND OTHERS - PLAINTIFFS—APPLICANTS

versus

Mt. CHANDRABHAGABAI—DEFENDANT NON-APPLICANT.

Court-Fees Act (VII of 1870, s. (7) (1) (c) (d)—Suit for declaration of title and injunction—Prayer for appointment of Receiver—Valuation of suit for purposes of jurisdiction—Plaintiff, right of—Court-fees payable.

In a suit for declaration of title to land and consequential relief, namely, injunction, regarding the same, the Court must accept the value of the relief stated in the plaint for the purpose of jurisdiction.

Rajkrishna Dey v. *Bepin Bihari Roy*, 17 Ind. Cas. 162; 40 C 245; 16 C. L. J. 194; 17 C. W. N. 591, not followed.

The relief for the appointmeot of a Receiver is in the nature of consequential relief and as such the plaintiff is entitled to put his own valuation on it.

Revision against the order of the Additional District Judge, Nagpur, dated the 25th September 1923, in Civil Suit No. 29 of 1922.

Dr. *Hr. S. Gour*, for the Applicants.

Mr. *M. R. Indurker*, for the Non-applicant.

ORDER.—The plaintiffs as reversioners of Narayon Rao, the deceased husband of defendant No. 1, brought this suit claiming the following reliefs:—

(1) A declaration that the deed of gift of 9th June 1921, executed by defendant No. 1 in favour of defendant No. 2 is void after defendant No. 1's death.

(2) A declaration that certain acts of defendant No. 1 amount to waste.

(3) An injunction restraining the defendant No. 1 from committing waste.

(4) Appointment of an Administrator or Receiver for the whole estate.

The plaintiffs valued their claim at Rs. 26,000 for the purpose of jurisdiction. A Court-fee stamp of Rs. 10 was paid in respect of the declaration sought and the injunction relief was valued at Rs. 10. No Court-fee was paid in respect of the relief for appointment of an Administrator or Receiver. A preliminary objection was raised by the defendant that the plaint was insufficiently stamped, payment of *ad valorem* Court-fee being necessary in respect of the relief for appointment of an Administrator or Receiver.

The Additional District Judge held that the plaintiffs' claim clearly fell under section 7, clause (4) (*c*) of the Court Fees Act. He also held that the plaint was not properly stamped and that the plaintiffs should have paid an *ad valorem* Court-fee on Rs. 26,000 at which they value their claim for the purpose of jurisdiction.

The plaintiffs apply in revision to have that order set aside.

KRISHNARAO *v.* CHANDRABHAGABAI

Under section 7, clause (4) (*c*), the suit is for a declaratory decree where consequential relief is prayed, and in such cases the Court-fee is to be levied according to the amount at which the relief sought is valued in the plaint. It has been frequently held that in a suit for a declaration of title to land and consequential relief, namely, injunction, regarding the same, the Court must accept the value of the relief stated in the plaint for the purpose of jurisdiction ; Cf. *Vachhani Keshabhai* v. *Vachhani Nanbha Bawaji* (1) and *Hari Sankar Dutt* v. *Kali Kumar Patra* (2). In the latter case it was held that a suit by a plaintiff in possession for declaration of his title to land and for an injunction restraining defendants from interfering with the plaintiff's possession falls under section 7, paragraph 4, clauses (*c*) and (*d*), of the Court-Fees Act, and that in such a suit the Court must accept the value of the relief stated in the plaint for the purposes of the Court-fees as well as for the purposes of jurisdiction, and this was followed in the Bombay case, above quoted, where it was held that in a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction. This view has been upheld by the Privy Council in *Sunderbai* v. *The Collector of Belgaum* (3), where the Privy Council holds that " where a plaintiff sues for a declaratory decree and asks for consequential relief, and puts his own valuation upon that consequential relief, then for the purposes of Court-fee and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both."

The learned Additional District Judge has relied on *Raj Krishna Dey* v. *Bepin Behari Roy* (4), in which it was held that an *ad valorem* Court-fee should be paid in respect of the relief for injunction. That case laid down that the Legislature never intended that the plaintiff should be at liberty to assign any arbitrary value and thus be free to choose capriciously the *forum* of trial or appeal. That case has been dissented from by the Bombay High Court in *Govinda Krishna Sathi* v. *Hanmaya Lingaya Fulmali* (5), in which it is stated that whatever the Legislature may have intended, that is the meaning which has been given to section 7 of the Court-Fees Act by the Privy Council. The reference is to *Sunderabai* v. *The collector of Belgaum.*

There can, therefore, be no doubt on the authorities, that, so far as the claim for declaration and injunction is concerned, it is a claim for a declaration and consequential relief and the plaintiff is entitled to put his own value on the relief claimed and the Court is bound to accept that value.

The only other question is regarding the appointment of a Receiver. It is argued on behalf of the non-applicant that the effect of the last claim, that is, the claim for appointment of a Receiver, is to deprive the widow of her possession, and reliance is placed on *Harbans Sahu* v. *Lalmoni Kuer* (6) and on the decision by the Punjab Chief Court in *Lakhmi Das* v. *Daropti* (7) where a suit was brought for a declaratory decree that the alienations made by the Hindu widow shall not affect the plaintiff's reversionary rights after her death, and for the appointment of a Receiver and restoration of the property to the *status quo ante*, and it was held that the proceedings fell under section 7 (IV) (*c*) and (*d*) of the Court-Fees Act and that the Court-fee calculated on the valuation of the suit was leviable, the Court-fee being calculated on the valuation of the property.

In *Manmatha Nath Biswas* v. *Rohilli Moni Dasi* (8) it was held by the Allahabad High Court that it is not possible to put a value upon a claim for the appointment of a Receiver. The Court-Fees Act does not make any provision for such a relief. At the most, it would be regarded as consequential relief under section 7, clause (*c*).

(1) 1 Ind. Cas. 108 ; 33 B. 307 ; 11 Bom. L. R. 30 ; 5 M. L. T. 220.
(2) 32 C. 731; 9 C. W. N. 690.
(3) 52 Ind. Cas. 897 ; 43 B 376 at p . 382 ; (1919) M. W. N. 251; 23 C. W. N. 753 ; 21 Bom. L. R. 1148 ; 46 I. A. 15 (P. C.).
(4) 17 Ind. Cas. 162 ; 40 C. 245 ; 16 C. L. J. 194 ; 17 C. W. N. 591.
(5) 59 Ind. Cas. 777 ; 45 B. 567 ; 22 Bom L. R. 1150.
(6) 62 Ind. Cas. 36.
(7) 19 Ind. Cas. 859; 134 P. W. R. 1913; 232 P. L. R. 1913 ; 93 P. R. 1913.
(8) 27 A. 406 ; 2 A. L. J. 84 ; A. W. N. (1905) 6.

TEHL KAUR *v.* AMAR NATH

It appears on a consideration of the authorities that the suit is one under section 7 (IV), clauses (*c*) and (*d*) of the Court Fees Act, and as such the plaintiff is entitled to put his own valuation on the relief sought, as has been held in the Bombay cases quoted above, which have been approved by the Privy Council. The plaint appears to be properly stamped and the order of the lower Court directing that the plaintiffs should be ordered to pay Court-fee on Rs. 26,000, is set aside.

As the plaintiffs were entitled under clause (IV) of section 7 of the Court-Fees Act to value their claim at any amount they liked, it is unnecessary for them to fix any value for the purposes of jurisdiction, as by section 8 of the Suits Valuation Act the value determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same : Cf. *Govinda Krishna Sathi* v. *Hanmaya Lingaya Fulmali* (5). As the plaintiffs did not pay the Court-fee demanded the lower Court rejected the plaint, against which order an appeal has been filed. That order will follow the result of this case and is also set aside. Costs on the non-applicant. Pleader's fees Rs. 15.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1847 OF 1917.

December 22, 1922.

Present :—Mr. Justice Martineau and Mr. Justice Campbell.

Musammat TEHL KAUR, LEGAL REPRESENTATIVE OF *Musammat* BUDHWANTI, WIDOW OF BANSI LAL (DECEASED)—DEFENDANT—APPELLANT

versus

AMAR NATH AND ANOTHER—PLAINTIFFS AND JOWALA DATT PARSHAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Religious acts—Alienation, power of—Accretions—Specific Relief Act (I of 1877), s. 42—Will by life-tenant—Declaratory suit by reversioner - Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 33—Cross-appellant, whether can file cross-objections—Appellate Court, general powers of—Powers, whether may be exercised in favour of defeated cross-appellant.

Hindu Law recognizes two sets of religious acts. One, those which are considered essential for the salvation of the soul of the deceased, and the other, acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. For an act of the first class a Hindu female can sell the whole estate if its income is not sufficient, and in the second case the widow can alienate a small portion of the property for the pious or charitable purposes she may have in view. [p. 683, col. 1.]

The rule of Hindu Law regarding accretions is that any accretion made by a widow partakes of the nature of the estate to which it is added and the question whether any property is an accretion to the estate is one of intention on the part of the widow to augment the estate by treating it as part thereof. In the absence of anything appearing to the contrary, any purchase made of the income of the estate may be presumed to be an accretion thereto. [p. 681, cols. 1 & 2.]

The mere execution of a Will by a Hindu window with a life interest in her deceased husband's estate bequeathing that estate elsewere than to the next reversionary heir does not entitle that heir to obtain in the widow's life-time a judicial declaration that the Will is invalid against his reversionary rights. [p. 679, col. 1.]

Under O. XLI, r. 22 of the Civil Procedure Code, a respondent who has preferred an appeal cannot file cross-objections. [p. 673, col. 2.]

Ramji Das v. *Ajodhia Prasad*, 25 A. 628, followed.

Although no general rule can be laid down that O. XLI, r. 33 of the Civil Procedure Code, cannot be applied in favour of a party who has appealed or has lodged cross-objections and failed, yet the Court will not take such a course in the absence of very strong reasons. [p. 680, col. 2.]

Appeal from the decree of the Senior Sub-Judge, Lahore, dated the 30th April 1917.

Bakhshi *Tek Chand* and Lala *Badri Das*, R. B., for the Appellant.

Dr. *G. C. Narang*, Babu *M. N. Mukerjee* and Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—The following is the pedigree table of the persons connected with this appeal :—

TEHL KAUR *v.* AMAR NATH

PANDIT MUKSUDAN.

1st wife-*Musammat* Mehr Kaur.

Pandit Radha Kishen — Har Kishen — Bal Kishen

Pandit Amar Nath, plaintiff. — Mohan Lal

Sohan Lal, insane — Ram Lal

Panna Lal, plaintiff.

Musammat Khushal Devi

Badri Nath

Prem Nath, defendant.

Musammat Tehl Kaur=Rikhi Kesh=*Musammat* Bed Kaur

Bansi Lal-left two widows
1. *Musammat* Budhwanti, defendant, now deceased.
2. *Musammat* Bishen Kaur, defendant, now deceased.

2nd wife-*Musammat* Bhagwanti

Devi Dat Pershad,

Jowala Dat Pershad, defendant, now deceased.

Bansi Lal died without issue on the 30th June 1897, and the present suit was lodged on the 20th of February 1909, by Amar Nath. The plaint alleged that in a collusive suit between the two widows of Bansi Lal, *Musammat* Budhwanti and *Musammat* Bishen Kaur, a compromise had been effected declaring that after the death of the widows the whole of Bansi Lal's estate would be dedicated to a temple and other buildings for religious or *quasi* religious purposes erected on a certain site in Anarkali Bazar, Lahore, and that the terms of the compromise professed to be in accordance with those of an oral Will made by Bansi Lal before his death which Will the plaintiff denied. A decree was sought for a declaration that the compromise did not affect the plaintiffs' reversionary right, after the deaths of the widows.

By order of the Trial Court, dated the 3rd of April 1918, Panna Lal was allowed to join Amar Nath as a plaintiff. On the 16th of December 1909, Jowala Dat Parshad and on the 28th of April 1910, Prem Nath were joined as defendants.

The widows pleaded that the suit between them was not collusive, that the compromise did not amount to an alienation and, therefore, gave no cause of action, that Bansi Lal's property had been dedicated by his Will which had been acted upon and acquiesced in by the plaintiff and that the plaintiff's suit was time barred.

The trial of the suit lasted for over eight years and a number of issues were framed of which those material are the following:—

(3) (*a*) Does the compromise dated the 22nd of February 1903, amount to an alienation?

(*b*) Does the compromise afford a cause of action?

(*c*) Was the suit between the widows which resulted in a compromise a collusive one?

4. Is the plaintiff entitled to a declaration about the Will on the plaint as framed if the compromise affords no ground of suit?

5. Did Bansi Lal dedicate the property in Anarkali to religious uses?

6. (a) Did Bansi Lal, make an oral Will, if so, when and to what effect?

(b) Did the plaintiffs consent to, and acquiesce in, the operation of the Will in the action of the defendants?

7. Presuming Bansi Lal to have made the Will as described by the defendant, is it unenforceable as being too indefinite to be given effect to?

8. Is the suit of the plaintiff barred by time, if a Will was set up, whether made or not more than 6 years before the suit to the knowledge of the plaintiff?

9. (*a*) Did the plaintiff file, and subsequently withdraw, any suit either himself or along with Pandit Jowala Dat Parshad with respect to the property in suit against the defendant?

(*b*) If so, what is its effect on the present suit?

10. Is Prem Nath, defendant, a nearer heir, if at all, of Bansi Lal, deceased, than the plaintiff and hence the plaintiff's suit cannot be maintained?

11. Is Jowala Dat Parshad as near a relation of Bansi Lal, as the plaintiff?

12. To what relief are the plaintiffs entitled?

On issue No. 3 the finding was that the compromise did not amount to an alienation of the property other than the temple, that it afforded a cause of action, and that the suit between the widows was not collusive. Issue No. 4 was held to be unnecessary. The finding on both issue No. 5 and issue 6 (*a*) was in the negative No. 9. On issue No. 6 (*b*) the Trial Court held that the plaintiffs had consented to, and acquiesced in, the building of the temple by the widows and that they acquiesced in nothing further. On issue No. 7 the Subordinate Judge expressed a belief that the deceased Bansi Lal had left a Will or a pious wish that in his memory some temple should be built on the Anarkali site and that this was all, and that there was no Will or instruction for the building of a *Musafarkhana*, *pathsala* or kitchen or for the application to charity of any particular property or share of income. The finding on issue No. 8 was that the suit was within time if the compromise was the basis of the action. The question whether the Will was the cause of action did not arise since the plaintiff denied that there was any Will, but if such a question did arise, the claim would be out of time as regards any acts of the widows done in pursuance of a proved Will. Issue No. 10 was decided in the negative and on issue No. 11 Jowala Dat Parshad was held to be equally entitled to the estate with Amar Nath but to have lost his rights to succeed and to dispute that the property was *wakf* by reason of having filed a previous suit similar to the present on the 22nd of January 1906, and having withdrawn it.

The cumulative result was that the plaintiffs were given a decree declaring that the compromise, dated the 22nd of February 1903, should not affect their reversionary rights in the estate left by Bansi Lal, provided that they should not disturb the temple. Against this decision there are two appeals, one by *Musammat* Budhwanti the only surviving widow, and the other by Amar Nath, while Amar Nath also preferred cross-objections to the appeal of *Musammat* Budhwanti.

Musammat Budhwanti's appeal was presented on the 23rd of June 1917, and on the 23rd of August 1918, she died. *Masammat* Tehl 'Kaur, the stepmother of Bansi Lal, applied on the 5th of February 1919, to be brought on the record as her legal representative and the application was granted subject to all just exceptions. On the appeal coming before us for hearing it has been objected that *Musammat* Tehl Kaur has no *locus standi* to continue the appeal and that the appeal abates since the right to appeal does not survive the death of *Musammat* Budhwanti.

In reply to the objections, Mr. Tek Chand for *Musammat* Tehl Kaur claims her to be the legal representative of *Musammat* Budhwanti for three reasons. Firstly, he alleges that by special custom observed in this family she is the heir of her step-son, Bansi Lal; secondly, he asserts that after the death of *Musammat* Budhwanti she held possession of at least a part of the property in suit, and thereby intermeddled with the estate, until the whole property was taken over by a Receiver appointed by this Court for the pendency of the appeal. Mr. Tek Chand demands that an enquiry should be held into these two claims and he should have an opportunity of producing evidence in support of them. Thirdly, he contends that *Musammat* Tehl Kaur also comes within the definition of a legal representative in section 2 (11), Civil Procedure Code, in that *Musammat* Budhwanti appealed in a representative character and *Musammat* Tehl Kaur is the person on whom the estate devolved on her death.

TEHL KAUR *v.* AMAR NATH

After hearing Counsel on both sides at some length we have decided that *Musammat* Tehl Kaur is the legal representative of *Muasmmat* Budhwanti in this latter sense. *Musammat* Budhwanti defended the suit and appealed as one of several persons interested in asserting the dedication to religious and public uses of Bansi Lal's estate. *Musammat* Tehl Kaur appears to us to be the only surviving member of the family interested in maintaining the alleged Will of Bansi Lal the terms of which as well as the compromise made distinct provision for her own maintenance. She could, we think, claim validly that *Musammat* Budhwanti's interest as manager of the alleged *waqf* devolved upon her since all the male heirs of Bansi Lal had refused to recognise any *wakf* and there was no other person upon whom it could dovolve.

The appeal and cross-objections by Amar Nath can be disposed of in a very few words. The respondents to the appeal are *Musammat* Budhwanti and Panna Lal, Two of the four paragraphs of the memorandum of appeal, Nos. 2 and 3, relate exclusively to Pannu Lal and have been withdrawn without prejudice. Paragraph 1 affects *Musammat* Budhwanti against whom the appeal has abated. No application has been made by the appellant to substitute any legal representative for her and without this there can be no question of setting aside the abatement. The fourth ground of appeal objects to the lower Court's order about costs. Rs. 300 was fixed as Counsel's fee of the plaintiffs and this amount was directed to be divided equally between both plaintiffs. It is argued before us that such an apportionment is unjust since Panna Lal was joined as a plaintiff at a very late stage and practically the whole burden of conducting the plaintiffs' case was borne by Amar Nath. We consider that the legal representative of *Musammat* Budhwanti is a necessary party to this part of the appeal, since a modification of the amount for which either individual plaintiff is entitled to take out execution, must affect directly that representative, and it is not correct to say that the questions concern Amar Nath and Panna Lal alone. Amar Nath's appeal fails and is dismissed.

As for the cross objections the law does not permit a respondent who has preferred an appeal to file cross-objections. This is the interpretation of O. XLI, r. 22, laid down by the Allahabad High Court in *Ramji Das* v. *Ajodhia Prasad*, (1) and we endorse it. The cross-objections fail and we are left with the appeal of *Musammat* Budhwanti.

The compromise which is the stated cause of action is dated 22nd February 1903 and is printed on pages 69-71 of the Paper-Book. The abstract of its material portions is as follows :—

"The parties to the suit Musammat *Kishen Kaur* v. *Musammat Budhwanti* for partition and for declaration of right are willing to act in accordance With the oral Will of the late Pandit Bansi Lal and have agreed to the following terms :—

"(*a*) According to the oral Will the entire immoveable property left by Bansi Lal and shown in the schedule shall be divided equally between the parties (no property described as situate in Anarkali Bazar, Lahore, is entered in the schedule).

(*b*) The moveables have been divided already.

(*c*) Each party shall be exclusive owner for her lifetime of the share of the scheduled property allotted to her by partition. On the death of either the survivor shall be absolute owner for life of the scheduled immoveable property and absolute owner of the moveables.

(*d*) After the deaths of the parties the scheduled property shall, in like manner as the *Thakurdwara* in dispute, situate at Anarkali, Lahore, which is *wakf* property already, be *wakf* and shall remain so subject to a charge for the maintenance of *Musammat* Tehl Kaur, if alive.

(*e*) The objects of the *wakf* are to maintain the *Thakurdwara* aforesaid, the Sanskirt *Pathshala*, and the *Musafarkhana*.

(*f*) During their lifetimes the parties shall pay out of their income Rs. 400 *per mensem* in equal shares for the maintenance of the *Tkakurdwara*, the *Pathshala*, and the *Musafarkhana*, but *Mussammat* Bishen Kaur shall pay Rs. 150 *per mensem* only until she is out of debts.

(*g*) The rental and other income derived from the shops, *baithaks*, and other houses attached to the *Thakurdwara*, shall also be

(1) 25 A. 628.

spent in connection with the *Thakurdwara*, Sanskrit *Pathshala*, and *Musafarkhana* and not on any other object.

(*h*) Provision is made for the mutual appointment of managers, of the *Thakurdwara*, Sanskrit *Patshala*, and *Musafarkhana*, described as "the said *wakf* property" and for the settlement of disputes by arbitration.

(*i*) *Musammat* Budhwanti to pay Rs. 4,000 to *Musammat* Bishen Kaur and the latter to pay off her own debts. The parties to pay their own costs of the suit and *Musammat* Budhwanti to be liable for those of Sohan Lal, defenadant.

(*j*) The property to be partitioned as soon as possible.

(*k*) The parties to be jointly responsible for the maintenance allowance of *Musammat* Tehl Kaur."

It is necessary, for the purpose of understanding both the circumsatances in which this agreement came to be made and ceratain references contained in it, to look into the history of the years following Bansi Lal's death.

Bansi Lal, as stated already, died on 30th June 1897. Before his death he had purchased a site and building in Anarkali Bazar. What the structures exactly were has not been made clear, but the price is said to have been Rs. 36,000. In December 1897, *Musammat* Budhwanti commenced building operations on the site. The present condition of the place is agreed to be as follows:—

The site has a frontage upon two main roads, one being the Anarkali Bazar. Along the frontage there are shops and above the shops upper stories termed *baithaks*. Behind the shops, with a passage leading to it from a gateway on the Anarkali Bazar, is a Hindu temple in a courtyard flanked on one side by a row of *Kothries* or rooms opening inwards. Beyond the temple is another enclosure with a number of *Kothries* called the *Musafarkhana* and with a back entrance from a third road. A room in one of the upper stories is, or has at one time been, used as Sanskrit School or Pathshala.

On the 28th February 1898, the two widows *Musammat* Budhwanti and *Musammat* Bishen Kaur applied jointly to the District Judge for a succession certificate to enable them to recover debts due to Bansi Lal, amounting to Rs. 4,770-7-0. On 1st March 1898, *Musammat* Bishen Kaur applied to the same Court for the grant of a certificate to her only, alleging that *Musammat* Budhwanti and one Sohan Lal, a servant of the deceased Bansi Lal, were misappropriating the proceeds of the estate. No mention was made in either application of any Will by Bansi Lal. A joint certificate was granted by the Court on 23rd May 1898, and the order mentioned that the widows "acting of the Will of the deceased" were constructing a *pathshala* at a cost of Rs. 70,000 and Rs. 80,000. This remark appears to have been derived from a deposition made in the proceedings by a servant or agent of *Musammat* Budhwanti, named Sohan Lal, on 21st May, 1898, which contains the two statements that the widows intended to carry out the Will of their deceased husband and that the deceased had left no deed authorising them to build the *Pathshala*

On 26th April 1898, *Musammat* Bishen Kaur filed the suit which ended in the compromise. The defendants were *Musammat* Budhwanti and Sohan Lal, whom she accused in her plaint of conspiring to deprive her of her just share of Bansi Lal's property. She claimed partition of the moveable property and asked that she be declared entitled to a one-half undivided share in the agricultural land, garden and *Thakurdwara* detailed in the third schedule and to receive the profits of the same for her own use. The plaint made no mention of any will.

Musammat Budhwanti in her written statement as defendant asserted, that by an oral Will made shortly before his death Bansi Lal had bequeathed his whole property to her with the direction that she should therewith construct and maintain a *Patashala* in his name, and maintain *Musammat* Tehl Kaur. In a written replication *Musammat* Bishen Kaur denied that Bansi Lal had made any Will of any kind. After considerable delay, due partly to proceedings for the appointment of a Receiver which were the subject of an appeal to the Chief Court, the suit was terminated by the compromise detailed above. Thereafter, on 8th January 1906, Amar Nath and Jawala Dat Parshad entered into an agreement to bring a joint declaratory suit against the two widows at the expense and risk of Jowala Dat

TEHL KAUR *v.* AMAR NATH

Parshad. On 20th February 1906, Jowala Dat Parshad filed such a suit above for a declaration that the widows' compromise should not affect his rights as reversionary heir to Bansi Lal. He joined as defendant Amar Nath who, he asserted, had colluded with the widows since the agreement, and he denied both the factum and validity of the Will mentioned in the compromise. The widows filed practically the same pleas as they have presented in the present suit. Amar Nath did not appear. On the 29th October 1906, Jowala Dat Parshad withdrew the suit unconditionally by a petition in which he admitted that the Will set up by the widows had been made by Bansi Lal and was binding on the heirs.

The present plaint was filed on the 20th February 1909. The explanation given before for Amar Nath's tradiness in attacking the compromise is that, previous to the agreement with Jowala Dat Parshad Petitions and negotiations were pending for the taking over of the estate by the Court of Wards, and that after the withdrawal of Jowala Dat Parshad's suit Amar Nath was employed as Sub-Registrar at two outlying places, Sharkpur and Chunian, and could not at the same time carry out his duties and conduct important litigation in Lahore.

The terms of the alleged oral Will were propounded in the Trial Court on the 27th May 1909, and are printed on page 174 of the printed record :—

"Now life is uncertain and I am seriously ill. Hence I make a Will regarding my property. I have purchased property in Anarkali from Hari Singh and give it by way of *Dharam Arth* for constructing a *Thakardwara* (temple). I wish that after my death out of the income of my entire immoveable property situate in Lahore, Amritsar and Kot Radha Kishen, a temple and *Musafarkhana* for the comfort of Hindu travellers should be built on the site of the property given by way of *Dharam Arth* and a *Pathshala* and a *Langer* (Kitchen) for the poor Hindu travellers should be started, and that my entire immoveable property should be considered as dedicated to the said temple as *Dharam Arth*. But the widows shall have cartrol over and possession of the said property in their lifetime. First, they should live and meet other necessary expenses according to the status of their family for their lifetime and should also give maintenance allowance to my step-mother and then the surplus should be spent in constructing a temple and a *Masafar-khana* as well as in starting a *Pathshala* and *Langer* (Kitchen). After the death of my widows the whole of my *Dharam Arth* property shall be entrusted to a committee of seven respectable citizens of Lahore and the Deputy Commissioner of Lahore or other respectable Government officer. They shall maintain the *Thakurdwara*, *Musafarkhana*, *Pathshala* and *Langer* for ever in the name of our family and shall also give maintenance allowance to my step-mother if she survives. I have given one *Haveli* with a *tawela* (stable, attached to it to *Pandit* Prem Nath, my *Prohit*, by way of *sankalp*. If I do not survive my widows should duly execute a *Sankalpnama* and get it registered. To-day I have told Doctor Brij Lal to bring any good pleader to draw up this Will. I hope that he will bring a pleader to-day or to-morrow. Whatever I have stated shall also be reduced to writing." Although it was pleaded at first in the lower Court by the plaintiff, Amar Nath, that Bansi Lal's Will, if any, was invalid because the property was acquired by *Pandit* Maksudan, his great grandfather, this position was afterwards abandoned and it was admitted that Bani Lal had full power to dispose of all his property by Will. It is conceded before us that if the above Will is proved to have been made the plaintiffs-respondents are out of Court altogether.

If the Will is held not to be proved, Mr. Tek Chand for the appellant argues that the plaintiffs have no cause of action on the compromise. He claims to dissect the deed of compromise and asks us to hold, firstly, that nothing in it amounts to an alienation of any property; secondly, that the expression *Thakur-dwara* includes the whole of the Anarkali site and its buildings, and, thirdly, that the portion relating to the property other than the Anarkali becoming *wakf* after the deaths of the widows (*vide* (d) above) is, in effect, Will by the widows, in regard to which no declaratory suit would lie in the life-time of the testators. For this last proposition he has quoted *Umrao Kunwar* v. *Badri* (2), *Musammat Ganga* v. *Kanhai Lal* (3), *Badho Bai* v. *Chatta Ram* (4) and *Lacho Bai Asa*

(2) 29 Ind. Cas. 302 ; 37 A. 422 ; 13 A. L. J. 551.
(3) 47 Ind. Cas. 222 ; 41 A. 151 ; 17 A. L. J. 44.
(4) 111 P. R. 1880.

Nand (5). The cause of action, if any, in regard to the *Thakurdwara* arose, he asserts, in December 1897, when the building was started by *Musammat* Budhwanti and he has two more arguments why the plaintiffs should not have any decree about the Anarkali property. The first is, that (Amar Nath's appeal and cross-objections having been dismissed) there is now a final finding by the Trial Court that Bansi Lal directed by oral Will the building of a *Thakurdwara* on the Anarkali site which was to be dedicated property. The second is, that the present buildings on the Anarkali site have been constructed by the widows out of the income of the estate of which they had full control, that they have shown an unmistakable intention that these buildings are not to go to the reversioners, but are to be dedicated to the service of the temple, and that, therefore, the buildings were not accretions to the estate, but the separate property of the widows.

On all these points we have heard lengthy arguments from Mr. Tek Chand, for the appellant and Mr. Gokal Chand, for the respondents. The first point for decision is the correctness or otherwise of the lower Court's finding that the Will has not been established. For proof of the Will the defendants relied upon ten witnesses, Shiv Dat, brother-in-law of *Musammat* Budhwanti, Ganesh Dass and Jagan Nath, cousins of Bansi Lal on the mother's side, Ram Kishen, whose son is betrothed to Shiv Dat's niece, Ali Muhammad, *Sarbarah Lambardar* for the widows in Kot Radha Kishen, Parma Nand, whose step-mother was a sister of Bansi Lal's step-mother, Nihal Chand and Kewal Das, family servants, Sanjhi Mal, a retired District Judge, and Prem Nath, the defendant. Of thsse Ganesh Dass, Jagan Nath and Prem Nath profess to describe what Bansi Lal told them afterwards was the substance of his Will. The other witnesses alleged themselves to have been present when the Will was pronounced. We have been through all the depositions in detail and also those of several witnesses for the plaintiffs who speak of various occasions in the last weeks and days of his life on which Bansi Lal was seen by them unconscious and incapable of making any Will. As a result we agree with the conclusion of the Court below that the alleged Will has not been proved with the precision which the law requires. The tests are laid down in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Partab Sahee* (6), the recognised leading case on the subject of nuncupative Wills. The above witnesses were all examined after terms of the Will set up by the widows had been put into Court in writing. They do not agree about time and they cannot locate the date. As pointed out by the learned Subordinate Judge, they differ on details. Rai Sanjhi Mal, the only witness who appears to be unconnected with the family, does not confirm what is said by the other witnesses who allege him to have been present when the Will was pronounced. Premnath in his written pleadings filed on 16th June 1910, said that he did not know whether Bansi Lal made the Will alleged or not As a witness on 31st March, 1917, he described himself as arriving just as Bansi Lal was finishing the Will and as being told immediately by the audience that a Will had been made in the terms set up by the widows. His explanation of his change of front is very feeble and no reliance can be placed on what he has said.

In her written pleas to *Musammat* Bishen Kaur's suit which ended in the compromise *Musammat* Budhwanti alleged a Will different from that now propounded. The Will propounded in Court contains no mention of the absolute ownership of the widows in the moveable property asserted in the compromise. *Musammat* Bishen Kaur made no allusion to a Will by Bansi Lal in her mortgage to Narpat Rai on 12th December 1900, of her share in a portion of the estate, and that transaction is inconsistent with the observance of any such Will as is now sought to be established.

Again, there seems no explanation whatsoever why Bansi Lal should have wanted to make an oral Will in the presence of several literate persons including a retired District Judge, any one of whom, presumably, could have written a Will for him. The witnesses speak not very convincingly of a fruitless search for a lawyer and at the same time allege that Bansi Lal after making the Will lived for some days in the enjoyment of his full senses.

In this connection we have ruled out the record of a deposition purporting to have

(5) 141 P. R. 1882.

(6) 12 M. I. A. 1 ; 9 W. R. 15 (P. C.) 2 Sutu P. C. J. 114 ; 2 Sar. P. C. J. 348 ; 20 E. R. 241.

been made by *Musammat* Budhwanti in the present suit before a Commissioner and also certain notes forwarded by the Deputy Commissioner of Lahore with a letter to the Commissioner in connection with the question of taking the estate under the Court of Wards. Both of these were sought to be used by Mr. Gokal Chand as proof of other inconsistent behaviour by *Musammat* Budhwanti. We have held that *Musammat* Budhwanti's statement was not recorded in the manner prescribed by law and that the notes are not admissible as evidence of the accuracy of the statements which they contain. We have no hesitation, however, in finding that the alleged Will by Bansi Lal has not been proved to have been made. The contention by Mr. Tek Chand of acquiescence by Amar Nath, has no force. Amar Nath is not proved to have admitted at any time that Bansi Lal made a Will of the character described in the compromise. To the argument that allowance should be made for the fact that Amar Nath by delaying his suit rendered it difficult for accurate evidence of the nuncupative Will to be obtained, there are two rejoinders ; firstly, that the widows have asseverated streneously that Amar Nath's suit was premature, and, secondly, that they might have applied for probate of the Will and instead of doing so applied for a succession certificate without making any mention at all of any Will.

An objection has been raised in the memorandum of appeal that the lower Court did not but should have awaited the return from England of a Commissioner for the examination of a witness there. It is not clear whether any commission was actually sent, but it is quite clear that the defendants, who wanted the witness examined, did not follow the procedure prescribed for such cases. In any event, the witness is not alleged to have been present when the Will was made, and medical evidence that Bansi Lal was in a fit state of health to make an intelligible oral disposition of his property would not alter our decision that he is not proved in fact to have done so.

We now come to the argument that even if there was no Will by Bansi Lal the compromise gave the plaintiffs no cause of action.

The Court below decided, correctly in our opinion, that the compromise did not effect an alienaton of property other than the temple. It proceeded to hold that a finding whether there was an alienation of the *Thakurdwara* was not necessary, and that the compromise gave the plaintiffs a cause of action for other reasons which do not meet the present contention that the compromise was a Will in regard to the other property. In our opinion, so far as it concerned the *Thakurdwara* (whatever that expression may mean) the compromise was an alienation. The widows commenced by stating falsely that Bansi Lal, had made a Will and proceeded to declare publicly (for the compromise was registered) and apparently for the first time that the *Thakurdwara* was already *wakf* by virtue of the fictitious Will. This we consider gave the plaintiffs a right to sue under section 42 of the Specific Relief Act for a declaration that the widow's action should not affect their reversionary interests. We cannot follow the suggestion that the plaintiff's cause of action arose previously when the building of the temple was started. Amar Nath certainly knew all about the temple being built and may even, as is alleged, have encouraged the building, but there is no proof that he ever knew that the temple and the neighbouring buildings, which are now asserted to be comprised in the name *Thakurdwara*, were going to be divorced from the rest of the estate still less that he ever acquiesced in this being done. There is nothing on the record to show that a temple cannot be private property, but, even if this is so, the present claim that shops and other buildings are included in the term *Thakurdwara* makes it clear that the plaintiffs had a cause of action to contest the alienation of the *Thakurdwara* so called. This being so, we should not be prepared to hold, on the authorities cited by Mr. Tek Chand, to which we shall presently refer, that, because there was no immediate alienation made of the other property and because the language used in describing its future disposal is capable of being construed as testamentary in character, therefore, the plaintiffs must be restricted to a portion only of the deed of compromise and cannot ask for a declaration that nothing contained in it shall affect their reversionary rights.

TEHL KAUR *v.* AMAR NATH

In the first of Mr. Tek Chands's cases, *Badho Bai* v. *Chatta Ram* (4), it was found that the document executed by a Hindu widow and sued upon was nothing but a Will, which could take no effect until the testator's death, and which, being by its nature a revocable instrument, might never take effect at all. It was ruled that there being nothing which amounted to an alienation of the property or of any interest therein the plaintiff's cause of action would not arise until the widow's estate come to an end.

This case was cited and followed in *Lacho Bai* v. *Asa Naud* (5) with the remark that the question of a Hindu widow's power to make a valid Will could be equally conveniently sued upon on her death, that the particular Will in question had not been placed upon the record, and that it would be very rash to pronounce an opinion upon the validity of an instrument which had not been brought into Court and which might contain provisions within the power of the widow.

The third case *Umrao Kunwar* v. *Badri* (2), related to a Will by a Hindu widow containing a recital that the bequest was made in accordance with oral directions given by the deceased husband. The first Court had dismissed the suit by the next reversioner for a declaration that the Will was void and ineffectual as against his interest. The District Judge reversed this decision and remanded the suit on the ground that their Lordships of of the Privy Council in *Jaipal Kunwar* v. *Indra Bahadur Singh* (7), (to which we shall return) had refused to interfere with a concurrent finding of two Courts in India that a reversionary heir in similar circumstances was entitled to a declaratory decree. The High Court restored the decree of the first Court, pointing out that the District Judge had departed from the spirit of the Privy Council ruling by interfering with the Trial Court's exercise of discretion, and that the Privy Council had maintained the decision of the Indian Courts with considerable reluctance. The High Court judgment made it clear that the Judges did not consider the mere execution of such a Will to be a sufficient reason for granting a declaratory decree.

(7) 26 A. 238 ; 31 I. A. 67 ; 8 C. W. N. 465 ; 6 Bom. L. R. 495 ; 14 M. L. J. 149 ; 8 Sar. P. C. J. 625 ; 7 O. C. 239 (P. C.).

In *Musammat Ganga* v. *Kanhai Lal* (3) the Judges evidently considered that the decision in *Umrao Kunwar* v. *Badri* (2), and the remarks of their Lordships of the Privy Council in *Jaipal Kunwar* v. *Indra Bahadur Singh* (7), settled definitely in the negative the question whether the execution of a Will by a Hindu female with a life estate bequeathing the estate to a person other than the reversionary heir gives the latter a right to sue for a declaratory decree.

The Privy Council decision in *Jaipal Kunwar* v. *Indra Bahadur Singh* (7), was as follows : —*Musammat* Jaipal Kunwar, widow of one Indarjit Singh, had executed and registered a Will declaring Ram Lal Singh, her sister's son, to be heir and successor to the estate. Indra Bahadur Singh, claiming to be the next reversioner, sued for a declaration that the Will was invalid against *Musammat* Jaipal Kunwar and Ram Lal Singh. The defendants pleaded that the plaintiff was not related to the deceased Indarjit Singh and that by the latter's oral Will *Musammat* Jaipal Kunwar was absolute owner of the estate. The Trial Court and the Judicial Commissioner of Oudh found the necessary issues in the plaintiff's favour and granted him a decree. The defendants appealed and the question before the Privy Council was whether the Courts below had exercised their discretion properly. Their Lordships dismissed the appeal observing as follows :—

" Their Lordships would guard against being thought to lay down that the execution of a Will by a limited owner, such as a Hindu widow, as a general rule, affords a sufficient reason for granting a declaratory decree They are not prepared to concur in all the reasoning of the learned Judge in the present case. And if they had been sitting at a Court of first instance they would have felt no little hesitation before making the decree that has been made. But their Lordships are always slow to reverse the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by law. And in the present case there are special reasons why they should hesitate before so interfering at the instance of the present appellants."

Those special reasons were then explained to be that, although the Will by itself did not specify the ground on which the testatrix purported to act, the pleadings in the suit made it clear that the defendants relied upon a title inconsistent with any present or future rights of the plaintiff or any other reversionary heir, and, further, that the appellants had no legitimate interest in the appeal except in respect of costs.

It may be that the portion of the compromise which deals with the estate other than the Anarkali property, is in effect a Will by the widows, and it certainly appears that, from the authorities above discussed, a general rule is deducible that the mere execution of a Will by a Hindu widow with a life interest in her deceased husband's estate bequeathing that estate elsewhere than to the next reversionary heir should not entitle that heir to obtain in the widow's life-time a judicial declaration that the Will is invalid against his reversionary rights. Still the lower Court has exercised a discretion vested in it by law and here there are special reasons, as in the Privy Council case, why we should refuse to interfere.

Those reasons are,—

(*a*) the Will was contained in an instrument of which another provision gave the plaintiffs an indubitable cause of action ;

(*b*) as in the Privy Council case, the widow based their action on something that was inconsistent with any rights of the plaintiffs ;

(*c*) that something was a Will by the deceased husband disinheriting all the reversionary heirs, which Will has been found to have had no existence ;

(*d*) the Will was stated to be oral, and thus a question was raised necessitating evidence which might not have been obtainable when the widows died, possibly after many years [this was held to be a material factor in a case where the Allahabad High Court upheld the grant of a declaration respecting a widow's Will : *Kalian Singh* v. *Sanwal Singh* (8)].

(*e*) the enquiry by the lower Court into the widow's power to dispose of the estate was elaborate and lasted for eight years, and to re-open the whole question now would almost amount to an absurdity ;

(*f*) the present appellant *Musammat* Tehl Kaur is not directly and personally affected.

This disposes of the appeal so far as it concerns the estate other than the Anarkali property, for it is conceded that, unless they succeeded in proving that they acted in compliance with a Will by Bansi Lal, the widows had no power to divert the inheritance of that part of the estate from the male heirs of Bansi Lal.

Before dealing with Mr. Tek Chand's further arguments in favour of the dismissal of the suit in regard to the Anarkali property it will be convenient to dispose of a request by Mr. Gokal Chand for the plaintiffs-respondents that we should utilize the provisions of O. XLI, r. 33, Civil Procedure Code, to set aside the findings of the Trial Court on issue 11.

Those findings, as already stated, are, that under the Hindu Law Jowala Dat Parshad is equally entitled with Amar Nath to succeed as an heir to the estate of Bansi Lal and that by reason of his unconditional withdrawal from his own declaratory suit his share, whatever it may be when succession opens up, becomes *wakf* for ever under the compromise. Jowala Dat Parshad, as we have said above, was joined as a defendant on the 16th December 1909. He was impleaded as a respondent to *Musammat* Budhwanti's appeal, but not to Amar Nath's appeal. When *Musammat* Budhwanti died he applied to be substituted as appellant for her independently of the similar application by *Musammat* Tehl Kaur. The two applications were placed before different Judges of this Court and each was granted subject to all just exceptions. Thereafter, Jowala Dat Parshad himself died, leaving a son Sewa Dat. No application has been made for the substitution of that son or other legal representative for Jowala Dat Parshad either as appellant or respondent. The appeal against him has abated and he is not represented in these proceedings. He never preferred any appeal in his individual capacity as defendant.

It is pointed out, however, that the findings may possibly affect Amar Nath

(8) 7 A 163 ; A. W. N. (1884) 337 ; 4 Ind. Dec. (N. S.) 378.

hereafter. Whether the fiindings are in fact embodical in the decree of the lower Court is a moot question and one which we cannot determine here, for no question of execution of the decree or of its effect upon the present day situation is before us. Mr. Gokal Chand has directed our attention to two orders on the record by Mr. Ross, District Judge, who conducted part of the trial. The first was recorded on the 10th March 1913, on an application by Jowala Dat Parshad which has not been printed, and states that the Court does not propose in the suit to go into the question who will succeed when the widows die. The second is dated 3rd April 1913, and admits Panna Lal as a plaintiff on the undertaking that no decision is being made about his and Amar Nath's respective rights as heirs. Mr. Gokal Chand points out that *Lala* Jaswant Rai, Sub-Judge, who wrote the final judgment, has alluded to the second order and has given effect to it (page 318 of the paper-book), but has made no mention of the first. He submits that *Lala* Jaswant Rai must have overlooked the first order in the mass of material compiled by other Judges with which he had to deal, and he asks us for that reason and in view of the exceptional nature of the case to rule that the findings on the 11th issue are not necessary to the determination of the suit and to expunge them from the lower Court's judgment. The issue, he asserts, and apparently with truth, although the point is not made absolutely clear on the record, was framed in consequence of a plea raised by Jowala Dat Parshad (*vide* page 193 of the paper-book), that Amar Nath was not competent to object to the actions of the widows in the presence of him (Jowala Dat Parshad), a nearer collateral of Bansi Lal.

These findings were attacked by Amar Nath in the cross-objections which we have dismissed for the reasons given above. They were not touched in Amar Nath's appeal, to which, as we have stated, Jowala Dat Parshad was not a respondent.

Mr. Tek Chand objects that O. XLI, r. 33, Civil Procedure Code, cannot be applied in favour of a party who has appealed or has lodged cross objections and has failed. He supports his argument by a reference to the Full Bench decision of the Allahabad High Court reported as *Rangam Lal* v. *Jhandu* (9), and to certain other cases (*e. g. Ram Lal Jahari Mal* v. *Dip Chand* (10), a Single Bench judgment of this Court (10) in which that ruling has been followed. The Full Bench pointed out that, although the words of O. XLI, r. 33, Civil Procedure Code, are very wide, and it is not easy, nor perhaps, expedient to lay down any hard and fast rule for the exercise of the discretion which it allows, Courts should not lose sight of the other provisions of the Code, notably, O. XLI, r. 22, and should bear in mind the illustration appended to r. 33. The learned Judges further expressed the opinion that, in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections, the Court should hesitate before allowing him to object at the hearing of the appeal.

We have no doubt that this and the other decisions quoted by Mr. Tek Chand must be taken each with its own particular facts, and that no general rule has been laid down which would absolutely prevent our acceding to Mr. Gokal Chand's request. But we have no satisfactory explanation of why Amar Nath, if he was dissatisfied with the findings at the time when the law permitted him to file an appeal, (*a*) did not appeal against them, (*b*) preferred an appeal of the character which he put in. In that appeal he actually objected to the lower Court's refusal to give a decision on the respective rights as heirs of himself and Panna Lal. It is true that his Counsel withdrew that part of the appeal when it came up for hearing before us, but what he did lends force to the contention that he deliberately refrained from attacking the findings in question at the proper time for doing so. In the circumstances, we find no such strong reasons to prevail as would justify our abopting the exceptional course which we are invited to take, and we must decline to pass any orders regarding the lower Court's recorded finding on issue No. 11.

There remain Mr. Tek Chand's two points on which he asks us to hold that the appeal must succeed in respect of the Anarkali property. The first of these has very little weight. There is no final decision by the Trial Court that that property became *wakf* by a

(9) 11 Ind. Cas. 640 ; 34 A. 32 ; 8 A. L. J. 1111.
(10) 60 Ind. Cas. 705.

TEHL KAUR *v.* AMAR NATH

Will of Bansi Lal. In discussing issue 6 (*a*) the learned Subordinate Judge observed :— " My belief is that he (Bansi Lal) left a Will, that in his memory some temple should be built on that site (the Anarkali site)." He proceeded to find on issue 6 (*a*) " in the negative", and in summing up his conclusions he stated the first of them to be that the deceased " left a pious wish that a mansion (preferably a temple) be built in his momory". There is no finding that the shops, *baithaks* and *Musafarkhana* are portions of " the temple" mentioned in the proviso to the decree, and there is no finding that Bansi Lal made any Will or expressed any pious wish that the whole of the Anarkali site should be dedicated to a religious object.

The second contention, however, that the widows had full power to dedicate these premises has more force and introduces a question of some difficulty. There is, in our opinion, reliable evidence that the widows spent a considerable sum derived from the income of the estate, which was theirs to use as they pleased, in erecting buildings on the Anarkali site. Hira Nand, servant of the widows, states on the 7th January 1914, that the sum so spent up to that date was Rs. 92, 798-3-5, and he produced accounts on which the plaintiffs had an opportunity to cross-examine. Amar Nath himself admitted that there had been some expenditure on the temple building from the widows' income. There is evidence that Bansi Lal purchased the Anrakali property with the idea of building a temple upon it or upon some portion of it, and we see no reason to disbelieve this.

The lower Court held that the temple, as such, was protected by the undertaking of the plaintiffs not to desturb it. and that the shops and other buildings surrounding the temple by reason of their standing upon a site which was part of the estate of Bansi Lal and not the absolute property of the widows, were accretions to the estate and must go to the reversioners. The rule of Hindu Law regarding accretions is stated in section 254 of Gour's Hindu Code to be that any accretion made by an heiress partakes of the nature of the estate to which it is added, that the question whether any property is an accretion to the present estate is one of intention on the part of the heiress to augment the estate by treating it as a part thereof, but that in the absence of anything appearing to the contrary any purchase made out of income of an estate may be presumed to be an accretion thereto. No ruleing has been cited before us which exactly fits to the present case. There is absolutely no doubt here that the widows' intention at the time of the compromise was that the buildings erected by them should not go to the reversioners. So anxious were they to avoid this that they set up a fictitious Will by their husband in order to defeat the claims of the reversioners and they have contested the present suit with the utmost vigour. The difficulties in the way of treating the Anarkali buildings as separate property of the widows lie in the facts (*a*) that there is no clear proof that the whole of the buildings existing at the time of the compromise were constructed by them ; (*b*) that while the buildings were being constructed by *Musammat* Budhwanti, previous to the compromise, *Musammat* Bishen Kaur was objecting strenuously to her actions; (*c*) that the site utilized was one belonging to the estate ; (*d*) that buildings existing on the site at the time of Bansi Lal's death were demolished in order to make room for the new buildings ; (*e*) that although there is evidence that Bansi Lal had a wish or intention to build a temple or *Thakurdwara* on the Anarkali site, it is not proved that he intended to utilize the whole site for that purpose; that the Anarkali site and buildings were purchased by Bansi Lal for Rs. 36,000 and could not be called a very small portion of the estate.

In regard to (*a*) and (*b*) the catalogue of the buildings given in the list attached to the plaint, the correctness of which is not disputed, states them to be a *Thakurdwara* with houses attached thereto, and thirteen shops with *baithaks* attached. A witness cited by Panna Lal named Narpat Rai has deposed (page 291 of the printed record) that he has been tenant of certain shops on the Anarkali site since their acquisition by Bansi Lal, that " the house, shops and *Ahata* in dispute " were mortgaged to him twice by *Musammat* Bishen Kaur after the death of Bansi Lal, that " these shops " were re-built after Bansi Lal's death, and that the *Thakurdwara* was built before his mortgage was redeemed. A copy of a

mortgage-deed by *Musammat* Bishen Kaur in favour of Narpat Rai is on the record (page 143). and from this it appears that all the shops were not mortgaged, since other shops not mortgaged and belonging to *Musammat* Budhwanti and Bishen Kaur are entered under the northern boundary of one of the mortgaged shops. In a statement made by Sohan Lal on 23rd June 1900, before a Magistrate, and admitted in evidence by consent, there is mention of shops being re-built but not of how many shops. It is claimed, however, by Mr Tek Chand that Amar Nath, plaintiff, admitted in the lower Court that all the old buildings had been demolished and re-placed by new buildings. What happened was this. The Court on the 5th May 1909, (page 174 of the printed record) called upon the widow defendants to put in a written statement specifying *inter alia* what the specific property was which they alleged to have been dedicated by *Pandit* Bansi Lal, its condition at the time of his death and its present condition, and what property the widows claimed to have built out of the income of the estate since the death of Bansi Lal. The written statement was filed and was handed to the plaintiff for a written reply. Para. 2 stated the Anarkali property to have been at the time of Bansi Lal's death one *Khata* having eight shops.....The entire building of every sort with the site attached to it is shown in the plan "Marked A."

Para 3 stated: "subsequently the old building was demolished, and a new building was constructed at considerable cost. Its detail is as follows, which appears from the plan attached "Marked B."

The replication of the plaintiffs was that "the plans of the houses situate in Anarkali produced by the defendants are not correct."

Mr. Tek Chand argues that, because demolition and re-building were not specifically denied they were admitted, but we think that the plaintiffs cannot be held to have committed themselves to such a pleading. The correctness of the plans was denied, and the plans were in the form in which the defendants had exhibited the alleged re-construction.

Mr. Tek Chand meets all the objections detailed above except (*b*) by arguing that the widows were at liberty to alienate a moderate portion of their husband's estate, *viz*, Anarkali site and any old buildings which might have existed on it, with a view to his spiritual benefit. Thereby incidentally, he resiles from his former position regarding the interpretation of the compromise and accepts the view which we have taken that this was in effect an alienation, or a public declaration of an alienation so far as the *Thakurdwara* was concerned, aud he uses this argument to distinguish *Raja Venkata Narasimha Appa Row Bahadur* v. *Raja Suraneni Venkata Purushothama Jagannadha*, (11), his ruling relied upon by the other side on the question of accretion and intention. In that case a Hindu female had built a large house on a site belonging to the estate held by her for life, and was held to have done so with the intention that it should be the estate mansion house. The Judges found on the evidence that the house was intended to go with the estate and proceeded to remark that it would go with the estate apart from any intention on the part of the lady to treat it as part of the estate, because it was built on a large part of land belonging to the estate. Mr. Tek Chand's reply to objection (*b*) is, that at any rate the widows were unanimous at the time of compromise and thereafter, and he adds that, even if some of the old buildings were left, the widows were entitled to alienate them along with the site for the purpose declared by them.

The latest authoritative ruling on the subject of alienations by Hindu widows for the spiritual benefit of their deceased husbands appears to be the Privy Council decision reported as *Sirdar Singh* v. *Kunj Behari Lal* (12). In that case a Hindu widow executed a deed of gift in 1876 conveying certain immoveable property of her deceased husband to the temple of Jagan Nath at Puri and to two *Pandas* of the temple and their successors, directing that half the income of the property should be applied to the *bhog* or daily offering of food to the deity, and the other half should go to the *Pandas*. The gift was described as a charitable gift for the salvation of her husband, herself and the other members of the family. It was held that what the

(11) 31 M. 321 ; 4 M. L. T. 5 ; 18 M. L. J. 409.

(12) 69 Ind. Cas. 36 ; 44 A. 503 ; (1922) A. I. R. (P. C.) 261 ; 16 L. W. 871 ; 31 M. L. T. 253 ; 37 C. L. J. 383 ; 44 M. L. J. 766 ; 27 C. W. N. 653 ; 25 Bom. L. R. 648 ; 2 P. W. R. 1923 (P. C.).

widows had done was fully in accordance with Hindu religious sentiment and belief and, therefore, was not in excess of her powers, having regard to the fact that the dedication related to 1/5th of the estate, and was made specifically for the creation of a permanent benefit of the soul of the deceased owner. Their Lordships pointed out that the Hindu Law recognises two sets of religious acts, one, those which are considered essential for the salvation of the soul of the deceased, and the other, acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. They observed that this distinction runs clearly through the views of the Judges who have decided the later cases. For an act of the first class they explained that a Hindu female could sell the whole estate if its income was not sufficient, and in the second case that a widow could alienate a small portion of the property for the pious or charitable purposes she may have in view. Their Lordships made it clear that the alienation with which they were dealing belonged to the second category and in its connection quoted with approval a pronouncement made in *Sardar Singh* v. *Kunj Behari Lal* (12), and also referred to a Calcutta case, *Khub Lal Singh* v. *Ajodhya Misser* (14), on which Mr. Tek Chand relies.

What the Judges said in *Vappuluri Tatayya* v. *Gannalla Ramma Krishnamma* (13) was as follows : "We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited, and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioners. We are obliged to express ourselves somewhat guardedly, because almost every gift, according to Hindu notions, is, as such, calculated to promote spiritual merit, and the occasions for the performance of ceremonies calculated to bring spiritual reward are so innumerable that almost any expenditure not for a sinful object, and any alienation by way of gift may be attempted to be justified as ministering to spiritual benefit." The gift there in suit was by a widowed daughter, and was made as part of the *Saradha* ceremony on what was held to be a peculiarly holy occasion. It was of a very small portion of the father's landed property. The learned Judges distinguished the gift from gifts made in performance of indispensable acts of duty or religious necessity, and thought that a rule could not be laid down that only alienations of the latter character are justifiable.

In *Khub Lal Singh* v. *Ajodhya Misser* (14) the same distinction appears to have been recognised. A Hindu widow had granted permanent leases on nominal rents and on payment of a premium of Rs. 528 of a little more than 2 *bighas* out of her deceased husband's landed estate of more than 10 *beghas*. The amount of the premium was spent on completing the walls of a temple founded by the deceased husband and in excavating a tank in connection with the temple. It was held to be impossible to define the extent and limit of a window's power to dispose of her husband's property for religious purposes, because this depends upon all the circumstances of the disposition, and that in the case under consideration the disposition, having been made for a work of recognized religious merit and being not unreasonable in extent was lawful, valid and proper. The reversioner's suit for recovery of possession or a declaration was dismissed. The judgment made it clear that such an alienation to be valid must be for a purpose supposed to conduce to the deceased husband's spiritual benefit.

The rule thus is established that a Hindu widow may alienate a small portion of her deceased husband's estate for the purpose of an act which is recognized by Hindu religious sentiment and religious belief as conducing to the benefit of the soul of the deceased, but which is not one regarded as obligatory under the Hindu Law.

Applying this to the facts of the case before us, we find it difficult to certify that the Anarkali property at the time of the compromise was a small portion of the estate. The purchase price of the site was substantial and its value must have appreciated very considerably in the six years which intervened between

(13) 6 Ind. Cas. 240 ; 34 M. 288 ; 20 M. L. J. 798 ; (1910) M. W. N. 222 ; 8 M. L. T. 74.

(14) 31 Ind. Cas. 133 ; 43 C. 571 ; 22 C. L. J. 345.

the death of Bansi Lal, and the date of the compromise, more so in all probability, than any other part of the property set forth in the schedule of the compromise (page 74 of the printed record). Again, while we may assume that Bansi Lal desired a temple to be built on this site, and that the act of the widows in carrying out his wishes was one recognized by religious sentiment as securing spiritual benefit, it is not proved that anything more than a temple was contemplated by him, and there is no proof, nor can it be assumed, that he had any reason to suppose that the temple would not be maintained adequately by his reversionary heirs who are themselves *Brahmans*. Nor is it proved that he desired the temple to be managed, not by his heirs, but by other trustees. It seems to us extremely doubtful whether, in the circumstances, the alienation of shops and other buildings standing on land belonging to the estate for the purpose of applying their rents to the upkeep of the temple would come within the scope of the rule above propounded. These buildings, in their present form, may have been erected wholly or partially out of income over which the widows had full control, but they have re-placed other buildings belonging to the estase which have been demolished, and it has not been established that they are a necessary adjunct to the temple to enable that institution to fulfil its intended character.

To revert to the question of the terms of *Musammat* Bishen Kaur's pleadings in the suit which ended in the compromise, and from the manner in which she fought it in its earlier stages, notably the receivership proceedings, that she objected to the expenditure of the estate income on buildings by *Musammat* Budhwanti. *Musammat* Budhwanti on her side asserted that *Musammat* Bishen Kaur had no right to interfere, and that she herself had been given full control of the estate by Bansi Lal. The widows composed their differences by the compromise and their does not appear to have been any subsequent disagreement, but the terms of the compromise do no not indicate any intention to separate the Anarkali property from the rest of the estate. On the contrary, the intention clearly was that the whole estate should be kept together and should be dedicated in whole to the service of the temple after the widows' death. Previous to the compromise there was no agreement in intention about how the estate was to be treated either before or after their deaths.

Can it be said, then, that there was any intention at any time that the accumulation of income invested in the Anarkali, buildings was to be divorced from the rest of the estate? We have alluded already to *Rajah Venkata Narasimha Appa Raw Bahadur* v. *Raja Suraneni Venkata Purushothama Jugganadha* (11), and on this particular point there is a more direct authority by the Privy Council reported as *Sheolochan Singh* v *Saheb Singh* (15).

In that case the survivor of two Hindu widows had gifted to an alleged adopted son the entire moveable and immoveable properties which had belonged to her husband, Sheo Dyal, together with others purchased by herself and her co-widow out of their savings. The deed of gift recited that the two widows desiring to carry out their husband's wishes as to the establishment of "more *thakurbaris* and *Shiwalas*" with other religious objects had made the donee sole manager of the estate, and that the donor, being now 60 years of age, desired to make and did make the gift "for the preservation of the *reasat* "and the name of her husband, for the *Siba puja* of Siri *Thakur*, and for husband's *sradh*."

A reversionary heir sued to contest the gift and was successful in the first Court except in respect of the properties purchased by the widows. The High Court decreed the whole claim and their Lordships of the Privy Council upheld the High Court's decision. They ruled that the authority on the question was the previous Privy Council judgment *Ishri Dutt Koer* v. *Hansbutti Koerain* (16), that the circumstances indicated that the widows intended the estate to be kept entire and that they did not intend the original estate and the subsequently-purchased properties to go in a different line of succession "because their act in what they did in regard to the defendant was to make a gift to him of the whole of the property and professing to do it so as to, what

(15) 14 C. 387 ; 14 I. A. 63 ; 11 Ind. Jur. 231 ; 5 Sar. P. C. J. 1 ; 7 Ind. Dec. (N. S.) 257 (P. C.).

(16) 10 C. 324 ; 10 I. A. 150 ; 13 C. L. R. 418 ; 7 Ind. Jur. 557 ; 4 Sar. P. C. J. 459 ; 5 Ind. Dec. (N. S.) 217 (P. C.).

seems to be called, carry out the intentions of Sheo Dyal found a *Thakurbari*, with which the estate would be connected."

In *Isri Dat Keor* v. *Hansbutti Koerain* (16) there was a question of after purchases of land which had been alienated by two widows along with the land of the original estate. The after purchases were of shares in land in which the estate was already a share-holder. They were made in 1857 soon after the husband's death and no attempt to alienate them was made till 1873. The object of the alienation was held to have been a desire to divert the succession from husband's heirs and it was remarked that neither with respect to this object nor apparently in any other way had the widows made any distinction between the original estate and the after purchases. "These are circumstances," their Lordships ruled "which clearly establish accretion to the original estate, and make the after purchases inalienable by the widows for any purpose which would not justify alienation of the original estate."

Here the utmost that could be argued from the terms of the compromise is, that the Anarkali property was omitted from schedule, and that its income was ear-marked immediately for the maintenance of the temple, while the rest of the estate (we have no reliable evidence of what the total income was at the time) was to pay Rs. 400 a month only to that object. But there was certainly no manifest intention to form two separate estates. Further more, the widows lived for several years after the compromise and six years (all but two days) elapsed before the present suit was filed There is no evidence that in fact the income from the shops was separated from that of the estate and applied execlusively to the temple in terms of the compromise. It was in the power of the defendant widows to produce such evidence, and no attempt was made to do so. Finally, the objections raised by *Musammat* Bishen Kaur at the time when the new buildings were being put up proves that there was no intention, on her part then to apply the income away from the estate, and it was for the widows in this suit to take the case out of the general law regarding accretions and to bring it within the exception.

We find, therefore, that Bansi Lal's pious desire was no more than that a temple should be founded in his name ; that he did not contemplate the alienation from his heirs of any portion of the estate for the maintenance of the temple ; that it was not necessary for such maintenance that this should be done, that that the Anarkali site and buildings other than the actual temple do not constitute a small portion of the estate ; that there was no intention of the widows to form two distinct estates, one consisting of buildings erected by them ; and that the maintenances of the temple was not a purpose justifying the alienation of the whole estate by the widows.

The temple is protected by the proviso to the lower Court's decree, and, for the above reasons, we are unable to interfere with the decree and dismiss the appeal.

In the circumstances, we do not think it desirable that the plaintiff-respondents should have a decree for their costs against *Musammat* Tehl Kaur, who is a widow, dependent for maintenance on the estate in suit. One or each of the plaintiffs presumably will come into possession now of some portion of the estate, and we order that parties shall pay their own costs in this Court.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 32 OF 1923.

October 12, 1923.

Present : —Mr. Dalal, J. C., and Mr. Neave, A. J. C.

MUHAMMAD YASIN ALI KHAN—DECREE-HOLDER—APPELLANT

versus

ALI BAHADUR—JUDGMENT-DEBTOR-OBJECTOR—RESPONDENT.

Decree, compromise—Matter foreign to suit included—Execution—Interest, power of Court—Civil Procedure Code (Act V of 1908), s. 151, application of.

MUHAMMAD YASIN ALI KHAN *v.* ALI BAHADUR

In a suit for specific performance of a contract for sale, the parties came to an agreement under which the plaintiff agreed to purchase certain other property of the defendant as well. The compromise was accepted by the Court and embodied in a decree. Subsequently, the plaintiff sought to avoid purchasing property not subject-matter of the previous suit and urged that he was not bound by that portion of the decree :

Held (1) that the compromise must be taken as a whole and each part of it treated as consideration for the other ;

(2) that, even if the agreement relating to the property not subject-matter of the suit could not lawfully from part of the decree, once it had been so made a part, the person bound by the decree could not object to that part as being not binding on him;

(3) that, in any case, the Court had inherent power to prevent abuse of its own process and as the action of the decree-holder in executing only a portion of it would cause damage to the judgment-debtor, the Court would not permit him to do so.

Appeal against the order of the Subordinate Judge, Sultanpur, dated the 28th May 1923.

Messrs. *Bisheshwar Nath Srivastawa*, *Ali Muhammad* and *Muhammad Ismail*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by the learned Subordinate Judge of Sultanpur in the execution department. The decree-holder Muhammad Yasin Ali Khan applied for execution of a part of the decree passed in his favour and the application was dismissed. He has, therefore, come to this Court in appeal. His original suit was for the specific performance of contract of sale of 7-annas *Zemindari* of village Kachnao. On 13th December 1919 the two parties entered into an agreement which was the same day partly modified by another agreement. The agreement related to the sale of the 7-annas property in the suit and of 2-annas other property in the same village. The defendant owned 14-annas share in the village. The second agreement merely modified the price fixed for the sale of the 2-annas share and reserved certain plots of land for the benefit of the vendor. The terms of the agreement were that the 7-annas share shall be sold for Rs. 54, 600 odd of which Rs. 655 had remained unpaid. Another sale was to be executed of 2-annas share for a sum which, according to the two agreements, would amount to Rs. 21,000 and odd. The plaintiff had paid Rs. 500 as earnest-money for the sale of the 2-annas share. These two agreements were filed in Court, one by the plaintiff and the other by the defendant, and a petition of compromise was also presented requesting that a decree may be passed in terms of the two agreements. The compromise was accepted by the Court and a decree passed in accordance therewith. The two agreements form part of the decree. In execution proceedings subsequently what the plaintiff-decree-holder desires is to enforce the preparation of a sale-deed of the 7-annas share only on payment of the balance of the sale consideration ; he has taken no steps to get the sale deed of the other 2-annas share executed by the defendant. The defendant objected that the two transactions were one and indivisible and that the plaintiff could not obtain the benefit of the sale of the 7-annas share without paying the price of the other two annas share and getting a sale-deed executed for that share as well. This objection was upheld by the lower Court.

In appeal it was argued, (1) that the portion of the decree relating to the sale of 2-annas share was inoperative, and (2) that even if that portion be operative, the decree-holder was at liberty to get the decree executed in part. Neither argument appears to us to be sound. As regards operation of the decree, the decree is before us and we are only concerned with the execution thereof. The question does not arise, though if it arose we should be prepared to decide it in favour of the defendant, that the decree was not passed in accordance with the provisions of O. XXIII, r. 3. We agree with the observations of the learned Judge in *Sabapathy Pillay* v. *Vanmahalinga Pillay* (1) that even if this condition of the sale of 2-annas share of property could not lawfully be made part of the decree, once it has been so made part of the decree the person bound by the decree cannot object to that term as not

(1) 23 Ind. Cas. 581 ; 38 M. 959 at p. 968 ; 15 M. L. T. 203 ; 26 M. L. J. 331 ; (1914) M. W N. 256.

binding upon him. It is, therefore, not necessary to discuss this question further.

If we permit the appellant-decree-holder to execute only a portion of the decree we shall be giving him a benefit not contemplated by the decree. It is obvious to us on reading the two agreements, the application for compromise and the terms of the decree, that the two transactions were inseparable. In our opinion the defendant who contested the suit for specific performance agreed to the sale of the 7-annas share on a compromise in consideration of the sale of another share of 2 annas being purchased by the plaintiff to the advantage of the defendant. The sale of the 2-annas was obviously profitable to the defendant because we find the plaintiff raising objections to carrying out the agreement with regard to the purchase of that share. Apart from all considerations of law and equity, there is the inherent power of the Court under section 151 of the Code of Civil Procedure to prevent abuse of the process of the Court. By acting as the decree-holder desires us to act, we should be doing injustice and allowing the decree-holder to take advantage of a certain portion of the decree through the process of the Court and thereby to do damage to the judgment-debtor. We are of opinion that if the decree holder desires to execute the decree he must get both the sale-deeds executed under the conditions and by making payments as laid down in the decree. The lower Court arrived at a correct decision and we dismiss this appeal with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3538 OF 1916.

May 31 1922.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Abdul Qadir.

RAGHO AND ANOTHER—DEFENDANTS —APPELLANTS

versus

DWARKA DAS—PLAINTIFF AND GOPAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Purchase from ostensible owner—Good faith—Notice of doubtful title—Equity, rule of—Transfer of Property Act (IV of 1862), s. 41—Civil Procedure Code (Act V of 1908), O. 11, r. 2—Suit for possession of portion of mortgaged property, whether maintainable.

Where a transferee of property having notice of a suit brought against his transferor by a third person for the recovery of the said property, fails to make any attempt to ascertain whether his transferor has the right to make the transfer or not, he cannot be said to be acting in good faith, and the transfer in his favour is not binding on the rightful claimant in view of the rule of equity embodied in section 41 of the Transfer of property Act

A mortgagee is not bound to sue for possession of the entire mortgaged property and a suit by him for possession of a portion of the mortgaged property is maintainable if he thinks that portion to be sufficient security for his money.

Appeal from the decree of the Senior Subordinate Judge, Kangra, Dharmsala, dated the 29th September 1916.

Pandit *Shco Narain*, R. B., for the Appellant.

Bakshi *Sohan Lal*, R. B., Mr. *N. C. Mehra*, Lala *Moti Sagar*, R. S., and Bakshi *Tek Chand*, for the Respondents.

JUDGMENT.—This was a suit for possession as a mortgagee of 1,223 *kanals*, 2 *marlas* of land being 1/8th share of 9,784 *kanals*, 17 *marlas*, situated in *Mausa* Thakardwara, Tahsil Nurpur in the District of Kangra. The plaintiff is the *Mahant* of the shrine known as the Datarpur shrine. The facts are somewhat complicated, but

the issue for decision is a very simple one. The following facts will disclose the nature of the dispute and the position of the parties to the suit :—

The 9,784 *kanals*, 17 *marlas* above mentioned were owned by a number of co-sharers One-fourth of this, that is, 2,446 *kanals*, 4 *marlas*, belonged to one Luchhman. Luchhman was succeeded by his three sons, Ragho, Hirde and Malhar. Half of this said one-fourth was mortgaged to one Ram Dass for Rs. 900. This mortgage was redeemable in 1888. The other half of the said one-fourth was under mortgage with Punjab Singh. This latter mortgage was redeemable in 1895. On the 5th May 1888 *Musammat* Mehtabo, as the mother and guardian of the three sons of Luchman, mortgaged the entire one-fourth share to *Mahant* Hari Dass for Rs. 2,340 for a term of 20 years. The previous mortgage in favour of Ram Dass was ripe for redemption and was redeemed by Hari Das who took possession of the land redeemed, namely, 1|8th share. The previous mortgage in favour of Panjab Singh, however, could not be redeemed and possession of the land mortgaged, could not be delivered to Mahant Hari Das. On the 6th May 1888, another land measuring 14 *ghamaons* and 12 *marlas* was mortgaged to *wahant* Hari Das in substitution for the mortgaged land in possession of Punjab Singh. A condition was entered in the mortgage-deed that the mortgagors would redeem Punjab Singh's mortgage and would deliver possession to the *Mahant* over the 1/8th share and take back the 14—*Ghamaons* and 12 *Marlas*. In 1895 *Mahant* Hari Das died One Dhiraj Das, *chela* of the *Mahant* succeeded to the *gaddi* and mutation in respect of all properties held by *Mahant* Hari Das was effected in his favour. Bharat Das, another *chela* of the *Mahant*, instituted a suit for the recovery of the *gaddi* against Dhiraj Das, and obtained a decree. In April 1897, possession was taken by Bharat Das in execution of this decree. Defendants Nos. 1 and 2 are the representatives of the original owner, Lachman. They, in 1899, redeemed the land mortgaged with Punjab Singh and mortgaged it to one Atma Singh. They did not fulfil the condition entered in the document dated the 6th May 1888, for they did not hand over the land to the *Mahant*. On the 24th February 1902, Bharat Das, the then *Mahant* in possession of the properties attached to the shrine, assigned the mortgage right in the entire one-fourth share to one Kharku whose son Gopal Singh is the defendant No. 3 in this suit. On the 8th December 1902, Kharku brought a suit for possession of the 1|8th share mortgaged to Atma Singh and impleaded the representatives of the original mortgagor Lachhman, Atma Singh and Bharat Das as defendants. This suit was decreed and Kharku obtained possession in execution of his decree. Thus Kharku obtained possession ovor the entire one-fourth share as mortgagee. On the 26th August 1901, the present plaintiff Dwarka Das brought a suit against Bharat Das for a declaration that he was the real *Mahant*, being the senior *chela* and having been nominated by *Mahant* Hari Das as his successor to the *gaddi*. On the 2nd November 1901, to the declaratory relief already claimed in the plaint, a further relief was added to the effect that the plaintiff should be installed on the *gaddi* as the *Mahant*. Later on, a further amendment of the plaint was effected and a relief for possession of the properties attached to the *gaddi* was added. For the first time then a list of the properties claimed was appended to the plaint and this list included also the property now in dispute. The assignment in favour of Kharku had already been effected on the 24th February 1902, as mentioned above. In this suit, besides Bharat Das, Dhiraj Das and Ghirdari Das, the two other *chelas* of *Mahant* Hari Das, were impleaded as defendants, but Kharku was not made a party. The suit was decreed by the first Court on the 29th July 1903, and the decree was upheld by the Cheif Court. In execution of this decree possession was taken by Dwarka Das, the present plaintiff, on the 27th November 1903. The proceedings relating to the delivery of possession over the mortgaged lands in dispute are printed at pages 26-30 of the paper book (B). The report of the *Girdawar* relating to the delivery of possession is translated and printed at page 29 of the paper book 'B' and is to this effect :—

"In compliance with the Court's order I came to the spot to-day, the 27th November 1903, and put Maya Das, the general agent of *Mahant* Dwarka Das, in possession of the land mentioned in the warrant, together with the

standing crop, in the presence of the *Lambardars* and the *Zemindars*, by beat of a drum. The report along with the papers is, therefore, submitted. The area of the land situate in *Mouza* Thakardwara, entered at *Khatauni* Nos. 94 to 363 in the *Jamabandi* papers for 1900-01, is shown to be 9,784 *kanals* and 17 *marlas*, while in the warrant it is entered as 9,684 *kanals* and 17 *marlas*. It has been entered in the warrant as 9,684 *kanals* and 17 *marlas* by mistake."

This report is signed by a number of persons as *Lambardars* including Kharku, the assignee of Bharat Das. At page 30 is to be found the *dakhlnama* executed by the decree-holder Dwarka Das, acknowledging the receipt of possession over the mortgaged lands of *Mauza* Thakardwara. During the pendency of the above suit, shortly before the decree was passed in favour of Dwarka Das, defendants Nos. 1 and 2 mortgaged half of the entire one-fourth share to one Gangi for Rs. 4,140 laying down the following condition in paragraphs 5 of the mortgage deed, namely, that Gangi, mortgagee, was to remain in possession of 111 *kanals*, 12 *marlas* (14 *ghumaons* 12 *marlas*) until he was able to get possession after redemption over the one-eighth share mortgaged to him. Raghbir Singh, defendant No. 5, in the suit,is the son ofGangi.He redeemed the entire one-fourth shore which was in possession of Kharku, kept half of this one-fourth himself and handed over half of the one-fourth to defendants Nos. 1 and 2. He also handed back the 111 *kanals* 12 *marlas*. The present suit was instituted on the 17th July 1915, for the recovery of possession over half of the one-eleventh share originally mortgaged by Lachhman together with mesne profits on the allegation that in collusion with Bharat Das defendants Nos. 1-5, had taken possession over 1223 *kanals*, 2 *marlas* of land, namely, the one-eighth share of the land owned by defendants Nos. 1 and 2. The main contention put forward on behalf of the plaintiff is contained in paragraph (1) (*f*) of the plaint which runs thus,—

"Bharat Das, defendant No. 4, was not competent to sell the mortgagee's right in respect of the land in dispute, during the pendency of the case or after the passing of the decree referred to in clause (*b*) nor was defendant No. 3 empowered to purchase the said mortgagee rights from Bharat Das, defendant No. 4, nor yet was defendant No 5, as a mortgagee, competent to take possession of the said land ; moreover, defendants Nos. 1-3 were not in any way competent to give possession of the said land. The plaintiff is not, in any case, bound by any act or the alienation on behalf of the defendants. The plaintiff, as a mortgagee, is entitled to take possession of 1,223 *kanals* and 2 *marlas* of the land of the share of defendants Nos. 1-3 entered in clause (*a*)."

The suit was contested by defendants Nos. 3 and 5 mainly. Defendant No. 3 mainly based his defence on the assignment of the mortgagee rights by *Mahant* Bharat Das in favour of his father. Kharkhu, defendant No.5, set up the mortgage in favour his father Gangi by defendants Nos. 1 and 2 and pleaded that he had redeemed the previous mortgage. Defendant No. 1 appeared but put forward a half-hearted defence. He denied his liability for mesne profits. The facts stated above are practically admitted by the parties. The main question which arose for decision on the above facts was whether the assignment of the mortgagee rights by Bharat Das in favour of Kharku was validy made and whether the mortgage of the 5th May 1888, in favour of the Dalapur shrine had been validly discharged and the plaintiff was entitled to claim possession as a mortgagee. The learned Senior Subordinate Judge has held that the assignment in favour of Kharku was made during the pendency of the suit of the present plaintiff against Bharat Das, the assignor, and that, therefore, the assignee was bound by the decree passed in that suit. It also held that Kharku had notice of the defective title of Bharat Das and of the legal rights of Dwarka Das, the plaintiff, and that, therefore, the assignment of the mortagagee rights by Bharat Das in his favour was invalid and not binding on the plaintiff. The learned Senior Subordinate Judge has further held that defendant No. 5 or his father Gangi, when redeeming the mortgage of 1888 by payment to Kharku, was aware of the latter's defective title and must have known that the payment should have been made to the rightful manager of the shrine, *viz.*, the plaintiff, and that, therefore, there was no valid discharge of the mortgage of 1888. On the above findings the Court granted a decree

for possession over 1,223 *kanals*, 2 *marlas* in equal shares against defendants Nos. 1, 2 and 5. On the question of mesne profits the Court held on the evidence that Rs 400 per annum would be a fair estimate and granted a decree for the amount of Rs 2,200 for a period of 5½ years, directing the amount to be paid in equal shares by defendants Nos 1 and 2 on the one hand and defendant No. 5 on the other. Mr. Sohan Lal for the plaintiff-respondent, has, however, admitted that the claim for mesne profits beyond three years could not be sustained as it would be barred by time.

Three appeals have been preferred against the decision of the lower Court First appeal No. 3538 of 1916 is on behalf of Ragho and Mallo who are represented by *Pandit* Sheo Narain. First appeal No. 408 of 1917 is no behalf of Raghbir Singh, defendant No. 5, who is represented by *Rai Sahib Lala* Moti Sagar. First appeal No. 112 of 1917 is on behalf of Gopal Singh son of Kharku, in which Mr. Tek Chand has appeared for the appellant.

The main argument has been addressed to us by Mr. Moti Sagar in First Appeal No. 408 of 1917. He has contened that the rule of *lis pendens* cannot be applied to the transfer in favour of Kharku, as the plaint as originally presented did not contain a claim for possession of the land in dispute and that the decision in Kharku's favour was made on the 24th February 1902, long before the plaint was amended on the 15th May 1902, so as to include a relief for possession of the land. On the evidence, however, it is quite clear that Kharku must have been aware of the institution of the suit by Dwarka Das against Bharat Das. The suit must be taken to have been instituted on the date on which the plaint was first presented. Leaving aside the question of *lis pendens* the transfer in favour of Kharku must be held to be bad in view of another rule of equity. That rule is thus stated in section 41 of the Transfer of Property Act IV of 1882:—

"Where, with the consent express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

Now, in this case there is not a tittle of evidence to show that Kharku had made any attempt to ascertain whether Bharat Das had the power to make the transfer. On the other hand, there is evidence on the record to show that he had notice of Dwarka Das's suit and of his rights as the rightful *Mahant*. The record of Civil Suit No. 80 of 1902, and the remarks of the learned Judges in their judgment exhibited as P. 7 on this record show that Kharku had express notice of the suit between the plaintiff and Bharat Das. He, therefore, cannot be said to have acted in good faith. The transfer in his favour, therefore, must be held not to be binding on the plaintiff. The same rule of equity applies to the case of defendant No. 5. As found by the lower, Court the sum of Rs. 2,340 was paid to Kharku by Hari Singh, D. W. 3, the agent of defendant No. 5. He and defendant No. 5 are residents of Dasuya Tahsil in the Hoshiarpur District. The mortgage-deed in favour of Gangi referred to the mortgage of 6th May 1888. This ought to have put Gangi on his guard and he ought to have made more necessary enquiries contemplated by section 41 of the Transfer of Property Act. The redemption of the mortgage of 1888 from Kharku, therefore, cannot be said to have been made in good faith. No valid discharge of the mortgage of 1888 in favour of the shrine can be held to have taken place. Mr. Moti Sagar has strenuously contended that the suit of the plaintiff's must be dismissed as the claim is confined only to a portion of the mortgaged property, *i.e.*, half of the one-fourth share. It was the plaintiff's look out to claim as much of the mortgaged property as he liked. If he considers only half of the mortgaged property to be a sufficient security for his money, it is not the business of this Court to hold that he ought to have claimed possession over the entire mortgaged property. Mr. Moti Sagar has been unable to cite any rule of law in support of his contention. We see no force in the pleas urged on behalf of Raghbir Singh. His appeal, therefore, must fail except in one respect, namely, that the claim of mesne profits would be confined to three years only.

MAHMOOD HASAN *v.* THE NATIONAL BANK OF UPPER INDIA

In first appeal No. 3538 of 1916 *Pandit* Sheo Narain, the learned Counsel for Ragho and Mallo, appellants, has contended that the suit being for the recovery of the 1-8th share in the possession of defendant No. 5 a decree for possession and mesne profits has wrongly been passed against the appellants and that the decree should have been against defendant No. 5 alone. A careful examination of the plaint bears out the contention of the learned Counsel. In paragraph (1) (*e*) of the plaint the plaintiff states that defendant No. 5 is in possession of the land in dispute as a mortgagee. Mr. Moti Sagar, the learned *Vakil* for defendant No. 5, has frankly admitted that his client is in possession of the 1-8th share which had been redeemed from Punjab Singh and was subsequently mortgaged to his clients. In our opinion the decree for possession and mesne profits passed jointly against defendants Nos. 1 and 2 and defendant No. 5 cannot be maintained.

In first appeal No. 172 of 1917 filed on behalf of Gopal Singh, defendant No. 3, Mr. Tek Chand has contended that inasmuch as the suit was not defended by his client a decree for costs should not have been passed against him. Gopal Singh's father Kharku was the main cause of this dispute, and it is not quite correct to say that the suit was not defended by him. A reference to the written statement filed by him clearly shows that he did defend the suit and it cannot be said that he was wrongly impleaded as a defendant. We see no ground for interfering with the order of costs made against him by the Court below.

The result is that the appeal of Raghbir Singh, defendant No. 5, is dismissed except in so far that the decree for mesne profits is reduced to Rs. 1,200 only ; that the appeal of defendants Raghu and Malhu is so far allowed that the decree for possession and mesne profits as against them is set aside and a decree is made for the possession of the entire 1|8th share together with mesne profits against defendant No. 5 above and the appeal of defendant No. 3 is dismissed with costs. Having regard to the special features of the case we leave the order of the lower Court as to costs undisturbed.

N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NOS. 45 AND 46 OF 1924.

May 13, 1924.

Present :—Mr. Pullan, A. J. C.

MAHMOOD HASAN—JUDGMENT-DEBTOR —APPLICANT

versus

THE NATIONAL BANK OF UPPER INDIA IN LIQUIDATION—AUCTION PURCHASER—OPPOSITE PARTY—RESPONDENT.

Execution of Decree—Sale of property—Possession, delivery of—Limitation.

A decree-holder auction-purchaser is not entitled to possession of the property sold more than three years after the confirmation of the sale.

Application against the order of the Munsif Haveli, Lucknow, dated the 23rd February, 1924.

Mr. *M. A. Qidwai*, for the Applicant.

Mr. *N. C. Dutt*, for the Opposite Party.

JUDGMENT.—Applications have been made in revision of two orders, one passed on 10th December 1923 and the other on the 23rd February 1924. The applicant in each case is the same. It appears that he is a judgment-debtor of the National Bank of Upper India now in liquidation. The Bank obtained a decree against him and put to sale certain property in execution of their decree. The sale was confirmed in 1919. The decree-holder made an application for delivery of possession more than three years after the sale was confirmed. Apparently, this fact was not brought to the notice of the Munsif who accepted the application on 10th of December 1923 and issued notices *ex parte*. Possession was accordingly given on 5th January 1924, when it came to the notice of the judgment-debtor that possession had been given beyond the period of limitation. First of all, the judgment-debtor applied to the successor of the Munsif apparently under section 151 of the

Code of Civil Procedure. The Munsif was of opinion that section 151 did not cover an application of this kind and on this point I agree with Munsif. He, however, went further and held that a defect of limitation was purely formal and that as the decree-holder could in any case bring a suit for possession, there was no reason why possession should not be given even beyond time in execution proceedings. The judgment-debtor has appled for revision of both orders, but the one which is of the most important is the first order, for I am of opinion that the second Munsif had no jurisdiction to interfere with the order of his predecessor, and that, therefore, his order, in so far as it was a mere refusal to interfere, is a good order and must be allowed to stand. As to the first order I have no doubt that it was passed on a misapprehension of facts and that possession cannot be granted more than 3 years after the confirmation of the sale. I, therefore, allow the application No. 46 against the order of the 10th of December 1923 with costs, set aside the order of the Munsif and order that the application for delivery of possession being beyond time is dismissed. With the dismissal of this order the order of second Munsif is of no effect but as a matter of precaution it is set aside without any order as to costs.

It has been pointed out that there is a joint liquidator, Seth Radha Kishan, who should have been made a party to these applications. The applicants will correct the application accordingly.

G. H. *Application allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1282 OF 1921.

May 25, 1922.

Present :—Mr. Justice Brasher.

ABDULLAH *alias* MASITA—PLAINTIFF—APPELLANT

versus

GIRDHARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Vacant site—Formal possession in execution sale against supposed owner—Possession, whether adverse to real owner.

In the case of a vacant site possession follows title. Therefore, where a person obtains a mere formal delivery of possession of a vacant site in an execution sale against a person who is not the owner of the site, but does not in any way use the site, his possession is not adverse to the real owner.

Appeal from the decree of the District Judge, Karnal, dated the 3rd March 1921, affirming that of the Munsif, First Class, Jhajjar, dated the 21st December 1920.

Mr. *B. D. Qureshi*, for the Appellant.

Mr. *Sagar Chand*, for the Respondents.

JUDGMENT.—The plaintiff in this case claimed to be the owner of a vacant site, and he sued for an injunction to restrain the defendants from interfering with some building operations which he had commenced.

The defendants denied that the plaintiff was owner of the site in question. The first Court came to no decision as to whether the plaintiff or his ancestors ever had any title in the land. It held that, even if the plaintiff's ancestors were owners in the year 1856 (as was alleged) the plaintiff had since lost his title because the land had been sold in the year 1902, in execution of a decree against other persons. The lower Appellate Court has agreed with the first Court and has held that the plaintiff cannot be deemed to have been in possession of the land after the confirmation of the sale.

It is a well known principle of law that in the case of a vacant site possession follows

title, and it is not alleged that the site has been used in any way by the purchasers in execution. Nothing is said to have been done beyond mere formal delivery of possession, and it cannot be said, therefore, that since then the defendants, Girdhari and Chhajju, who purchased the land, have remained in adverse possession of it. It has not been decided whether the plaintiff was previously owner of the land, but if he was, he cannot be held to have lost his rights by the sale in execution.

I accordingly accept this appeal and remand the case to the lower Appellate Court for a fresh decision. Stamp on appeal to be refunded. Other costs to be costs in the case.

N. H. *Appeal accepted.*

ALLAHABAD HIGH COURT.

MISCELLANEOUS APPEAL NO. 9 OF 1923.

May 31, 1923.

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

KASHI NATH—APPLICANT
versus
EMPEROR—OPPOSITE-PARTY.

Legal Practitioners Act (*XVIII of* 1879), *ss.* 36, 38—*Court, discretion of—Order including name in the list of touts—Opportunity to show cause—Appeal—High Court, powers of superintendence—Government of India Act*, 1915, (5 & 6 *Geo. II, Ch.* 61), *s.* 107.

The powers conferred on the High Court by section 107 of the Government of India Act are extensive enough to authorise the Court to send for the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper.

The High Court will not interfere in the exercise of its powers of superintendence on the sole ground that the decision of the District Judge is against the weight of the evidence.

Section 38 of the Legal Practitioners Act, 1879, confers on the Courts therein mentioned including the Court of a District Judge, a very wide discretion in the matter, with the only qualifications that the District Judge must be satisfied by evidence of general repute or otherwis, and that no person's name is to be included in the list of touts until he has had an opportunity of showing cause against such inclusion.

It was never the the intention of the Legislature to allow anything of the nature of an appeal against the decision of a competent Court under section 36 of the Legal Practitioners Act.

Appeal against the order of the District Judge of Benares.

Mr. *J. M. Banerji*, for the Applicant.

Mr. *Lalit Mohan Banerji*, for the Opposite Party.

JUDGMENT.—We have before us four applications from persons in respect of whom the District Judge of Benares has passed an order under section 36 of the Legal Practitioners' Act No. XVIII of 1879, that is to say, the names of each one of these four persons have been put by the District Judge in a list of persons who are proved to his satisfaction, by evidence of general repute or otherwise habitually to act as touts. The word "tout," we may note, is defined by section 3 of the same Act. In the case of two of the persons concerned, namely, Kashi Nath and Sarju Dat, notice was ordered to issue and the learned Government Advocate has appeared to support the order of the District Judge. The other two applications, namely, those of Abdul Hamid and Sital Pandey, were simply orderd to be laid before this Bench, to be dealt with in such manner as this Court might see tit after hearing arguments in the other two cases. The learned Government Advocate has raised the general question of the right of this Court to interfere in revision with an order passed by the District Judge, or other competent Court, under section 36 of Act XVIII of 1879. That is a question which has more than once been before this Court ; but the standard authority on the subject is the decision of a Bench of two Judges, one of them the then Chief Justice of this Court, passed *In the matter of the Petition of Madho Ram* (1) in the year 1899 (1). We agree with the learned Judges who decided that case, that this Court could only interefere with an order, such as that now before us, in the exercise of the general

(1) 21 A. 181 ; A. W. N. (1899) 15 ; 9 Ind. Dec. (N. S.) 825.

powers of superintendence conferred upon it by what is now section 107 of the Government of India Act. We are satisfied that those powers are extensive enough to authories this Court in the exercise of its discretion to send for the record of such a proceeding in a subordinate Court, namely, the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper. The question remains, however, what principles this Court should lay down to govern the exercise of its discretion in this matter. The learned Judges who decided *Madho Ram's* case (1) above referred to laid down one principle of considerable importance. This was that this Court would not interefere in the exercise of its powers of superintendance, where the sole ground upon which interference was asked for was that the decision of the District Judge was against the weight of the evidence. We desire to stand by that principle. It is quite clear from the wording of section 36 of Act XVIII of 1879 that the Legislature intended to confer upon the Courts therein mentioned, including the Court of a District Judge, a very wide discretion in the matter. The District Judge is authorised to frame and publish a list of persons proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts. It has been pressed upon us that the word 'touts' as used in this section, refers back to the definition in the preceding section No. 3 of the same Act. This is undoubtedly so: but what is laid down in section 36 is that the District Judge has discretion to frame and publish a list of persons who are proved to his satisfaction to behave in the manner set forth in the definition of the word "tout" in section 3. The only qualifications imposed by the Act on the exercise of this discretion are that the District Judge must be satisfied by evidence of general repute or otherwise, and, further, that no person's name is to be included in such a list until he has had an opportunity of showing cause against such inclusion. We may say in this connection that we should certainly hold it a valid ground for interference by this Court, in the exercise of its general powers of supervision, if the District Judge had disobeyed this latter direction and had included in his list of touts the name of a person who had never been allowed an opportunity of showing cause against such inclusion. We return now to the obvious fact that it was never the intention of the Legislature to allow anything of the nature of an appeal against the decision of a competent Court under section 36 of Act XVIII of 1879. We cannot allow our general powers of supervision to be invoked so as, in effect, to create a right of appeal which was never intended by the Legislature. In the cases now before us it is sought to bring the matter within the scope of the revisional jurisdiction, represented as falling somewhat short of the jurisdiction exerciseable by a Court of Appeal, by representing that the record of the enquiry conducted by the District Judge discloses as against each of the four persons whose petitions lie before us no legal or relevant evidence to warrant the finding arrived at by the District Judge that they habitually do act as touts. The plain fact of the matter is that, as regards each of these four persons, direct evidence was wanting; but there was laid before the District Judge certain circumstantial evidence from which the District Judge drew the inference as against each of these persons that they were habitually acting as touts. In our opinion it would be straining the powers of superintendence conferred on this Court and setting undesirable precedent, if we were to take it upon ourselves in every instance of this kind to consider whether the circumstantial evidence relied upon by a District Judge, and set forth in his order, was or was not evidence upon which we ourselves would have drawn the same inference. We think the Legislature intended that the District Judge should be master in his own Court to this extent. The result is that we are not prepared to interfere in any one of the four cases before us, and each of the applications stands dismissed accordingly.

K. S. D. *Revision dismissed.*

SHANKAR DAYAL *v.* BINAYAK PRASAD

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 228 OF 1922.

March 23, 1923.

Present :—Mr. Kanhaiya Lal, J. C.

SHANKAR DAYAL—PLAINTIFF—APPELLANT
versus
BINAYAK PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111, applicability of—Will—Right of residence, without power to grant lease devise of—Forfeiture.

Section 111 of the Transfer of Property Act does not apply to a forfeiture claimed by reason of an infringement of the provisions of a devise.

Plaintiff was given under a Will a right of residence in a house without power to sub-let. He sub-let the house and defendants, who were the heirs of the testator, claimed that the plaintiff had forfeited his right of residence under the Will.

Held (1) that section 111 of the Transfer of Property Act was not applicable to the case ;

(2) that in the absence of a clause in the Will providing for a right of re-entry in case a sub-lease was granted by the plaintiff, the latter could not be held to have forfeited his right of residence in the house.

Appeal from the decree of the Additional District Judge, Lucknow, dated the 31st March 1922, setting aside the decree of the Additional Subordinate Judge, Lucknow, dated the 28th April 1921.

Messrs. *Niamat Ullah* and *Har Govind Dayal*, for the Appellant.

Mr. *Makund Behari Lal*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to a house situated in Lucknow which belonged to Rup Chand. Rup Chand had three brothers, Khub Chand, Sukhdhan and Ram Dayal. Khub Chand had a son, Ram Lal, the predecessor of the defendants-respondents. Sukhdhan had a son, Durga Prasad. Ram Dayal was the grandfather of the plaintiff-appellant. Rup Chand was living separately from his brothers and nephews. He died leaving a widow, *Musammat* Batasa, and a grand-daughter, *Musammat* Jairani, by a predeceased daughter. He made a devise by which he gave the entire property to his wife and his grand-daughter subject to the reservation that after his death and that of his wife one of the houses was to go to Khub Chand and another to Sukhdhan in proprietary right. By another clause of the Will it was provided that Ram Dayal and his descendants would be allowed to remain in possession of the third house now in dispute for their residence without any power of sale, mortgage or lease subject to the condition that they would have to pay the rent of the said house to the testator and his wife so long as they were alive and would be entitled to apply the same thereafter to its repairs. It was further provided that after the death of his wife and grand-daughter, if the latter died without leaving any male issue, the entire property would vest in the male issue of his own brothers, Khub Chand and Sukhdhan.

It is admitted that Ram Dayal was the step-brother of the testator, and that no proprietary right was given to him under the said Will. The plaintiff-appellant is a pleader practising in Sitapur. The house in dispute was let out by him to certain tenants. During his absence the defendants reconstructed a wall of that house and opened a door facing the door of their own residential house. The plaintiff thereupon filed the present suit for an injunction restraining them from interfering or meddling with his right to make constructions and repairs in the said house and to exercise other acts including the collection of rent in connection therewith. The defendants pleaded that the plaintiff had forfeited his right of residence or tenancy by the denial of their title and also urged that they had a right to make the constructions complained of.

The Court of first instance found that the plaintiff had not set up any adverse proprietary right or forfeited his right of residence. It further found that the defendants had no right to obstruct the plaintiff in repairing the said house or re-building any fallen or dilapidated portion thereof and granted an injunction accordingly. The lower Appellate

Court, however, held that there had been a denial of the title of the defendants by the plaintiff prior to the suit, that for a long time past the house in dispute had been sub-let by the plaintiff in contravention of the direction given by the Will, and that the plaintiff was not entitled to claim an injunction after he had forfeited his rights by his conduct.

The plaintiff is not, however, a mere lessee. He was given certain rights by the Will, which were subsequently confirmed by an agreement executed after the death of the testator and his wife by *Musammat* Jairani, Ram Lal, Durga Prasad and Ram Dayal. By virtue of the Will, Ram Lal was only given a right of residence in the house and to maintain it in good repair out of the rent which would otherwise have been payable after the death of the testator and his wife to the legal representatives of the former. Section 111 of the Transfer of Property Act (IV of 1882) does not apply to a forfeiture claimed by reason of an infringement of the provisions of a devise. The Will does not provide for a right of re-entry in case a transfer or sub-lease is made in contravention of the terms thereof, and no right of forfeiture can be exercised so long as the plaintiff is willing to use the house for the purposes for which it was assigned to him and does nothing inconsistent with the terms of the Will. If the plaintiff has sub-let the house in the past without any objection by the defendants, it is open to him now to rectify his error; and he has a right to repair the house so long as he is ready to occupy it on the terms on which it was offered. The defendants have no right to re-build a wall or open a door, so long as no material injury to their proprietary right or future right of reversion is threatened. The re-construction of the wall by the defendants does not, however, in any way militate with the use of that house by the plaintiff for the purpose of his residence; but the opening of the door interferes with the privacy of that house. It is open to the plaintiff to close it.

The appeal is accordingly allowed and the claim decreed for the injunction granted by the Court of first instance to the plaintiff with half of his costs here and hitherto. The defendants will, in the circumstances, bear their own costs throughout.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 120 OF 1923.

June 19, 1923.

Present:—Mr. Justice Mullick and Mr. Justice Bucknill.

Sheikh AKHAJ KHALIFA—PETITIONER
versus
RAMLAL MARWARI AND ANOTHER—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 14—Judgment-debtor adjudicated insolvent—Application by decree-holder to be entered in the schedule of creditors, rejection of—Order of adjudication, annulment of—Subsequent application for execution—Decree whether time-barred—Execution, whether can proceed.

The petitioner made an applicaion on 1st August 1917 to be declared an insolvent, and the order of adjudication was made on 1st November 1917. *N*, a creditor obtained a Small Cause Court decree on the 3rd August 1917. On 14th May 1921, the minor sons of *N* applied to the Insolvency Court to be entered in the schedule of creditors but the application was rejected on 11th February 1922. The order of adjudication was eventually annulled on 27th October 1922. Thereupon a fresh aplication was made for execution of the decree:

Held, that the rejection of the application asking that the names of the decree holder's sons be entered in the schedule of creditors was not due to any defect of jurisdiction and section 14 of the Limitation Act did not apply;

(2) that time began to run against the decree-holder from the date of his decree, *viz.*, the 3rd August 1917 and the decree was barred on the date when application for leave to execute it was made;

(3) that the execution could not, therefore, proceed.

Revision from an order of the Subordinate Judge, Manbhum, dated the 20th January 1923.

Mr. *Atul Krishna Ray*, for the Petitioner.

Mr. *P. C. Roy*, for the Opposite Party.

JUDGMENT.

Mullick, J.—This is an application under section 25 of the Provincial Small Cause Courts Act against an order passed by the Subordinate Judge of Manbhum on the 20th January 1923. The petitioner made an application on the 1st August 1917 to be declared an insolvent. On the 1st November 1917 the

BADRI SAH *v.* BALBHADDAR SINGH

Court made an order of adjudication. On the 3rd August 1917 a creditor, named Nagarmull, the predecessor of the opposite party, got a Small Cause Court decree for Rs. 260. On the 14th May 1921 the minor sons of Nagurmull applied to the Insolvency Court to be entered in the schedule of creditors but on the 11th February 1922 that application was rejected. On the 23rd March 1922 the District Judge called upon the applicant to make an application for his discharge and on the 27th October 1922, as the applicant did not comply with that order, the District Judge annulled the order of adjudication. Thereupon the opposite party made an application to the Subordinate Judge for the execution of their Small Cause Court decree. On the 20th January 1923 the Subordinate Judge held that the decree was not barred by limitation and that execution should proceed. Against this order the present application for revision has been made by the applicant.

Now, if the Insolvency Act of 1920 applies to the case, then it is clear that, under section 78, the decree-holder is entitled to a suspension of the period of limitation during the insolvency proceedings provided he has proved his debt in the manner required by the Act. It is admitted that he has not proved his debt and, therefore, if the Act of 1920 applies to the case the decree-holder cannot be permitted to maintain his execution application.

If, on the other hand, the Insolvency Act of 1907 applies, then there is nothing in the Act which entitles the decree-holder to a suspension of the period of limitation between the date of application, that is, the 1st August 1917 and the date when the adjudication was set aside, namely, the 27th October 1922.

The only mode in which the learned Counsel for the opposite party seeks to save limitation isby a resort to section 14 of the Limitation Act. He points out that on the 16th January 1920 the decree-holder made an application to the Insolvency Court asking that his name should be entered in the schedule of creditors and that on the 11th February 1922 the Subordinate Judge disposed of that application with the remark that it could not be entertained because it had not been supported by affidavit according to law. In my opinion the rejection of that application of the 16th January 1920 was not due to any defect of jurisdiction and section 14 of the Indian Limitation Act is not applicable.

That being so, time began to run against the decree holder from the date of his decree, namely, the 3rd August 1917, and on the date when he applied to the Subordinate Judge for leave to execute the decree was barred.

Therefore, whether the Act of 1920 or the Act of 1907 is applicable, in either case, the decree is barred by limitation.

In my opinion the learned Subordinate Judge was wrong in allowing the execution to proceed. His order will, therefore, be set aside and this application will be allowed with costs : hearing fee one gold *mohur*.

Bucknill, J.—I agree.

K. S. D. *Revision allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 38 OF 1922.

August 6, 1923.

Present:—Messrs. Dalal, J. C. and Cumming, A. J. C.

BADRI SAH—DEFENDANT—APPELLANT

versus

BALBHADDAR SINGH AND ANOTHER—PLAINTIFFS AND RAGHUNATH SINGH—DEFENDANT—RESPONDENTS.

Malicious prosecution—Innocence of accused—Doubt as to guilt—Setting law in motion—Confession incriminating innocent person.

In an action for malicious prosecution the plaintiff has to prove,—

(1) that he was prosecuted by the defendant.

(2) that he was innocent of the charge upon which he was tried,

(3) that the prosecution was instituted against him without any reasonable and probable cause,

BADRI SAH *v.* BALBHADDAR SINGH

(4) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.

There is malicious prosecution if a person is innocent and is falsely prosecuted, but the fact that a guilty person is prosecuted for private ends and not from a sense of helping the cause of justice is immaterial. By itself malice is not actionable.

To succeed in an action for malicious prosecution it is not enough for the plaintiff merely to raise such doubts regarding his guilt as were sufficient to save him from conviction.

If a Court takes action as the result of prior malicious proceedings originated by the defendant, the latter cannot escape liability on the excuse that the Court had acted of its own motion. Inquiry should be aimed at a discovery whether the Court in taking action was or was not influenced by the proceedings of the defendant.

When in a criminal proceeding instituted against him, a person makes a confession incriminating another person as his accomplice, as a result of which the latter is also involved in the prosecution, the responsibility for starting prosecution as against him rests on the former.

Appeal from the decree of the Subordinate Judge, Kheri, dated the 15th May 1922.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Messrs. *A. P. Sen* and *Ram Prasad*, for the Respondents.

JUDGMENT.—The plaintiffs, who are uncle and nephew, by name Balbhaddar Singh and Bachchu Singh, instituted a suit in the Court of the Subordinate Judge of Kheri against a Bania Badri Sah and a Thakur Raghunath Singh for recovery of damages to the amount of Rs. 10,000 for malicious prosecution. The suit was decreed *ex parte* against Raghunath Singh, who has not appealed, and decreed after contest against Badri Sah who has brought the present appeal. As a preliminary to an inquiry into the issue arising in the civil suit it will be convenient to summarize the main facts of the criminal prosecution.

One Sheo Bakhsh Singh was apparently murdered on the night between the 17|18th September 1919. His body was afterwards discovered in the house of Raghunath Singh (defendant No. 2 of this suit) on 20th September. The deceased was called by one *Teja Nao*, about 16 years of age at the time, to the house of Raghunath Singh before or soon after dark on the 17th of September and was not seen alive again by the inhabitants of the village. Sheo Bakhsh Singh, Teja, Raghunath Singh the plaintiffs' and the appellant Badri all live in the same village Mohiuddinpur. Raghunath Singh is said to have confessed in the village on September 20th that he, Teja and the plaintiffs of this suit had killed the deceased whose corpse was in his house. He was taken to the police station of Pasgawan by his father Hazari, the appellant Badri and another man Bharath (Court witness No. 1 in this suit). He made, a confessional statement there as report of the occurrence of murder, was arrested and put in the lock-up. The Sub-Inspector of Pasgawan Ahmad Husain (D. W. 1) afterwards recovered the dead body from a room in the house of Raghunath Singh and also the dead man's shoes and *lathi*, which were found in another room. In the room where the *lathi* and shoes were discovered the Sub-Inspector found on a wall what looked like stains of blood. According to the Sub-Inspector Teja also made a statement to him incriminating himself, so he arrested Teja and sent for Raghunath Singh from the police station. Subsequently, after Raghunath Singh had pointed out the dead body and the two articles belonging to the deceased, he sent Raghunath and Teja to Sitapur to have their confessions recorded. These confessions were recorded on the 24th September. The police did not find the plaintiffs in the village and did not arrest them. The police did not prosecute them. The Magistrate who inquired into the case of Raghunath Singh and Teja had the plaintiffs arrested by issue of a warrant and held a joint inquiry prior to commitment in their case also: the plaintiffs were discharged on 30th December 1919 (Order Exhibit 87), and Raghunath Singh and Teja were committed to the Court of Session. The Sessions Judge issued notice to the plaintiffs to show cause why they should not be committed as well, but discharged the notice on 27th March 1920 (Ex 95). In the Sessions Court Raghunath Singh and Teja retracted their confessions (Exhibits 85 and 97) and were acquitted by the Sessions Judge on 26th April 1920. When Raghunath Singh and Teja retracted their

statements in the Sessions Court they both alleged that they were tutored by Badri Sah, defendant-appellant, to implicate the plaintiffs.

To complete the history of action in the Criminal Courts, details of action taken by the plaintiffs to prosecute the defendants under section 211, Indian Penal Code, may be stated. They applied for sanction which was granted by the Magistrate on 14th September 1920 (Ex. A-5) but revoked as regards Badri, appellant, by the Sessions Judge on 6th November 1920 (Ex. A-6). After Raghunath had been examined as a witness for the plaintiffs in the Civil Court on 19th December I921 the plaintiffs withdrew from his prosecution on 13th February 1922 (Ex. A-9). The present suit was instituted on 9th December 1920.

In an action for malicious prosecution the plaintiff has to prove:—

(1) that he was prosecuted by the defendant;

(2) that he was innocent of the charge upon which he was tried;

(3) that the prosecution was instituted against him without any reasonable and probable cause;

(4) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.

It is difficult to summarize the exact findings of the lower Court, but we think that we are right in concluding from the judgment that in its opinion not only the plaintiffs but Raghunath Singh and Teja were innocent of the crime, that Badri tutored Raghunath Singh to repeat the story of his confession knowing well that it was false and that Badri acted through malice due to long standing enmity between him and the plaintiffs. In this view of the case no question of reasonable and probable cause arises when Badri invented a false story of the plaintiffs' complicity in the crime of the murder of Sheo Bakhsh. In our opinion the two main issues in the case are (1) whether the plaintiffs have proved themselves to be innocent of the charge of murder, and (2) whether Badri instigated Raghunath to implicate the plaintiffs falsely. Before entering upon a determination of these issues we desire to brush aside the argument of the appellant's learned Counsel that there was no prosecution of the plaintiffs directly consequent on the confession of Raghunath Singh. He has relied on the reasons given by the Magistrate for the issue of warrants against the plaintiffs. In his order of discharge the Magistrate has noted: "I examined *Musammat* Parbati, Mula and Girdhari Lal on the 27th October 1919: as the evidence of all these three witnesses implicated Balbhaddar Singh and Bachchu Singh I issued a warrant against them." It was argued (1) that prosecution was ordered by Court and not undertaken by the defendant-appellant, and (2) that the basis of that prosecution was the testimony of three witnesses and not the confession of Roghunath Singh, even presuming that it was brought about by the appellant Badri. If a Court takes action as the result of prior malicious proceedings originated by the defendant, the latter cannot escape liability on the excuse that the Court had acted of its own motion. Inquiry should be aimed at a discoverey whether the Court in taking action was or was not influenced by the proceedings of the defendant. The Magistrate was not examined as a witness in this suit on behalf of the defence; and we cannot accept the words quoted above to imply that he had not taken into consideration the main basis of the prosecution, which was the confession of Raghunath Singh. In our opinion the Magistrate's meaning is that the testimony of the three witnesses appeared to corroborate the confessions of Raghunath Singh and Teja and such corroboration impelled him to take action against the plaintiffs.

In our opinion the plaintiffs have not succeeded in proving their innocence of the charge of murder. It must be remembered that the burden lies on them in this civil litigation to prove their innocence; and it is not enough for them merely to raise such doubts as regards their guilt as were sufficient to save them from commitment to the Court of Session. The learned Counsel for the appellant gave up the theory of the lower Court that Raghunath Singh and Teja as well as the plaintiffs were innocent. His theory was that they had actually committed the murder. The dead body was buried in Raghunath Singh's house on the night of the 17th September during the absence of his father Hazari and on Hazari's return on the

20th Raghunath Singh was unable to hide the presence of the corpse in the house and confessed his guilt to his father. He and his father thereupon went for advise to Badri who took advantage of the situation to induce Raghunath Singh to implicate the plaintiffs. Badri held out the hope that Raghunath Singh would be made an approver. In support of this theory the learned Counsel pointed to the testimony of his two witnesses Bhikhari (No. 12) and Debi Sahai (No. 14). Bhikhari's statement is as follows :—

" One day before the cropse was found I saw Raghunath at Badri Sah's house. I was told by my wife that I was wanted at Badri Sah's house to help in the kitchen as some guests had arrived at Badri Sah's house. When I went there Badri Sah and Raghunath Singh were not present. At abour 4 *gharis* after that when I went into the house to ask for *ghi* I saw Badri and Raghunath sitting under a *chappar* at the entrance to Badri's house. Badri Sah told Raghunath Singh that if he did not leave out the names of Balbhaddar and Bachchu Singh he would save him."

This story sounds improbable ; it is not likey that Badri would have waited till next day to take Raghunath Singh to the police station if he had known of the murder on the 19th September. The learned Judge of the lower Court has effectively summed up in his judgment reasons for disbelieving this witness. He says :—" The reason given for which he happened to be at the house of Badri at the time is not very convincing. He is cultivating plaintiffs' land. His brother was servant of the plaintiffs for some time. His brother's wife is still employed by the plaintiffs to draw water. He has been ejected by Badri from a tank in which he sowed waternuts. He was not produced to prove this incident in the case brought under section 211, Indian Penal Code." No weight can be given to the opinion of the learned Judge when in a subsequent part of the judgment he relies upon the testimony of this witness. The witness Debi Sahai says nothing pertinent to the matter of tutoring. He deposes to seeing Raghunath Singh at the house of Badri on the morning of the 20th September. Badri himself admits that Raghunath Singh and his father spoke to him on the morning of the 20th of September, the difference is only as to location. Badri stated that this was done outside the house of Bhujarai. It will not be difficult to induce a witness to depose to a change of place. This knowledge of the witness was not brought to light till more than two years after the occurrence. The Counsel next argued that Badri's story that Raghunath Singh confessed in the presence of Bhujarai and Bharath had been disproved. It is true that these witnesses have appeared on behalf of the plaintiffs and given a lie to Debi. Bhujarai is a cripple and old, and was not expected to go to the police station. Bharath, however, went to the police station; and if the confession was not made in his presence by Raghunath Singh in the village no reason is apparent why he should have taken the trouble of walking three miles to Pasgawan with the party. His statement is that about one *pahar* after sunrise he was sitting at a well in the village when he saw Raghunath Singh, Badri Sah and Hazari coming from the direction of the village. He accompanied the party at the request of Hazari. He denied having heard the confession of Raghunath Singh at the house of Bhujarai. He is, however, a Thakur and would naturally favour the plaintiffs. This witness, however, admits that on the way to the police station Hazari told him that Bachcha and Balbhaddar had got his son to murder Sheo Bakhsh. There is another important point which falsifies the testimony of this witness. In the police report (Ex. A 1) where Raghunath Singh made his confession over again he stated: " My father went and told Badri Sah, who said ' what reliance can there be placed on what you say ? Bring Raghunath Singh to Bhujarai's Chaupal and if he says, I will accept.' Then my father took me to Bhujarai's door where Bhujarai, Bharath Singh and Badri Sah all three were sitting. I told them all these facts." It will be remembered that this report was made at the police station in the presence of Bharath Singh and presumably in his hearing. Yet there is no note in the report that Bharath Singh denied the allegation made in the report by Raghunath Singh of his having made the confession in the presence of Badri, Baharath Singh and Bhujarai. It so happens that both Bharath Singh and Bhujarai are under the influence of the plaintiffs, and in consequence they failed to support Badri's statement in the Criminal Courts.

Bharath Singh's brother has been in the plaintiffs' service for a considerable time, Rhujarai tried to minimize his business relasions with the plaintiffs, but they were disclosed by Bharath Singh who stated "Bhujarai is the *dasaundhi* (receiving 1/10th of the produce for services rendered) of the plaintiffs, of the tenants in the village and all persons in the village including the *banias*. He holds *muafi* from the plaintiffs." Instead of the testimony of these two witnesses falsifying Badri's story we have come to the conclusion that they have made incorrect statements to help the plaintiffs.

The Counsel asked what was the motive for the plaintiffs to murder Sheo Bakhsh. Two motives were alleged (1) that the plaintiffs desired possession of Sheo Baksh's house, and (2) that the plaintiff Bachchu and Raghunath Singh had an intrigue with Sheo Baksh's wife. The lower Court is mistaken in thinking that Raghunath made no mention of the house affair in his confession. In the very first sentence of his confession (Ex. A. 3) he said:—"Balbhaddar Singh and Bachchu Singh said 'if you kill Sheo Bakhsh we shall give you Rs. 500 as reward and we can take his house as it is very convenient to us.'" The intrigue theory is ridiculed for reasons that two paramours of a woman would be rivals and would not jointly kill the husband, and that an uncle would not help his nephew in such an immoral object. Such a motive is perhaps improbable, but no other motive for the murder of Sheo Bakhsh has so far been disclosed. Sheo Bakhsh's mother insists that his wife had no intrigue; so even Raghunath Singh could not have had that object in killing Sheo Bakhsh, yet the plaintiffs' Counsel himself conceded that Raghunath Singh must have had a hand in committing the murder. Sheo Bakhsh was a strong idle man under police surveillance, and may have given umbrage to the plaintiffs in various ways.

The next argument of the learned Counsel was that if the plaintiffs had taken part in the murder Raghunath Singh and Teja would not have retracted their confessions in the Sessions Court and would not have alleged that they were tutored by Badri. There is no force in such an argument. When Raghunath Singh and Teja found that they were not made approvers the only way open to them to escape a sentence of hanging was to retract their confessions. In Raghunath Singh's statement in the Sessions Court (Ex. 85) there is one noticeable omission which proves it not to be genuine. There can be no question that his father took a prominent part in the events of the morning of 20th September, yet the statement contains no mention whatsoever of the part played by his father that morning. Teja stated (Ex. 97) that Badri Sah went to his house at noon on the 20th September to tutor him. Obviously, he has mentioned the time at random, and has been caught in fixing upon a time which is not probable. The report was made by Raghunath at noon and Badri was present at the police station at the time. The party must have left the village, which is three miles from the police station, before 11 A. M. Badri stated that he reached the village on his return from the police station after the Sub-Inspector had arrived there; and the Sub-Inspector has also stated that Badri appeared before him after he had recorded some statements. It will be noticed that in this statement Teja omits all mention of his statement to the police. He has denied fetching Sheo Bakhsh to the house of Raghunath Singh on the night of the 17th; this is certainly false as is apparent from the fact that from the very beginning *Musammat* Parbati, mother of Sheo Bakhsh (D. W. 3), has asserted that Teja fetched her son from her house that night. In the lower Court Raghunath Singh adhered to his confession. He was produced as a witness on behalf of the plaintiffs. It was argued by the plaintiffs' learned Counsel here that the plaintiffs were cheated into the belief that Raghunath would tell the truth and expose Badri's tutoring. It appears, however, from the lower Court's judgment that the plaintiffs did not expect from Raghunath Singh a statement other than what he actually made. Raghunath must have fulfilled the plaintiffs' expectations because the plaintiffs withdrew from his prosecution subsequent to his statement. The lower Court observes with reference to Teja's testimony: "He is cultivating fields of Mohan Singh who is the sister's son of one of the plaintiffs. Defendant has attempted to show that Teja had left the village and has been recently brought over again by the plaintiffs' who have thus ingratiated themselves in his

favour to obtained his evidence. While this attempt of the defendant has failed there are ample reasons for the view that Teja, if he would be partial to anybody, would be partial to the plaintiffs and not to the defendant with whom no connection whatever is shown." The learned Judge concludes by saying that Teja's statement must be accepted with very great caution.

There is thus neither direct nor circumstantial evidence to lead to the inference of the plaintiffs' innocence. On the other hand, there is cause for suspicion that they were guilty. At the time of the occurrence Raghunath Singh was 18 and Teja 16 and one of them a *nao*. We quite agree with the observation of Sheo Bakhsh's mother that these two boys could not have killed Sheo Bakhsh, who was a wrestler, even if they got him at a disadvantage, without disturbing the neighbourhood. There is every reason to suppose that the boys were helped by maturer men. They had accomplices and Raghnath Singh has asserted throughout, except once in the Sessions Court when such a statement would have resulted in his hanging, that the accomplices were the plaintiffs. Immediately after the night of the 17th, the plaintiffs disappeared from the village, though Balbhaddar was headman of the village. The Sub-Inspector has deposed that they never turned up during the police investigation, and when the Court issued a warrant they were not arrested but appeared in Court on 17th November 1919. We hold that the plaintiffs have failed to prove their innocence of the crime.

Instigation by Badri is said to be proved from Badri's conduct. The shifting manner in which he gave evidence created a very bad impression on the Judge of the lower Court. It is, however, well known that litigants will never adopt a straightforward attitude, and do considerable harm to themselves by prevarication and attempt at denying well established facts. He minimized the bitter enmity between himself and the plaintiffs, and he tried to make out that he was reluctant to accompany Raghunath and Hazari to the police station, that he took no interest in collecting prosecution evidence for the case and that money was lent to Raghunath Singh for his defence by his nephew and not by him, when in reality he and his nephew are joint. Such demeanour and behaviour, however, do not by themselves prove that he instigated Raghunath Singh, though they would be circumstances to raise a presumption of such an instigation if he had an opportunity to that end. The two issues of the plaintiffs' innocence and Badri's tutoring run into each other and this has led the plaintiffs' learned Counsel to advance an ingenious theory He argued that when the plaintiffs' innocence was proved it must be presumed that Raghunath was tutored to implicate them, and the inevitable conclusion would be that the tutoring was done by Badri. One need not cavil at the conclusion that we have already shown the premises of the plaintiffs' innocence is wrong. The learned Counsel pointed out that Badri's story of Raghunath Singh having made a confession in the presence of Bhujarai and Bharath was disproved, that he accompanied Raghunath to the police station, that he was the first to give evidence to the police, that he went inside Parbati's house, after Parbati made a statement to the Sub-Inspector (this is deposed to by the Sub-Inspector), that he denied the facts of his nephew Chhedi accompanying Raghunath Singh's mother to Court during the criminal proceedings, though this is admitted by her, and of his lending money to Raghunath for his defence, that the pleader engaged by Raghunath Singh during criminal proceedings and by him in the Civil Court below was the same gentleman and that he attended all the hearings during the criminal Trial. We do not agree that Badri's story of the confession having been made in the presence of Bhujarai and Bharath has been disproved; his going inside Parbati's house on 20th September was an incident deposed to by the Sub-Inspector more than two years after the event; and we are not prepared to trust the Sub-Inspector's memory. Nor is the precise significance of the incident itself particularly apparent. The other incidents prove Badri's interest in the prosecution, but do not indicate that he tutored Raghunath Singh. The other circumstances alluded to on behalf of the plaintiffs were the positive evidence of Teja in the lower Court that he was tutored by Badri, the statements of Teja and Raghunath Singh before the Sessions Judge, and the testimoney of the two witnesses Bhikhari and Debi Sahai. All these points we have considered in detail above and have

refused to rely on them as proving the plaintiffs' innocence. They do not prove tutoring by Badri either.

We have not entered into details of long standing and bitter enmity between Badri and the plaintiff. It is a circumstance we have borne in mind in weighing the evidence produced by the plaintffs. The enmity may have led Badri to interest himself in the criminal proceedings, in order to get rid of his enemies, and not from a sense of helping the cause of justice. There would be malice for malicious prosecution if the plaintiffs had been innocent and the defendant had falsely prosecuted them. By itself malice is not actionable.

The plaintiffs' learned Counsel picked out one sentence from Badri's statement and took it as an admission on Badri's part that he had no reasonable and probable cause for helping in the criminal proceedings. His words were : "I cannot say, and it was not my belief, that Bachchu and Raghunath Singh killed Sheo Bakhsh in concert because both of them were in illegal connection with his wife." (Printed record p. 88 f). It was sought to interpret these words into a belief of Badri that Bachchu and Raghunath were innocent. The real meaning is that he did not accept the motive of the murder to be the joint intrigue of Bachchu and Raghunath with the wife of Sheo Bakhsh. Later on, Badri stated definitely: "I believed Raghunath to have been making a true statement about the murder and about the plaintiffs having participated in it and, therefore, I went to the *Thana* at the time the report was made." We have not understood what the learned Judge means by the following observations in deciding issue No. 2 :—" The learned Pleader for the defendant has, however, admitted that instigation under the circumstances of the present case would be actionable and would be governed by the same principles of law as malicious prosecution even if it is not that wrong itself as commonly known." If the observations mean that Badri would be liable to damages, even if he was held not to be guilty of malicious prosecution, we do not agree. The plaintiff's learned Counsel Mr. Sen admitted that it was not possible to take up any such position.

We hold that the plaintiffs have failed to prove their innocence or that they were prosecuted by the defendant Badri by instigating Raghunath to implicate the plaintiffs. The plaintiffs' suit, therefore, ought to have failed.

To make this judgment complete we may say a word about the damages. The plaintiffs gave details in List A under different heads of damages sustained by them to the amount of Rs. 18,726 and sued for Rs. 10,000 out of that sum. It was argued that the plaintiffs must be considered to have relinquished their claim in that proportion under every head. Such an inference does not necessarily follow. We think that the plaintiffs were entitled to prove damages up to a sum of Rs. 10,000. They have been allowed Rs. 2,126 under heads 3 to 12 correctly. The other items allowed by the lower Court are :—

18.	Mental anguish	...	Rs. 5,000.
19.	Physical pain	...	,, 874.
20.	Disgrace and contempt	...	,, 2,000.

The plaintiff Balbhaddar himself has not described what his mental anguish was. He deposed that his brother, who is not a party to this suit, lost his senses, but did not allege that he himself did. No physical pain is alleged anywhere in his statement. As to disgrace and contempt his statement was 'No relation of mine said to me that I was lowered in his estimation on account of this case. Nobody expressed to me that I was lowered in dignity on account of anything done to me in the case. Except that I would take it highly derogatory to a person of my position and brotherhood to be handcuffed, there is no reason for my saying that I was lowered in the estimation of my brotherhood." He alleges that he was handcuffed for a few minutes in the Court of Session between his arrest and release on bail. This story has not been supported by any reliable evidence. We are of opinion that the plaintiffs were not entitled to any damages in excess of Rs. 2.126.

In the result we discharge the decree of the lower Court and dismiss the plaintiffs' suit with costs of both the Courts.

N. H. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL APPEAL NO. 59 OF 1923.

January 23, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

RUSTOMJEE HEERJIBHAI—DEFENDANT—APPELLANT

versus

COWASJEE DADABHAI—PLAINTIFF—RESPONDENT.

Practice—Original Side—Costs to several respondents—Order, meaning of.

Where, on the Original Side, more parties than one appear as defendants, or respondents, and the decree or order directs payment of the defendants or respondents' costs by the plaintiff or appellant, the order must be taken to mean that the losing party should only pay one set of costs to be divided amongst the successful parties. If the latter appear separately and want separate sets of costs, an application must be made on their behalf at the time when judgment is delivered for separate sets of costs, and an order obtained to that effect.

Mr. *M. C. Setalvad*, for the Appellant.

Mr. *Kanga*, for the Respondent.

JUDGMENT.—This was an originating summons filed by one trustee against his co-trustees for the determination of the following question:—

"Whether the defendants should not be ordered to execute a deed of appointment appointing Dinshaw D. Romer as a trustee of the premises mentioned in the deed of declaration, dated June 6, 1919, referred to in the plaint in place and stead of Cowasjee Maneckjee Rustomjee, deceased."

At the hearing of the summons the second defendant was absent, while Counsel appeared for the plaintiff, the first and third defendants respectively. The answer to the question was that the defendants were bound to execute a deed of appointment. The costs of plaintiff and third defendant as between Attorney and client were to come out of trust funds, and the first defendant was directed to bear his own costs.

From that judgment the first defendant appealed. He made the plaintiff and the second and third defendants respondents. At the hearing of the appeal the second defendant was absent while separate Counsel appeared for the plaintiff and the third defendant. The appeal was dismissed with costs.

No application was made to the Court at that time to ascertain whether separate sets of costs were allowed to the plaintiff-respondent and the third defendant-respondent. The draft decree was drawn up. The first and the third respondents appeared by one set of attorneys, and in the draft it was directed that the appellant should pay the costs of the first and the third respondents of the appeal. The appellant objected and altered the draft, so that it contained a direction that the appellant should only pay one set of costs to the respondents.

In consequence of that dispute, the suit has been set down before us for speaking to the minutes of the decree. We have been told by Counsel for the respondents that it has been the practice on the Original Side of this Court to construe an order or decree in a suit where more than one party appears as defendant or respondent, directing payment of the defendants' or respondents, each by the plaintiff or appellant, as meaning that each defendant or respondent appearing is entitled to costs from the losing party. I and my learned brother are not aware of such a practice, and no authority has been cited before us in which such a practice has been confirmed by a decision of this Court. We think that when such parties appear separately then an application should be made at the time when judgment is delivered in their favour with costs for separate sets of costs. That is the invariable practice on the Appellate Side, and unless such an application is made an order like the one which has been made in this appeal must be taken as meaning that the losing party should only pay one set of costs to be divided amongst the successful parties. In any event, it is certain that if the respondents had applied for separate sets of costs we would not have allowed them. There was no necessity whatever for separate appearances on behalf of the plaintiff and the third defendant. Therefore, the decree will be settled as altered by the appellant.

No order for costs. *Order accordingly.*

Attorneys, for the Appellant: Messrs. *Wadia, Gandhy & Co.*

Attorneys, for the Respondents: Messrs. *Merwanji, Kola & Co.*

MA HMON *v.* MAUNG TIN KAUK

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 155 OF 1922.

October 16, 1923.

Present :—Mr. Justice Heald and Mr. Justice Lentaigne.

MA HMON—DEFENDANT—APPELLANT
versus
MAUNG TIN KAUK—PLAINTIFF—RESPONDENT.

Burmese Buddhist Law—Ex parte *divorce*—*Parties previously married.*

Where parties to a Burmese Budhhist marriage have been previously married, there is no right of divorce at the mere caprice of one party against the will of the other party and without proof of misconduct or default on the part of the other party.

Case-law reviewed.

Semble.—The law is the same in the case of parties who have not been previously married.

Appeal against the decree of the District Court, Toungoo, in Civil Appeal No. 20 of 1922.

Mr. *Lambert*, for the Appellant.

Mr. *Hatkar*, for the Respondent.

FACTS.—The facts of the case are fully set out in the following preliminary order of Heald, J. :—

" Respondent sued for divorce from appellant on the grounds that she was grossly disobedient, that she had joined the Young Women's Buddhist Association without his consent, that she had attended a conference of that Association and made speeches, that she had taken part in politics in defiance of his wishes and in order to injure him as a Government servant, and that she had falsely charged him with being a member of the Young Men's Buddhist Association when he had actually resigned his membership of that Association. He said that he was willing to forego any claim to share in the joint property and that he undertook to pay the joint debts.

" Both the parties had been married before.

" The Trial Court regarded respondent's suit as a claim to divorce on the ground of misconduct on the part of the wife, with an alternative claim to divorce on the ground that a Burman Buddhist husband is entitled to divorce his wife at any time against her will and without proving any fault on her part, if he surrenders all the joint property and pays the joint debts.

" As for the first of these claims, the learned Judge held that no misconduct sufficient under Burmese Buddhist Law to justify the divorce of a wife was proved, and on the alternative claim, he found that such a right is not recognised in Lower Burma. He accordingly dismissed respondent's suit.

" Respondent appealed and the learned Judge in the District Court came to the conclusion that appellant's attendance at meetings against the wish of her husband and her neglect of his comfort amounted to misconduct sufficient in Burmese Buddhist Law to justify divorce, and accordingly gave respondent a decree for divorce on condition that he paid the joint debts and the costs of the suit and gave up the jointly acquired property.

" Appellant now comes to this Court in second appeal on the ground that respondent failed to establish any sufficient grounds for divorce under Burmese Buddhist Law.

" It appears that in October 1921 appellant obtained an order for maintenance against respondent, who had left her, and very shortly afterwards respondent filed this suit for divorce.

" The grounds which he set out in his plaint seem *prima facie* to be insufficient to justify divorce for misconduct, and it seems clear that respondent himself regarded them as inadequate for such a divorce since he did not claim the penalty for a divorce for misconduct and did not claim even a divorce ' as by mutual consent,' which a Burman Buddhist is held to be entitled to claim on proof of less serious misconduct than that required for divorce for misconduct.

" It appears, however, that the learned Judge who admitted the appeal in this Court desired to hear agrument on the question whether or not in Burmese Buddhist Law either party to a marriage is entitled

to divorce the other without that other's consent and without proving any fault, provided that the claimant relinquishes all rights in respect of jointly acquired property ; and it would seem that he was of opinion that the rulings which have been regarded as settling the law on this subject in Lower Burma since 1886 ought to be re-considered in the light of the more recent rulings on the same subject in Upper Burma.

" It is clearly desirable that what is recognised by the Courts as Burmese Buddhist Law should be the same in both parts of the Province, particularly where that law is based on precisely the same texts and where it concerns so important a matter as the dissolution of marriage, and as the High Court now represents both the Chief Court of Lower Burma and the Judicial Commissioner of Upper Burma, whose rulings have been in conflict, it is time that an authoritative judicial decision binding in both Lower and Upper Burma should be given.

" The question of a Burman Buddhist's right to divorce without proof of misconduct was considered in Lower Burma in the case of *Nga Nwe* v. *Mi Su Ma* (1), and the Court found that there is no right of divorce on mere caprice in a Burman Buddhist husband or wife. That ruling was considered in the case of *Maung So Min* v. *Ma Ta* (2) and the decision in it was affirmed in the case of *Mi Pa Du* v. *Maung Shwe Bauk* (3) and until recently was regarded as settling the law on the subject in Lower Burma.

" In Upper Burma some doubt was cast on the Lower Burma ruling in the case of *Maung Shwe Lon* v. *Ma Ngwe U* (4) and in the case of *Mi Kin Lat* v. *Nga Ba So* (5) the matter was considered at length and it was held that a Burman Buddhist husband or wife may sue and obtain a divorce on condition of surrendering all the joint property and paying the joint debts and the costs of litigation, even when the other party is without fault and does not consent.

" Recently, in Lower Burma there has been a tendency to doubt the correctness of the ruling in *Nga Nwe* v. *Mi Su Ma* (1), and to regard the Upper Burma decision as correct. The Upper Burma ruling was mentioned in *Po Han* v. *Ma Talok* (6) without disapproval, and there is a passage in *Mi Ah Pu Ma* v. *Mi Hnin Zi U* (7) which seems to recognize a right to divorce without fault and without the consent of the party to be divorced, while in *Ma Thein Mya* v. *Maung Tun Hla* (8) a Single Judge of the Chief Court expressly accepted the Upper Burma ruling as good law and refused to follow the Lower Burma case of *Mi Pa Du* v. *Maung Shwe Bauk* (3).

" Under these circumstances, it seems desirable that an authoritative decision on the subject should be given and, under the provisions of Rule 1 (*c*) of the rules framed by this Court under section 108 (1) of the Government of India Act, 1915 (Notification No. 10, General, dated the 18th December 1922), I hold that questions of an importance not represented by the value of the subject-matter of the suit are involved in this appeal, and I submit the appeal to the Chief Justice to be heard and determined by a Bench or a Full Bench as the Chief Justice may determine."

JUDGMENT.

Lentaigne, J.—This is an appeal against the judgment and decree of the District Court of Toungoo, reversing the decree of the Township Court of Toungoo, and granting plaintiff-respondent a decree for divorce.

The parties are Burmese Buddhists ; and the plaintiff-respondent instituted his suit against the appellant, alleging that appellant was a grossly disobedient wife ; that, having no love for plaintiff, she took part in political movements out of vengeance and in a manner likely to be detrimental to plaintiff and in defiance of the express wishes of the plaintiff ; that she had failed to look after the comforts of the plaintiff and when his health was in a critical condition, she left him

(1) S. J. L. B. 391.
(2) S. J. L. B. 610.
(3) S. J. L. B. 607.
(4) (1902) 2 Chan. Toon. L. C. 177.
(5) 2 U. B. R. (1904-06.) Bud. Law Divorce, 3.
(6) 20 Ind. Cas. 674 ; 6 Bur L T. 134 ; 7 L B. R. 79.
(7) 28 Ind. Cas 918 ; 7 Bur. L. T. 83.
(8) 69 Ind. Cas 980 ; 11 L. B. R. 385 ; (1923) A. I. R. (R.) 86.

and went to Rangoon ; and the plaintiff then expressed his willingness to forego his share of the joint property and to pay the joint debts, and prayed for a dissolution of his marriage with costs. The appellant filed a written statement, disputing many of the averments of the plaint, and alleging that there is no joint property, that plaintiff had deserted her and had instituted the suit in order to avoid the payment of maintenance which he had been ordered to pay her ; and she stated that his plaint alleged no grounds for a divorce according to Burmese Buddhist Law and disclosed no cause of action.

The Trial Court held, firstly, that if there was no default on the defendant's part, the plaintiff was not entitled to claim a divorce against the wishes of defendant by foregoing his share in the joint property and that the decision of Judicial Commissioner of Upper Burma discussed below, which recognised such right of divorce, was not binding, because the Lower Burma Courts had decided against such right of divorce ; and, secondly, on the questions of default justifying a divorce, the Trial Court decided various issues in favour of the defendants and held that the single infraction of duty, by reason of defendant going to Rangoon when her husband was ill, was not sufficient ground for divorce, and dismissed the suit which costs.

The learned Judge of the District Court reversed that decision, and held that the defendant had neglected her duty to look after the comforts of her husband and had attended political meetings against the wishes of her husband, and that, though defendant had not thought that her attendance at political meetings would be detrimental to her husband's interests, her conduct was reprehensible ; and he reversed the decree of the Trial Court and granted plaintiff-respondent a decree for a divorce on his paying the joint debts and foregoing the jointly acquired property and bearing the costs of suit.

The present appeal is against that decision, and I am of opinion that the only question which really arises in the case is the legal question whether one party of a Burmese Buddhist marriage has the right to insist on a divorce against the will of the other party and without proof or the misconduct of default of the other party, under the penalty of paying the costs of the suit and all joint debts, and foregoing all claims to the joint property of the marriage.

Prior to the year 1886, there were some decisions of the Court of the Recorder of Rangoon, refusing to grant decrees for restitution of conjugal rights as between Buddhists on the assumption that either party had the right to divorce the other on mere caprice and that consequently a decree for restitution of conjugal rights would be nugatory. In the year 1886, the question whether a suit for restitution of conjugal rights would lie as between Burmese Buddhists, was referred to the Special Court consisting of the Recorder of Rangoon and the Judicial Commissioner of Lower Burma in the case of *Nga Nwe* v. *Mi Su Ma* (1), and it was held that such a suit for restitution of conjugal rights would lie and that there is no right of divorce on the mere caprice of a Burmese Buddhist husband or wife. This decision was followed in 1891 by a decision of the Judicial Commissioner of Lower Burma who refused to grant such a divorce in the case of *Mi Pa Du* v. *Maung Shwe Bauk* (3), and again in 1892 by the High Court at Calcutta in a reference from the Recorder of Rangoon in the case of *Maung So Min* v. *Ma Ta* (2), where the Court also refused to grant such a divorce. The decision of the question that there is no right of divorce on the mere caprice of one party was no doubt *obiter* in the first case, but that criticism does not arise in respect of the two latter decisions.

In 1913, Parlett, J., as a Single Judge of the Chief Court, Lower Burma, followed these decisions in the case of *Maung Kyaw Yan* v. *Ma Nyo U* (9), and apparently the above decisions were not overruled in Lower Burma up to the beginning of the year 1922, but in that year, a Single Judge of the Chief Court sitting alone took a different view and allowed such a divorce in a case discussed below.

In Upper Burma in 1876 a doubt was thrown on the correctness of the Lower Burma decisions by a remark which was *obiter* in the decision of *Mi Gyan* v. *Su Wa* (10); but the decision in that case, that a suit is not maintainable for a divorce only without also seeking a partition of property, cannot now be treated as an accurate statement of the law, having regard to the decision of the Privy

(9) 23 Ind. Cas. 380 ; 7 Bur. L. T. 16.
(10) 12 U. B. R. (1897) 28.

Council in the case of *Maung Pe* v. *Lon Ma Gale* (11). In 1902 a doubt was again expressed in Upper Burma as an *obiter* in the decision in *Maung Shwe Lon* v. *Ma Ngwe U* (4), but that decision was apparently only following the above decision of 1897 on the question as to the supposed necessity for a prayer for partition of property as part of the prayer for a divorce. In 1905, however, in the decision in *Mi Kin Lat* v. *Nga Ba So* (5). Mr. Shaw, afterwards Sir George Shaw, entered into an elaborate discussion of the question and, disagreeing with the Lower Burma decisions, expressly held that a Burmese Buddhist husband or wife may sue and obtain a divorce on condition of surrendering all the joint property and paying the joint debts and the costs of litigation, when the other party is without fault and does not consent. This decision points out certain weak points in the Lower Burma decisions, and, as Sir George Shaw had a far greater experience of the condition in Burma and presumbly a far better knowledge of the Burmese language than the Judges who had previously decided the question in Lower Burma, great weight should be attached to his opinion.

The decision of the Special Court in 1886 was based partly on a discussion of the various passages in the *Manukye*, other than the disputed passage in Book 12, Chapter 3, and after such discussion, MacEwen, J., on page 393, sums up the result of his investigation as follows :— "It seems to me all these passages indicate that a divorce cannot be had at the mere will of either party. In certain cases and under particular circumstances the parties must wait for the stipulated time, in each case, before he or she is free to marry again ; and in other cases there must be a nuptial offence or fault before the marriage tie can be broken." Secondly, he discusses the disputed passage in Chapter 3 of Book 12 containing the word *kanmasat* and gives the explanation of Dr. Forchchammer, the learned Professor of Pali, which had been reproduced in Mr. Jardine's Notes, and apparently comes to the conclusion that the provisions can only apply in cases where there is some serious misdeed, such as matricide, patricide, killing, stealing, shedding the blood of a Buddha or a *rahan*, heresy or adultery. It appears to be generally recognised that Sir George Shaw was correct in pointing out that there would be a fault in such cases, and that the provision in question, which expressly refers to a case where there is no fault on the part of the spouse who does not want the divorce, cannot be explained in the manner approved by Dr. Forchchammer and by Mr Jardine and accepted as one of the grounds for the Lower Burma decisions. Sir George Shaw also appears to be correct in his attack on Mr. Jardine's denial of the right to "*ex parte*" divorce, where he shows that there is clearly a right of divorce for misconduct against the will of such other party. This contention, however, that there is nothing inconsistent between such divorce for misconduct and the "*ex parte*" right to divorce without proof of misconduct on payment of a penalty, may be a good reply to any contention based on an erroneous use of the most inaccurate term "*ex parte*" divorce, but it does not appear to be a good answer to the first contention of MacEwen, J., based on his survey of the other passages of the *Manukye*. If Mr. Jardine had described the alleged right of divorce as a *kanmasat* divorce, instead of describing it by the incorrect and obviously inaccurate term "*ex-parte*" divorce this criticism would have had less force, though Sir George Shaw's other remark that the word *kanmasat* does not occur in the other *Dhammatyats* would require special consideration. But the pre-eminent position now accorded to the *Manukye* as an authority should not be overlooked and is probably a sufficient answer to his last point [see *Ma Hnin Bwin* v. *U Shwe Gon* (12)].

Sir George Shaw's criticism of certain points of the Lower Burma decisions, though correct in certain respects, does not appear, therefore, to be a complete answer to the other points of the earlier decisions ; and for other reasons also, it does not convince me that Sir George Shaw is correct in his decision that there is a right of divorce on mere caprice and against the will of the other party. If the entire subject of the dispute is considered broadly, certain points appear to stand

(11) 11 Ind. Cas. 497 ; 6 L. B. R. 18 ; 15 C. W. N. 705 ; 8 A. L. J. 739 ; 13 Bom. L. R 464 ; 14 C. L. J. 15 ; (1911) 2 M. W. N. 397 ; 4 Bur. L. T. 153 ; 38 C. 629 ; 10 M. L. T. 479 ; 38 I. A. 140 (P. C.).

(12) 23 Ind. Cas. 433 ; 8 L. B. R. 1 ; 7 Bur. L. T. 105 ; 16 Bom. L R. 377 ; 27 M. L. J. 41 ; 18 C. W. N. 1121 ; 16 M. L T. 142 ; 20 C. L. J. 264 ; 41 C. 887 ; 1 L. W. 914 ; (1914) M. W. N. 449 ; 41 I. A. 121, (P. C.).

out which should tend to raise doubts as to the corrrectness of Sir George Shaw's decision in this latter respect. It is noticeable that the question first appears to have arisen in Lower Burma, not in consequence of any claim for such a divorce but, as a point raised as a defence against a suit for restitution of conjugal rights. It is likewise noticeable that in Upper Burma also the point was not raised in the first instance by any claim for such a divorce but was part of an argument on a question as to whether there could be a suit for divorce without joining a claim for partition. It is further noticeable that though claims for a divorce at the mere caprice of one party subsequently arose and possibly in consequence of the *obiter* remarks in the earlier cases, the number of such claims has been extremely few. It is likewise noticeable that the first discussion of the question as an *obiter* in Upper Burma for the purpose of showing that there could not be a suit for divorce without joining the claim for partition resulted in the inconsequent decision that there could nevertheless be such a suit without joining such claim if the party claiming the divorce abandoned all claim to partition, etc., as an exception from the supposed rule ; and that the supposed rule has since also been found to be incorrect on other grounds under the rules applicable to procedure in the Courts.

This inadequacy of the Upper Burma decision suggests another question whether another avenue for the avoidance of the exception to the supposed rule raised in Upper Burma was not also open ; and whether this other avenue has been fully discussed and explored. I notice that in Richardson's translation of the *Manukye*, he generally uses the English word "seperation" instead of the word "divorce" in the vast majority of cases, whilst he sometimes uses the word " divorce." Assuming that the same word was used throughout, it becomes obvious that the Burmese language is subject to the defect that it has not adequate words to denote the exact defference between "separation" and "divorce," though the mere separation or absence of one party admittedly does not necessarily imply a divorce. This raises the question whether it is possible that the *kanmasat* passage now in question was not intended to refer at all to a completed divorce, but merely to a separation which might or might not resultin a divorce after the requisite period had passed or other additional aspect had intervened, so as to justify or effect a complete divorce. If such a construction were possible, the penalty provision, whether regarded as a relinquishment of the joint property, etc., or as a payment of *kobo*, might really be only a provision in the shape of a provision for the maintenance of the other party during the intervening period until there should be either a reconciliation or a completed divorce. It seems to me that this is a question which should have been thoroughly considered in the discussion, but as I have no claims to be an expert in either Burmese or Pali, I must hesitate to form any definite opinion on the result of such an investigation. I may point out, however, that it is noticeable that in Chapter 3 of Book XXII of the *Manukye* the question of divorce by mutual consent is also provided for and the *Dhammathat* expressly states that in such a case of divorce by mutual consent, the wife shall not have the power to prevent the husband taking another wife, and that the husband shall not have the power to prevent the wife taking another husband, whilst there is such provision in the case of the *kanmasat* passage, but as the same remark also applies to the cases subsequently discussed, I doubt whether any significance can be attached to the omission.

The idea underlying "*kanmasat*" as a ground for separation or divorce is not the only instance in which the idea of destiny or anticipated ill luck or misfortune is recognised as a motive acting on the Burmese minds in connection with their marriage relations, because it is also an underlying idea in the *joby nanbye* divorce, or rather so-called divorce, where the temporary sepration is effected by the consent of both parties, and is not in fact a divorce in the legal meaning of the term, If the *kanmasat* divorce or separation could be regarded as a similar separatjon or even as a so-called divorce, though at the will of only one party, there would be more similarity between the two classes of cases, and it would not in fact amount to a legal divorce.

Assuming, on the other hand, that the *kanamasat* passage does contemplate a completed divorce in the legal meaning of the term

"divorce," I would hold that the Courts are not justified in completely ignoring the word *Kanmasat* as having no operation at all ; and this ignoring of the term is in effect a necessary part of the construction adopted by Sir George Shaw. Of course, it may be difficult to fix on the exact test for establishing in what cases the Courts would be justified in holding that the evidence would establish the necessary requisite that " the destinies of the parties are not cast together," but that difficulty does not justify the Court in refusing to give some force to the term.

In 1922 this decision of Sir George Shaw has been followed for the first time in Lower Burma by the decision of a Single Judge of the late Chief Court in the case of *Ma Thein Mya* v. *Maung Tun Hla* (8), in which the learned Judge dissented from the previous Lower Burma decisions quoted above, but there appears to be a misapprehension in this decision as to the meaning of certain remarks of Sir Daniel Twomey in *Mi Ah Pu Ma* v. *Mi Hnin Zi U* (7), in so far as such remarks are relied on as a recognition of the right of a wife to insist on a divorce, where there has been no fault on her husband's part, on resigning all claim to the joint property. This construction of that decision overlooks the force of the finding that " Mi Tun Kra Pu brought her husband's consent to the divorce," in the second line of page 84 of the report of that case. Consequently, the divorce in that case was apparently regarded by Sir Daniel Twomey as a divorce by mutual consent, though by agreement the ordinary rule as to equal division of property was abandoned; and the subsequent remark of Sir Daniel Twomey was not an approval of the Upper Burma decisions, but an agrument that the wife's only course was to obtain her husband s consent in that way.

It is unnecessary to refer to the other decisions discussing the question whether a claim for a partition is a necessary part of a claim for a divorce, as the above remarks on the earlier decisions will equally apply to the later decisions, and the point now in question did not receive detailed consideration in any of the later cases.

The question then arises whether this decision of 1922 and the decision of Sir George Shaw in Upper Burma of 1905 are sufficient grounds for reversing the previous line of decisions in Lower Burma, or whether these two decisions should be dissented from in order that the law in Upper and Lower Burma should be brought into line, as both parts of the province are now under the jurisdiction of this Court. It should be recollected that the importance of the question is not limited to the few cases specified above, because there are also numerous cases in which maintenance orders are obtained against husbands and very often in the case of marriages where there is probably little or no jointly acquired property, and in which the monthly earnings of the husband would bs his sole means of livelihood.

The points in question appear to cover a number of these cases also. In the case now under appeal and in the case decided in 1922, there was an allegation that there was no joint property ; whilst in the case now under appeal it is also alleged that the object of the husband is to escape from paying such maintenance already ordered by a Court.

The series of decisions in Lower Burma have now been the law over thirty years, and I am of opinion that the Court would not be justified in reversing these decisions unless the decisions (as distinct from the reasons in the decisions) could be clearly shown to be wrong ; and after carefully considering the question, I am unable to come to the conclusion that such decisions are wrong. As regards the decision of Sir George Shaw in 1905 in Upper Burma, it appears to have been the only reported decision in Upper Burma in which it has been held that there can be a divorce at the mere caprice of one party against the will of the other party in the absence of any proof of misconduct or default on the part of the other party ; and, as I have stated above, it appears to me to be wrong in so far as it is based more on criticism of the arguments advanced in support of the 1886 decision rather than on a constructive analysis of the *Dhammathats*, and that Sir George Shaw does not appear to have answered the argument to MacEwen, J., based on the comparison of the provision in question with the other provisions of the *Manukye*.

May Oung, J., in his text book discusses various arguments for and against the right of

divorce at the caprice of one party and against the will of the other without any fault being proved against the other ; and he appears to take the view that the Lower Burma decisions were decided on wrong grounds so far as the question of *kanmasat* was concerned, etc., but he has not stated that he is in favour of the Upper Burma decision as being the correct law on the actual question decided.

May Oung, J., at page 77 of his text book points out his view of the origin of the class of divorce in question, and it is obvious that at the time of the *Dhammathats* divorce was always arranged either by elders or persons who would bring pressure to bear on the parties and prevent divorce at the mere caprice of one party ; and it would only be after every effort had been made that the divorce in question would be allowed. The *Manukye* is a later and more authoritative compilation, and it is very probable that the word *kanmasat* was used to emphasise one or other of the points either that it was not to be divorce at the mere caprice of one party, or that it was merely a separation analogous to the *jobye nanbye* divorce ; and, as time went on and civilization developed, the necessity for some such restriction must have become the greater.

What is the position now ? Divorces are granted by Courts which bring no pressure to bear on the parties to settle their differences. If divorce at mere caprice is to be allowed in accordance with the Upper Burma decision, either party in a fit of pique and especially in a case where there is no joint property, could involve the other in the expenses of fruitless litigation without having a genuine desire for a divorce, and in many cases divorces would be granted which would never have been granted at the time when the *Dhammathats* were written. Likewise, it would be open to a husband who had no joint property but merely his monthly earnings to avoid complying with maintenance orders by merely claiming a *kanmasat* divorce and abandoning the non-existent or trifling joint property of his marriage. These considerations are good grounds for adopting a strict construction of such restrictions as that before us and they are stronger ground for not removing the restriction altogether, as has been done in Upper Burma.

For the above reasons, I would dissent from the decisions in *Mi Kin Lat* v. *Nga Ba So* (5) and likewise from the decision *Ma Thein Mya* v. *Maung Tun Hla* (8), and I would hold that there is no right of divorce at the mere caprice of one party to a Burmese Buddhist marriage against the will of the other party and without proof of misconduct or default on the part of the other party.

In the present case I am satisfied that the plaintiff-respondent has failed to prove any misconduct or default of a kind which would justify a divorce and that likewise he has failed to prove any facts which would bring his case within the *kanmasat* provision on any reasonable construction of that provision which gives full force to the word *kanmasat*.

For the above reasons, I would set aside the the judgment and decree of the lower Appellate Court and restore the decree of the Township Court with costs in all Courts.

Heald, J.—I set out the facts of this case in my order of reference, and it is not necessary for me to set them out again.

The question for decision is whether, under Burmese Buddhist Law, where both husband and wife have been married before, the husband is entitled to divorce his wife without proving at least such misconduct on her part as would entitle him to a divorce as by mutual consent.

It is, I think, beyond question that the ancient law did in certain cases allow divorce without proof of misconduct, provided that the husband claiming such divorce relinquished all claim to the property possessed by the pair as a married couple and left the house taking with him only certain specified separate property and one suit of clothes. If the couple possessed no property, the husband claiming divorce had to pay to the wife a fine called the "body price."

The *Wagaru Dhammathat*, which is said to be the oldest of the law books now extant, dealing with this subject, says :—

"In accordance with the five duties between husband and wife, they should live together. As regards the separation of people who have practised the five duties, without there being any fault, the person wishing to separate must leave the house with only one suit of clothes

and all the debts which have been acquired. The property which has been acquired the person who does not wish to separate must have. If there be neither debts nor acquired property, the fine (body price) must be paid."

The *Manukye*, which may by regarded as a typical *dhammathat* of the middle period and which has been described as an authority of the highest rank, says :—

"Husband wishing to separate, wife does not wish to separate; wife wishing to separate, husband does not wish to separate; though it be true that between the two no fault is or appears, their destinies not joining, as for the partible property with the wife or husband who wishes to separate, let the person who wishes to separate without fault, first setting aside what the King in his bounty has given, then let the clothes with the person who wishes to separate be set aside, thereafter whatever remains, animate or inanimate, the person wishing to separate shall not have; let the person not wishing to separate have all. The law penalty also let the person wishing to separate bear. If there be no property, animate or inanimate, if there has been increase of wearing apparel by reason of official gifts of valuables or apparel, as for the person wishing to separate, let him have just enough to wear. Whatever remains let the person not wishing to separate have. If there be debts whether old or new, let the person wishing to separate pay them. Wearing apparel, apart from official gifts, whatever is worn, one garment, men's clothes, *paso*, jacket, head-dress, sword, let him take. As for the woman, women's clothes, *tamein*, shawl, jacket, girdle, these are women's clothes. With these the roller, lathe, pulleys, shuttle, reeds, healds (of the loom) let the woman take. If they have no good debts and there be property officially given, having let them take each their own, let the person wishing to separate pay the "body price" according to class. In separation where there is no fault between the two, this is the law for decision."

I have translated this passage, so far as possible, verbatim, because there is a literary translation of it in Richardson's *Manukye*, besides two in Jardine's Notes II and IV. and the official translation in the Kinwun Mingyi's Digest and because, if Dr. Richardson translated from the text which is published with his translation, his rendering of the part about official gifts of valuables or apparel is mistaken, since he translated the word "Phien" ("by reason of") as if it were "Pyin" ("outside of").

The Kinwun Mingyi's *Attasankhepa*, which is the most recent compilation in the form of a *Dhammathat*, says :—

"Husband of the official class, wife of the official class, between persons neither previously married, if either wishes to separate, as for the persons wishing to separate let him take only the clothes which belong to him and the separate property officially given to him, and let him also bear the law. As for the person not wishing to separate let him have whatever is left, excepting the aforesaid property, the good inheritance all of it. There being no debts and no other property, but only separate property officially given, let the person wishing to separate pay damages according to class based on the class of the person not wishing to separate. As for the separate property, let the owner of official gift have it."

I have given these three extracts as showing that this provision of the ancient law has been reproduced at all stages in the history of the *Dhammathats* as they now exist, and the extracts collected in section 255 of the Kinwun Mingyi's Digest show that it was a common-place of most of them. But the reference to "caste" seems to show that it is archaic. In the *Manukye* the passage occurs in a section the rules of which are restricted to the case where the husband is of the caste of prince and the wife is a princess, and the same reference to "class" or caste occurs in its reproduction in *Attasankhepa*. This, to my mind, shows that it is taken from some pre-Buddhistic law book and that it belongs to a primitive civilisation when the marriage tie was much weaker than it was at the time when most of the *Dhammathats* were compiled and enormously weaker than it is in the present state of Burmese civilisation. There are, in my opinion, other indications of this also. In each of the *Dhammathats* I have quoted there are passages which are obviously inconsistent with this right of divorce without fault.

In the *Wagaru* for instance there is this passage: "A woman who possesses the five kinds of longing, or the six kinds of evil practices, or the four kinds of pride should not be put away or ill-treated with the elbow or the foot; she should be gently chastised with the palm of the hand only."

Similarly, in section 42 of the XIIth Book of *Manukye* various kinds of misconduct on the part of a wife are described and the appropriate punishment for example chastisement with a bullock driver's stick on the loins, buttocks or feet, are laid down, but it is definitely said that wives who have been guilty of such misconduct are not to be put away but must be corrected at least three times before they can be divorced. Similarly, in section 43 of the same Book a list of wives who may be put away is given, but it is expressly stated that "put away" does not mean divorced but means that a second wife may be taken. Similarly, in section 11 of Book V a list of wives who ought not to be put away is given.

In *Attasankhepa* again the following passage occurs: "Though the husband illtreat the wife once, a decree for divorce should not be given. Let the husband give a definite written undertaking not to do it again and let them live together as before. If the woman refuse to live with him on his giving such an undertaking, let there be a divorce as by mutual consent. If after giving such a written undertaking they live together and the wife is dissatisfied and again wishes for divorce, let there be a divorce as by mutual consent. If the husband objects to giving the undertaking and wishes for a divorce, let there be a divorce as for the husband's fault. If after the husband has given an undertaking they live together and the husband does not fulfil his undertaking but offends again, let there be a divorce as for the husband's fault."

It is clear that all such rules as there are inconsistent with a right to divorce without fault, and belong to a later stage of civilisation when marriage had come to be regarded as more permanent.

A great controversy has centred round the word *kanmasat* ("destiny not joining") which occurs in the passage cited from *Manukye* and in no other *Dhammathat*.

Jardine's notes are full of it and so are some of the leading cases on this subject.

My own contribution has been a tentative conjecture that the word "*kan*" may possibly be a corruption due to some scribe's having written *kamma* "destiny" for "*kama*" which would mean "sexual desire" or "sexual intercourse." I am, however, not satisfied that that conjecture is correct or that, if it were correct, it would help the discussion materially.

It must be admitted that the words as they stand do make sense in Burmese and that an actual divorce because the destinies of the couple do not agree might be no less in accordance with Burmese ideas than a pretended divorce because the stars are adverse.

A Burman reading the words would not, I imagine, read into them more than "incompatibility of destiny" which, after all, is not a very different idea from that of "incompatibility of temper" in its old sense of "temperament," but whether they mean "incompatibility of temper" or "incompatibility of sexual desires," it seems to me probable that the words which, as I have said, appear in no other *Dhammathat* were added by the writer of *Manukye* because, at the time when that *Dhammathat* was compiled, divorce without reason was repugnant to the ideas and customs of the people, and he, therefore, felt constrained to give some kind of reason for it. The explanation of the omission of the words in *Attasankhepa* is clear, since there the Kinwun Mingyi was merely rendering into prose a metrical text in which no similar words occurred.

There is a further point which seems to me to support my view that the passage allowing divorce without fault belongs to an archaic law, namely that it is omitted in several of *Dhammathats* which deal directly with the subject of divorce. It does not appear in *Manuyin*, which is said to be based on *Wagaru* and is slightly earlier in date than *Manukye*, and the rules given in *Manuyin* as to the wives who should not be divorced are, like those in *Manukye*, inconsistent with a right to divorce without fault; it does not appear in *Vannana* which is supposed to be a little later in date than *Manukye* and which contains rules similar to those in *Manukye* as to wives

MA HMON *v.* MAUNG TIN KAUK

who may or may not be divorced ; and although the *Mohavicchedani*, which is said to be the latest of the *Dhammathats* strictly so called, gives the old law, saying : "if a man wishes to be divorced let him leave behind all animate and inanimate property; if the woman wishes to be divorced let her head be shaved and let the husband have the right to sell her as a slave ;" it goes on like *Manukye* and other *Dhammathats* which mention the old law, to give lists of faults for which a wife is to be admonished but not divorced.

It seems clear, therefore, that although a right to divorce was recognised in the ancient law which was adopted into the Buddhist law books, nevertheless that right was modified by commandments in those very law books forbidding divorce except for serious fault.

It is true that the right was recognised in certain decisions of the Recorder of Rangoon prior to 1882, when Jardine's Notes were published but the publication of Richardson's translation of *Manukye* in 1847 and of Major Spark's Code which was based on that translation, in 1859 would explain those decisions, just as they explain the mistaken introduction of the doctrine of pre-emption into Burmese Buddhist Law *Maung Pu Za* v. *Ma Nge Ma* (13), and it does not appear that in a single one of the cases in which those decisions were given the right which was recognised was actually claimed, Jardine's Note II, pages 9 –13.

The history of the case-law since the publication of Jardine's Notes has been fully set out by my learned brother Lentaigne, and it is unnecessary for me to recapitulate it.

The result is that from 1882 to 1922, that is, for a period of forty years, it was regarded as settled law in Lower Burma that no right to divorce without fault was recognised in modern Burmese Buddhist law.

In Upper Burma doubts as to the correctness of that interpretation of the law had been expressed in two cases and in 1905 the Judicial Commissioner of Upper Burma expressly dissented from it.

In 1913 a Single Judge of the Chief Court of Lower Burma mentioned the Upper Burma decision and said that it did not yet appear to have been adopted fully in Lower Burma, but he added that for the purposes of the particular case with which he was dealing it was not necessary 'to consider whether the wife would have been entitled to a divorce if her husband had been without fault since it had been her case throughout that he was guilty of cruelty towards her.

In 1914 again in a judgment which was not published officially—and which dealt with a case—where, as the learned Judge said, it seemed probable that the wife bought her husband's consent to the divorce by abandoning her share of the joint property and it did not appear that she had any marital fault to allege against her husband, the same learned Judge sitting as a Single Judge of the Chief Court said : "In such a case if she desired a divorce she would have to resign all claim to the joint property." This passage has been relied on as a recognition by the Chief Court of Lower Burma of the right to divorce without fault.

In 1922 again a Single Judge of the Chief Court of Lower Burma in dealing with a case in which divorce was claimed for misconduct, found that the misconduct which actually proved was not sufficient, to warrant a divorce for misconduct but, accepting the Upper Burma decision as good law, gave the wife a decree for divorce on payment of the costs of the suit and forfeiture of the joint property which it may be noted appeared in that particular case to be a negligible quantity. The learned Judge said that the Upper Burma decision was cited with approval in the earlier of the two Lower Burma cases which I have mentioned and was approved by Mr. May Oung, now a Judge of this Court, in his "Leading Cases on Buddhist Law." In this connection, reference may be made to the following passage in the book mentioned : "In Jardine's day there was a difference of opinion and many Burmans maintained the view now held in Upper Burma, but there is no evidence of the existence of a custom of divorcing faultless persons against their will. He took great pains to collect all the available data and was inevitably led to the firm conclusion that the doctrine of *ex parte* divorce was unsustainable from any point of view. Experience gained since then points to the same result ; there is no such custom among Burman Buddhists either in Lower or Upper Burma, and where the parties cannot agree to a divorce, the general view is that it cannot

(13) 53 Ind. Cas. 468 ; 9 U. B. R. (1919) 151

be effected unless some 'fault' is shown to exist" (at page 77).

With this statement I entirely agree. My experience, for what it is worth, points to the same state of facts. I have been dealing as Judge with cases of divorce under Burmese Buddhist Law for nearly 25 years; I have spent several years in the Court of the Judicial Commissioner of Upper Burma and several years in this Court first as the Chief Court of Lower Burma and now as the High Court for the whole of Burma, and I have never till now dealt with a case in which a claim to divorce without fault was made. In my judgment in the case of *Maung Nga* v. *Ma Pyu* (14) where I set out the various kinds of divorce recognised in Burmese Buddhist Law the only example of divorce without fault which I could give was the Upper Burma case of 1905. The question whether or not the decision in that case was good law did not then arise, but I have always doubted it.

It is now settled law in both Upper and Lower Burma that a suit for divorce can be instituted without any claim in respect of the property of the marriage.

The provisions of the Burmese Buddhist Law as to the payment of a fine or "body price" on divorce have long been obsolete, and if either party can claim divorce without alleging misconduct on the part of the other, the result would seem to be that in every case where divorce is claimed a decree must be given, that is, that the application to the Courts is a mere formality, that if there is property of the marriage the husband can get a decree for divorce against the wife and leave her to sue for the property, that if there is no property either party can divorce the other at any time without penalty and that a husband can thus render nugatory an order for the msintenance of his wife, which in fact was the intention and result of the Upper Burma case of 1905, and is obviously the object of the present claim, and that either party can, in the same way, defeat an order for restitution of conjugal right.

Such a result seems to me to be entirely incompatible with any idea of the permanence of the marriage tie, or with anything which can be called marriage in the sense in which that word is used amongt civilized peoples. Burma is now, and has been for many years, a civilized country and its ideas of marriage are, in my opinion, at least a thousand years in advance of that state of society from which the archaic rule for divorce without fault has survived. The *Dhammathats* are full of such pre-historic remains, see, for example, the provision mentioned above, that a wife who wishes to divorce her husband for no fault must have her head shaved and may be sold as a slave. No one nowadays thinks of applying such fossil laws to the conditions of modern Burma, and, in my opinion, the right to divorce without fault, like a large number of other rights mentioned in the *Dhammathats*, has long been obsolete. It is not supported by custom; its resurrection in the British Courts for a few years, 50 or 60 years ago, was the result of a mere accident; if allowed, it would defeat the provisions of the law as to the maintenance of wives and would practically destroy marriage as a permanent institution. It is a mere relic of the ages of barbarism. For the past 40 years it has been rejected in Lower Burma without objection on the part of the people, and the fact that its recognition in Upper Burma nearly 20 years ago has not been followed by a demand for such divorce shows that it is contrary to the present ideas of the people. It is clearly desirable that the Burmese Buddhist Law, which is administered by this Court for the whole of Burma, should be the same for both parts of the Province, and, if we had to choose between recognition and non-recognition of a right which I believe to be repugnant to the present civilisation of the country, I should have no hesitation in deciding that we ought to follow what for so many years been recognized as the law in Lower Burma, and reject the Upper Burma decision in the case of *Mi Kin Lat* v. *Nga Ba So* (5) and also the recent Lower Burma case of *Ma Thein Mya* v. *Maung Tun Hla* (8).

But so far as the present case is concerned the claim to divorce without fault cannot be supported from either *Manukye* or *Attasankhepa*, since both of them would confine the right to couples who have not been previously married and the parties in this case have both been previously married.

(14) 59 Ind. Cas. 1005; 3 U. B. R. (1920) 251.

No fault which would entitle respondent to divorce, even as by mutual consent, has, in my opinion, been established, and such a divorce is not claimed.

I would, therefore, allow the appeal, set aside the judgment and decree of the Lower Appellate Court and restore the decree of the Trial Court, dismissing respondent's claim. I would also order respondent to pay appellant's costs in the lower Appellate Court and in this Court, Advocate's fee in this Court to be five gold *mohurs*.

N. H. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 55 OF 1923.

April 17, 1924.

Present:—Mr. Kendall, A. J. C. and Mr. Pullan, A. J. C.

MOHAMMAD SHER KHAN—PLAINTIFF—APPELLANT

versus

Mst. KAMAL-UL-NISSA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Construction of document—Ariat, essentials of—Marriage settlement—Revocation.

A Muhammadan *taluqdar* executed a marriage settlement whereby he purported to transfer a half share in a certain village to the defendant for life in consideration of her marrying his son and on her death to her male child, if any, absolutely; failing which the property was to go to her husband and his heirs. The marriage was duly performed but no transfer was effected. The defendant, however, sued for possession and obtained a decree on the basis of a compromise. In a subsequent suit by the father-in-law to revoke the said settlement on the ground of its being an *ariat* under the Muhammadan Law:

Held (1) that none of the essentials of an *ariat* appertained to the marriage settlement in suit.

(2) that the deed was a contract between the donor and the bride who only consented to marry on condition that the settlement was made in her favour.

(3) that once the contract was complete by the marriage on one side and the gift of property on the other, the donor had no longer any interest in the property and no right to revoke the deed.

Mumtaz-un-Nissa v. *Tufail Ahmed*, 28 A. 264; A. W. N. (1905) 260, distinguished.

The essentials of an *ariat* under the Hanafi Law are (1) that it cannot be revoked; (2) that it cannot be a transfer of the property; (3) that it must be for a definite period, and (4) that it does not devolve upon the heirs of the recipient.

Appeal against the decree of the Subordinate Judge, Kheri, dated the 12th September 1923.

Messrs. *A. Rauf* and *Rauf Ahmad*, for the Appellant.

Messrs. *Niamat Ullah*, *E. R. Qidwai* and *M. H. Kidwai*, for the Respondents.

JUDGMENT.—The plaintiff-appellant in this case is a Mohammadan *taluqdar* who executed a marriage settlement in favour of his daughter-in-law, defendant No. 1, at the time of her marriage to his son, defendant No. 2. According to the terms of that document the plaintiff gave to defendant No. 1 a half share of a certain village for her life stipulating that if she gave birth to a male child by defendant No. 2 the property would devolve on that child and otherwise would revert to her husband and his heirs. Mutation was to be effected within a week after the celebration of the wedding, but at that time the plaintiff was unwilling to give effect to the settlement and defendant No. 1 brought a suit for enforcement thereof. This suit was decreed in accordance with a compromise which gave possession of the half village subject to the provisions of the marriage settlement to the present defendant No. 1, who was plaintiff in that suit. The present suit has been filed for revocation of the original settlement. In the plaint it was alleged that the settlement had been made under undue influence, but subsequently the plaintiff's Counsel made a statement admitting that this plea was barred by the decision of the previous suit where the alleged undue influence was a point at issue. Accordingly, it was agreed that the deed could not now be questioned on these grounds and could only be challenged on certain other grounds mentioned in the plaint and amplified in an amendment. We have, therefore, to consider only two questions :—first, whether the

deed was revocable by the plaintiff, in that it was of the nature of an "*ariat*", and, secondly, whether there had been any breach of condition on the part of the defendant No. 1 which would justify the Court in setting aside the deed.

First, we shall consider whether the deed in suit can be described as an "*ariat*". "*Ariat*" is a term used in the Hanafi Law for a gratuitous loan and the essentials of an *ariat* are :—

(1) that it can be revoked ;
(2) that it cannot be a transfer of property ;
(3) that it must be for a definite period, and
(4) that it does not devolve upon the heirs of the recipient.

In our opinion none of these essentials of an "*ariat*" appertain to the marriage settlement in suit. In more than one place it is definitely said that the donor and his representatives shall have no power to make any changes or alterations in the deed or interfere in any way with the property or create any burden thereon. These statements cannot be reconciled with the theory that the deed is revocable.

It is perfectly clear from the document that the property in question was to be conveyed to defendant No. 2. This is clearly stated in paragraph 1 and the condition as to mutation is in itself proof that transfer was intended. Moreover, the property has actually been transferred as a result of the compromise between the parties in accordance with this very document. Even if only a transfer of usufruct was contemplated as contended by the appellant we are of opinion that this would be a sufficient transfer for this purpose : [See *Durga Devi* v. *Duri Chand* (1).]

This deed is not for a definite period of time. As regards defendant No. 1 it is for her life-time and it is quite clear that her interest is limited to her life-time merely to protect the interests of her son and not those of the donor.

Clause 2 of the deed lays down an order of succession to this property on the death of the defendant No. 1. We cannot, therefore, accept the contention of the appellant that this deed is in any sense an "ariat". The case reported in *Mumtaz-un-nissa* v. *Tufail Ahmed* (2) is entirely different, being one in which the only evidence of transfer was an application for mutation of names made by a Muhammadan in favour of his wife. In our view it is what it calls itself, a marriage settlement, executed by the donor not under the Muhammadan Law but under the *taluqdari* law of Oudh. In our opinion the deed is a contract between the donor and Sheikh Asad Husain Qidwari, the brother of defendant No. 1, who only consented to give his sister in marriage on the condition that this settlement was made in her favour. Once the contract was complete by the marriage on the one side and the gift of property on the other the plaintiff-appellant has no longer any interest in the property and no right to revoke the deed.

As to the allegation that there has been some breach of condition on the part of defendant No. 1 which would entitle the plaintiff to have the deed set aside we can only say that the deed contains no such condition. We are referred to paragraph 5, but this merely lays down a pious wish that the defendant No. 1 should always obey her husband and never give cause for any disunion. This, if it is a condition at all, is one between the two defendants and not between the defendant No. 1 and the plaintiff-appellant. No doubt, the lower Court took no evidence as to the allegations in the plaint and the amendment of the plaint as to the conduct of defendant No. 2 we are unable to see that any of these allegations affected the defendant No. 1 but we cannot see how evidence adduced on these points could have in any way affected the decision of the suit.

It has also been argued that the lower Court should not have laid stress on the fact that a male child has actually been born to defendant No. 1 and allowed this fact to influence its decision. In our opinion the birth of this child has no effect on the case and we have laid no stress on the fact in our judgment. In our opinion the plaintiff totally failed to prove that he is entitled to any part of the relief claimed and we dismiss the appeal with costs.

G. H. *Appeal dismissed.*

(1) 2 A. L. J. 563.

(2) 28 A. 264 ; A. W. N. (1905) 269.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 463 OF 1923.

July 5, 1923.

Present :—Mr. Justice Pratt.

MA HLA GYI—APPELLANT
versus
MAUNG SEIK PO—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Award, suit to enforce, nature of—Appeal, second, competency of.

A suit to enforce an award, is in essence a suit for specific performance of a contract, and is not of a small cause nature, consequently, a second appeal is competent in the case of such a suit.

Kunjo Behari Bardhan v. *Goto Behari Bardhan*, 42 Ind. Cas. 590; 22 C. W N. 66; 27 C. L. J. 486; relied on.

Maung Po Tok v. *Ma Swe Mi*, 49 Ind. Cas. 62; 3 U. B. R. (1918-20), 109, dissented from.

Appeal against the decree of the District Court, Meiktila, in Civil Appeal No. 40 of 1922.

Mr. *Dutt*, for the Appellant.

Mr. *Sanyal*, for the Respondent.

JUDGMENT.—This is an appeal arising from the decree in a suit for compensation based upon an award of arbitrators made without reference by a Court. A preliminary objection is raised by the Advocate for respondent that the suit is of a small cause nature and no second appeal lies.

The learned Judicial Commissioner's ruling in *Maung Po Tok* v. *Ma Swe Mi* (1), is undoubtedly an authority for holding that a suit for the specific performance of an award is not a suit for the specific performance of a contract. A contrary view was taken by a Bench of the Calcutta High Court in *Kunja Behari Bardhan* v. *Gosto Behari Bardhan* (2), which held that a suit to enforce an award is in essence a suit for specific performance of a contract. I have no doubt that this is the more correct view. With all due respect to the learned Judicial Cmmissioner, I cannot agree that the claim for compensation is merged in the award

(1) 49 Ind. Cas. 62 ; 3 U. B. R. (1918-20).
(2) 42 Ind. Cas. 590; 22 C.W.N. 66; 27 C. L. J. 486.

so that the payment of money directed by the award is a simple claim for money of a kind cognizable by a Court of Small Causes. I hold that the suit must be considered to come within the category of suits for specific performance of a contract, and is not, therefore, of a Small Cause nature.

A second appeal, therefore, lies.

N. K. *Objection disallowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1105 OF 1921.

February 19, 1924.

Present :—Mr. Justice Krishnan.

ARETI SUBBAYYA—DEFENDANT—APPELLANT
versus
SREE RAJA VENKATARAMIAH APPARAO BAHADUR, ZAMINDAR GARU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908) ss. 3 (16), 45, 163—"Ryoti land," definition of—Land, ordinarily submerged in water and not under cultivation whether ryoti land—"Cultivable," meaning of—Mesne profits, suit for—Civil Court, whether has jurisdiction.

Waste land in an estate usually submerged in water in the rainy season and not under cultivation is not "ryoti land" within the meaning of section 3 (19) of the Madras Estates Land Act.

A suit for mesne profits for such a land is properly maintainable in the Civil Court.

The words "cultivable land" in the definition of 'ryoti land' means land that is ordinarily and usually cultivated and does not refer to waste land, though even waste land can at times be cultivated with labour and expenditure of money.

Raja of Venkatagiri v. *Ayyapareddi*, 21 Ind. Cas. 532 ; 38 M. 738 at pp. 740, 741 ; 14 M. L. T. 405 ; (1913) M. W. N. 919 ; 25 M. L. J 578, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Kistna, Ellore, in A. S. No. 388 of 1920, preferred against the decree

of the Court of the Principal District Munsif, Tanuku, in O. S. No. 371 of 1916.

Mr. *K. Kamanna*, for the Appellant.

Mr. *T. Ramachandra Rao*, for the Respondents.

JUDGMENT.—In this case the point taken before me is that Civil Courts have no jurisdiction to grant mesne profits in the way the lower Courts have done, as the plaintiff is entitled only to such profits as can be claimed under clause (2) of section 163 of the Madras Estate Lands Act, under which mesne profits have to be ascertained by the Collector under section 5, and reliance is placed upon the ruling in *Koti Kalapudi Kattayya* v. *Sree Rangiah Venkata Ramaya, Appa Rao Bahadur* (1). If the land in question were *ryoti* land, the argument may be sound, but the finding of both the lower Courts is that this land is not *ryoti* land because it is not ordinarily cultivable. The learned Appellate Judge says that it is a sort of waste land usually submerged in water in the rainy season and not under cultivation at all. On that finding, section 163 will not apply and there will be no ground for objection to the Civil Courts ascertaining the mesne profits due. It is, however, contended before me that as the land has been actually cultivated by the appellant for some years, it must be taken to be cultivable land, and being in a *Zemindari* estate, it must be treated as a *ryoti* land and the finding to the contrary by the District Judge should not be accepted. *Ryoti* land is defined in the Estates Land Act as meaning cultivable land in an estate other than private land but does not include tank beds, thrashing floor, etc. It certainly does not include waste land where no cultivation is ordinarily carried on. In section 6, clause (4) waste land and grazing land are treated as lands in which a person cannot get permanent rights of occupancy. This has been pointed out by the learned Judges in *Rajaof Venkatagiri* v. *Ayyappareddi* (2), their observations are found at pp. 740 & 741. When the definition of *ryoti* land speaks of cultivable land, it seems to me that it means land that is ordinarily and usually cultivated and does not refer to waste land, though even waste land can at times be cultivated with labour and expenditure of money. I think that the finding of the lower Court that this land is not *ryoti* land is correct.

The second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

K. S. D.

(1) 60 Ind. Cas. 32 ; 39 ; M. L. J. 571 ; (1920) M. W. N. 702 ; 12 L. W. 673 ; 28 M. L. T. 279.

(2) 21 Ind. Cas. 532; 38 M. 788 ; At pp. 740 M. 741; 14 M. L. T. 405; (1913) M. W. N. 919; 25 M. L. J. 578.

RANGOON HIGH COURT.

FULL BENCH.

CIVIL REFERENCE.

September 3, 1923.

Present:—Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice May Oung, and Mr. Justice Beasley.

JONES—PETITIONER—APPELLANT

versus

JONES AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Divorce Act (IV of 1869), ss. 2, 7—Domicile of origin English—Domicile of choice, acquisition of—Requisites— Animus Momendi *not proved—Jurisdiction to grant decree nisi.*

Courts in India are bound by the provisions of s. 7 of the Divorce Act, notwithstanding the provisions of s. 2 of the Act, and their jurisdiction to grant divorce depends upon domicile as under the English Law.

Domicile of origin cannot be lightly shed and the onus lies distinctly on the person wanting to do so that he has in its place acquired a domicile of choice. A domicile of choice can only be acquired by residence coupled with an intention of permanent or indefinite residence, mere residence by itself being insufficient.

A soldier with an English domicile of origin obtained employment in Burma on discharge from the army. He was married in Burma and his children were also being educated there. After residing there for about 11 years he lost his appointment in Burma; he returned to England and from there went to Barbados where he was in service for about a year when he returned to Burma to his former appointment. He presented a petition for divorce and the question was whether the Court had jurisdiction to grant the decree:

JONES *v.* JONES

Held that his return to Burma was due to the opportunity of employment and did not arise from a firm and fixed intention of making Burma his home and that this in itself being no proof of the fact that he had acquired his domicile of choice, the Court had no jurisdiction to grant the divorce sought.

This was a reference which came up before a Full Bench of the High Court for the confirmation of a *decree nisi* passed by the Divisional Judge of Magwe on the ground of the respondent's adultery, and the learned Chief Justice made the following order of remand in which May Oung and Beasley, JJ., concurred :—

"This is a reference for the confirmation of the decree *nisi* passed by the Divisional Judge of Magwe on the ground of adultery.

"The first question that arises is, whether the Court has jurisdiction to grant any decree for the dissolution of the marriage, but the matter was not raised in the Court below, and there is no affirmative evidence on the record as to the domicile of the petitioner. It would, however, appear probable that he has an English domicile.

"From the Certificate of Marriage that has been filed, the petitioner was at the time of his marriage an Office Sergeant of the Second Royal Welsh Fusiliers at Maymyo where the marriage took place. The petition states that after the marriage petitioner lived and cohabited with his wife at Maymyo and Singu, Upper Burma, and then at Carnarvon in Wales and lastly at Yenangyaung, Upper Burma. He is an Assistant Storekeeper to Messrs. The Burma Oil Company, Limited, at Yenangyaung.

"We have heard Mr. Keith on the question of jurisdiction and, while it is admitted that the decision in *Keyes* v. *Keyes* (1) lays down that the Courts in India are not empowered to decree dissolution of the marriage between persons not domicile within their jurisdiction, it is urged that the Court has power to grant a decree for dissolution which has full force and effect within British India. It is no doubt true that section 2 lays down that relief may be granted where the petitioner professes the Christian religion and resides in India at the time of presenting the petition and that in addition in the case of dissolution of marriage it may grant decrees where the marriage has been solemnised in India or where the adultery complained of has been committed in India, and that, in spite of the decision their Lordships of the Privy Council in *Le Mesurier* v. *LeMesurier*(2), the Courts in India have considered that they have jurisdiction to grant decrees of dissolution of marriage. It is clear that the recent decision in *Keyes v Keyes* (1) shows that jurisdiction should not have been so assumed. It has been suggested that this decision does not give sufficient weight to the opening words of section 7, Indian Divorce Act, and, while it is true that the Courts in India are directed to 'act and give relief on principles and rules, which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief, this is only to be the rule subject to the provisions contained in the Indian Divorce Act. We are unable to see any force in this argument. The provisions of section 2 as to residence, no doubt, apply to cases where the parties are domiciled in India, but where the parties are domiciled in England, they cannot override the express provision in section 7 of the Act.

"In *Keyes* v. *Keyes* (1) it was definitely held that the Indian Councils Act, 1861, did not warrant the making of a law to empower Courts in India to decree dissolution of marriage between persons not domiciled within their jurisdiction, and Courts in India are bound by the provisions of section 7 of the Act to act and give relief on the same principle, namely, that jurisdiction depends on domicile.

"The proviso added to section 7 was referred to. It is no doubt worded in very general terms, but it cannot be taken as overriding the section itself. This proviso was enacted in 1912 to lay at rest a conflict between the Calcutta and Madras High Courts *Thapita Peter* v. *Thapita Lakshmi* (3) and *Gobardhan Dass* v. *Jasadamoni Dassi* (4) on an entirely

(1) (1921) P. D. 204 ; 90 L. J. P. 242 ; 124 L. T. 797 ; 65 S. J. 435 ; 37 T. L. R. 499.

(2) (1895) A. C. 517 ; 64 L. J. P. C. 97 ; 11 R. 527 ; 72 L. T. 873 (P. C.).

(3) 17 M. 235 ; 6 Ind. Dec. (N. S.) 162.

(4) 18 C. 252 ; 9 Ind. Dec. (N. S.) 168.

different point and it in no way affects the question before us.

"We have been referred to Note 17 in the Third Edition of Mr. Dicey's Conflict of Laws at page 845, and it there appears to be suggested that Courts in India could still grant decrees of dissolution to have effect throughout British India only. It is not possible, in our opinion, to hold this view having regard to the fact it has been held that the Act which authorised legislation by the Government did not authorise legislation to grant matrimonial jurisdiction that was not based on domicile. The decision in *Keyes* v. *Keyes* (1) was not taken further, but was clearly accepted as a correct exposition of the law and a validating Act was passed. That Act has no application to future divorces and it is, therefore, necessary that the Court, on entertaining a petition for dissolution, should be satisfied that it has jurisdiction by reason of the domicile of the petitioner. If, therefore, the petitioner in the present case has an English domicile and was not domiciled in India, the Court had no jurisdiction to grant him a decree for dissolution of marriage.

"As has been pointed out, there was no issue drawn on this and no evidence has been given on the point, and we must, therefore, remand the case for an enquiry into this matter and the Court, after issuing notice and hearing such evidence as may be led before it, will return the evidence to this Court with its opinion."

The Divisional Court having re-submitted the record to the High Court after hearing further evidence and coming to a finding that the petitioner was domiciled in India, the matter came up once more before the same Full Bench.

Mr. *Keith*, for the Appellant.

JUDGMENT.

Robinson, C. J.—The petitioner came to India in 1907 as a soldier and his Regiment was transferred to Burma. Shortly before his discharge from the Army, he obtained a post in the Burma Oil Company, in the service of which Company he has continued with the exception of an interval of one year. It is not in dispute that his domicile of origin is British, but it is urged that he has deliberately abandoned that domicile and has acquired a domicile of choice in this coutry. What he says himself in his evidence is that "after getting married I have intended to stay always in Burma as the climate suits my health very well." And, again, "I have been in the oil business for the last twelve years on a local contract. I, therefore, cannot change my profession at this age. If I go back to England I cannot make use of my experience in the oil line. I have no property in England. All my interests are centered in British India. I am heavily in debt here and I have no savings to fall back upon; hence I did not think of going back to England at all." And the statement ends, "I have not the slightest intention at all to go back to England and there is nothing to attract me there."

It is urged that this evidence, coupled with certain other circumstances, is sufficient to establish the propositions that he has a domicile of choice in Burma. His domicile of origin being English, it cannot be lightly shed and the onus lies distinctly on petitioner to prove that he has, in its place, acquired a domicile of choice, *Bell* v. *Kennedy* (5). A domicile of choice can only be acquired by residence coupled with an intention of permanent or indefinite residence. Mere residence by itself will not be sufficient. There is no doubt that for the last twelve years the petitioner has with only one break resided in Burma, but that break in itself appears to me to raise the strongest doubt as to his intention to make a permanent home in this country. On his discharge from the Army he no doubt sought employment as do many other soldiers. He obtained it and resided in Burma in consequence. But he lost or gave up that employment, and in June 1919 he went home to England. He went to seek other employment and he obtained it in Barbados. After he had been there for nearly a year, it appears that he received a communication from his old employers, the Burma Oil Company, Limited, offering him again a post in Burma. This he accepted and returned to Burma, but when he left Burma in June 1919 with the object of obtaining other work, he did an act which appears to me to show clearly that he either could not have had an intention of making Burma his home permanently or that if he had had

(5) (1868) 1 H. L. Sc. 307.

such an intention, he abandoned it. It takes far less to revive a domicile of origin than to acquire a domicile of choice. His return to Burma, the following year was merely to take up his employment and does not show and is in itself no proof of *animus manendi*. His return was due to the opportunity of employment. It did not arise from a firm and fixed intention of making Burma his home. This visit appears to me to wipe out the effect that the previous long residence in Burma might have had on the decision of this question. So far as his own evidence is concerned, I need only quote the words of Horridge J., in *Waddington* v. *Waddington* (6) "I always look with suspicion on an act on petition made subsequently to proceedings in a a suit in order to escape from the jurisdiction of this Court. The evidence of the wife is also subject to a similar comment." In that case the wife was the petitioner. The reasons given in his evidence afford little or no proof of the *animus manendi* that the climate suited his health ; that his employment for the time being lay in Burma ; that he was heavily indebted and had no money and possibly would not be allowed to leave the country, are no grounds in support of the allegation of an intention to remain. The facts that he married in Burma and that his children are being educated in Burma carry it no further. He could not afford to have his children educated anywhere else. Petitioner's circumstances are exactly similar to a great many other cases to be met with here, and, in my opinion, he has failed to discharge the onus that lay on him. There is no evidence of any acts done by him or of any statements made by him which lends support to his allegation. In my opinion it should be held that his domicile is English and that this Court has no jurisdiction to grant the divorce sought. I would, therefore, dismiss the petition and hold that petitioner must pay respondents' costs, if any.

May Oung, J.—I concur.

Beasley, J.—I concur.

N. K. *Petition dismissed.*

(6) (1926) 96 I. L. R. 359.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 26 OF 1923.

November 26, 1923.

Present :—Mr. Daniels, J. C.

THAKUR RUDRA PARTAP SINGH—
PLAINTIFF—APPELLANT
versus
HAUSLA PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Oudh Rent Act (*XXII of* 1886), *s.* 127, *application of—Cultivated grove—Suit for rent, maintainability of.*

A suit for rent of cultivated grove land is not maintainable under s. 227 of the Oudh Rent Act.

Appeal from the decree of the Additional District Judge, Bara Banki, dated the 24th April 1923, modifying the decree of the Deputy Collector, First Class, Bara Banki, dated the 8th May 1922.

Mr. *Hyder Husain*, for the Appellant.

Mr. *Ram Bharose Lal*, for the Respondents.

JUDGMENT. —This is a second appeal by the plaintiff in a suit for arrears of rent. The suit was brought under section 127 of the Oudh Rent Act on the ground that the defendants, some twenty years ago, brought the land under cultivation without the sanction of the landlord. The suit related to two plots Nos. 194 and 407 in Mahal *Musammat* Darya Kunwar of the village of Khera Kankan in the Bara Banki District, but the appellant has confined his arguments to plot No. 407. It is common ground that this plot was originally grove land and the defendants contend that there has been no change in its character. The land was recorded as a cultivated grove in the record of the first Regular Settlement and the finding of the Court below is in favour of the defendants that there has been no change in its character and that it continues to be a cultivated grove as it always has been. It is contended on behalf of the appellant that there can be no such thing as a cultivated grove. The explanation may lie in the kind of trees grown, which are mainly *shisham* trees and may have grown up chiefly round

the boundary of the plot where they stand at the present time. On the findings of the Court below the case is not one to which section 127 of the Oudh Rent Act is applicable and the suit has been rightly dismissed. I accordingly dismiss the appeal with costs.

N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 2 OF 1923.

December 13, 1923.

Present :—Mr. Justice Pratt and Mr. Justice Fawcett.

MAHOMED VALLI ASMAL—PLAINTIFF—APPELLANT

versus

VALLI ASMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, paras. 15, 16—Arbitration—Award—Objection—Appeal, whether lies—Revision—Letters Patent (Bombay) cl. 15—Appeal against order in revision.

The effect of the introduction of the words " or being otherwise invalid " in paragraph 15 of Schedule II to the Civil Procedure Code, is that any objection to the award on the ground that it is not an award or on the ground of its invalidity should be made at the time when the award is filed.

If such an objection is not taken then, or is taken and is disallowed, it is not open to the party objecting, to re-agitate the matter by way of appeal against the decree.

An order in revision is not subject to appeal under the Letters Patent of the Bombay High Court.

Appeal from an order passed by the Chief Justice under O. XLI, r. 11, Civil Procedure Code, in First Appeal No. 449 of 1920, from the decision of the First Class Subordinate Judge, Broach, in Suit No. 26 of 1918.

Mr. *K. N. Koyajee*, for the Appellant.

Messrs. *G. N. Thakor* and *R. J. Thakor*, for the Respondent.

JUDGMENT.—This appeal, under the Letters Patent, arises under the following circumstances :—

The appellant who is the plaintiff filed a suit against the defendants in the Court of the First Class Subordinate Judge at Broach, and that suit was determined by the judgment given in terms of an award between the parties. An appeal was filed against the decree made on this judgment, and that appeal was summarily dismissed by Macleod, C. J., on the ground that no appeal lay. From that summary dismissal this appeal under the Letters Patent was admitted by us and being conscious of the fact that the decree appealed against was not in excess of the award we directed that the appeal should be admitted as an appeal against an order either under section 104 (1) (*f*) of the Cdoe of Civil Procedure or under O. XLIII, r. 1 (*m*) of the same Code. That order was evidently made under the impression that the award had been made without the intervention of the Court. It now appears that the order was made on a reference through the Court under Schedule II to the Code of Civil Procedure. It follows, therefore, that the award cannot be treated either as a compromise under r. 3 of O. XXIII, or an order appealable under s. 104 (1) (*f*) of the Civil Procedure Code.

On what ground, then, is the appeal maintainable? Mr. Koyajee argues that an appeal lies because the award in terms of which the judgment was given was not in fact an award. He contends that there was no reference as one of the parties did not sign the submission paper himself, his signature being affixed on his behalf by his pleader. In other words, Mr. Koyajee's contention is that an appeal will lie against the decree made in terms of the award, if he can show that that award was an invalid award or an award made without jurisdiction. This was the ground on which appeals were admitted under the old Code in the cases of *Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar* (1) and *Shib Lal* v. *Chaturbhuj* (2). But the effect of the introduction of the words " or being otherwise invaild " in paragraph 15 of the Schedule II of Civil Procedure Code, is that any objection to the

(1) 26 M. 47 ; 12 M. L. J. 396.
(2) 2 Ind. Cas. 363 ; 31 A. 450 ; 6 A. L. J. 496.

award on the ground that it is not an award or on the ground of its invalidity should be made at the time when the award is filed If that objection is not made then, or if that objection is then made and is disallowed, it is not open to the party objecting, to re-agitate the matter by way of appeal against the decree. The object of that change in paragraph 15 of the arbitration schedule was, as pointed out by Mulla, J., in his notes on the subject, to give full effect to the principle of finality as laid down by the Privy Council in *Ghulam Jilani* v. *Muhammad Husain* (3). The appeal was, therefore, rightly dismissed as not competent.

I should observe that no objection on his ground was made by the appellant either at the time when the award was filed or in his memorandum of appeal from the decree of the Subordinate Judge. Even if it were suggested that the first appeal should be treated as an application for revision of the decree, following the recent decision of this Court in the very extreme case *Merali Visram* v. *Sheriff Dewji* (4), the appellant would be in no better position, for an order in revision is not subject to appeal under the Letters Patent.

We, therefore, uphold the preliminary objection and dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(3) 29 I. A. 51 : 4 Bom. L. R. 161 ; 12 M. L. J. 77 ; 6 C. W. N. 226 ; 29 C. 167 ; 5 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(4) 12 Ind. Cas. 687 ; 36 B. 105 ; 13 Bom. L. R. 1017.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 301 OF 1922.

December 10, 1923.

Present :—Mr. Justice Young, Acting Chief Justice, and Mr. Justice May Oung.

M. S. NAIKWARA—PLAINTIFF—APPELLANT

versus

MA AYE BYU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 144, 151—Wrongful appointment of Receiver — Restitution— Inherent power of Court.

When a plaintiff obtains the appointment of a Receiver in respect of the property of several defendants, one of whom is subsequently dismissed from the suit as having been wrongly joined, although restitution in respect of the Receiver's commission and other expenditure incurred, cannot be granted under section 144 of the Civil Procedure Code, the order pressed not being a decree, yet the Court should allow restitution in such a case under its inherent powers. The fact that the Receivership has been to the applicant's advantage is no ground for not granting restitution in view of the possession of the Receiver having been wrongful *ab initio.*

Mr. *Kyaw Din*, for the Appellant.

Messrs. *Cowasjee and Das*, for the Respondents.

JUDGMENT.—In the case out of which this appeal arises the plaintiff had obtained the appointment of a Receiver over properties belonging to A and also properties belonging to B.

B was subsequently held to have been wrongly joined and was dismissed from the suit and the Receiver returned to her properties and the nett rents collected. She applied to the Trial Judge that the plaintiff should also return to her the Receiver's commission and certain expenditure incurred for watching fees and hire of boats for collecting paddy, and the learned Judge allowed the application. Hence this appeal on the grounds that the Judge had no jurisdiction and should have referred the parties to a regular suit.

If the removal of the Receiver had been a decree there can be no doubt that section 144 would have applied, and that the Court of first instance would have had power to order restitution on the application of the aggrieved party and such party would have been bound to make such application and could not have brought a regular suit.

But the order removing the Receiver was not a decree and it is, therefore, contended that the section does not apply and that B must be referred to a regular suit.

The learned Trial Judge made use of the inherent powers of the Court under section 151, treated the application as one analogous to an application made under section 144 and allowed it.

In this we think he was justified as there can be no reason why such an order should

not be treated in the same way as a decree. Restitution was as necessary under the order, as it would have been if such order had been a decree, and it would have been an abuse of the process of the Court to have referred the parties to a regular suit just because it was an order that was passed and not a decree.

Next, it was contended that the order was wrong on the merits, that the applicant had received advantages by having her property taken care of for her and that watching fees would have been necessary in any case and also the hire for boats to collect the paddy, but the law takes no account of such considerations under section 144: the Receiver's possession was wrongful *ab initio* and such restitution is ordered as will, so far as may be, place the parties in the same position that they would have occupied if such decree had never been passed. But for the order the applicant would never have been called on to pay to the Receiver fees for taking care of the property and realising its profits, and she is entitled under the law to be put in the same position, so far as may be, as if the order had never been passed. The appeal is dismissed with costs.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 17 OF 1922.

November 2, 1923.

Present:—Mr. Dalal, J. C. and Mr. Neave, A. J. C.

AWADH RAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHBUB KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Legal necessity—Burden of proof—Pre-emptor of property, position of—Antecedent debt, what is—Separation—Mutations in favour of individual members—Presumption.

A pre-emptor of a sale of Hindu joint family property by the father does not stand in a better position against the sons than the vendee so far as the question of legal necessity is concerned, except that being in a less favourable situation than the vendee to prove proper inquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of inquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons unless the sons were parties to the pre-emption decree

Jamna Pershad v. *Balbhadr*, 74 Ind. Cas. 353; 9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O) 147 followed.

An antecedent debt to be binding on Hindu sons must not only be antecedent in time to the transfer questioned by the sons but also dissociated in fact therefrom.

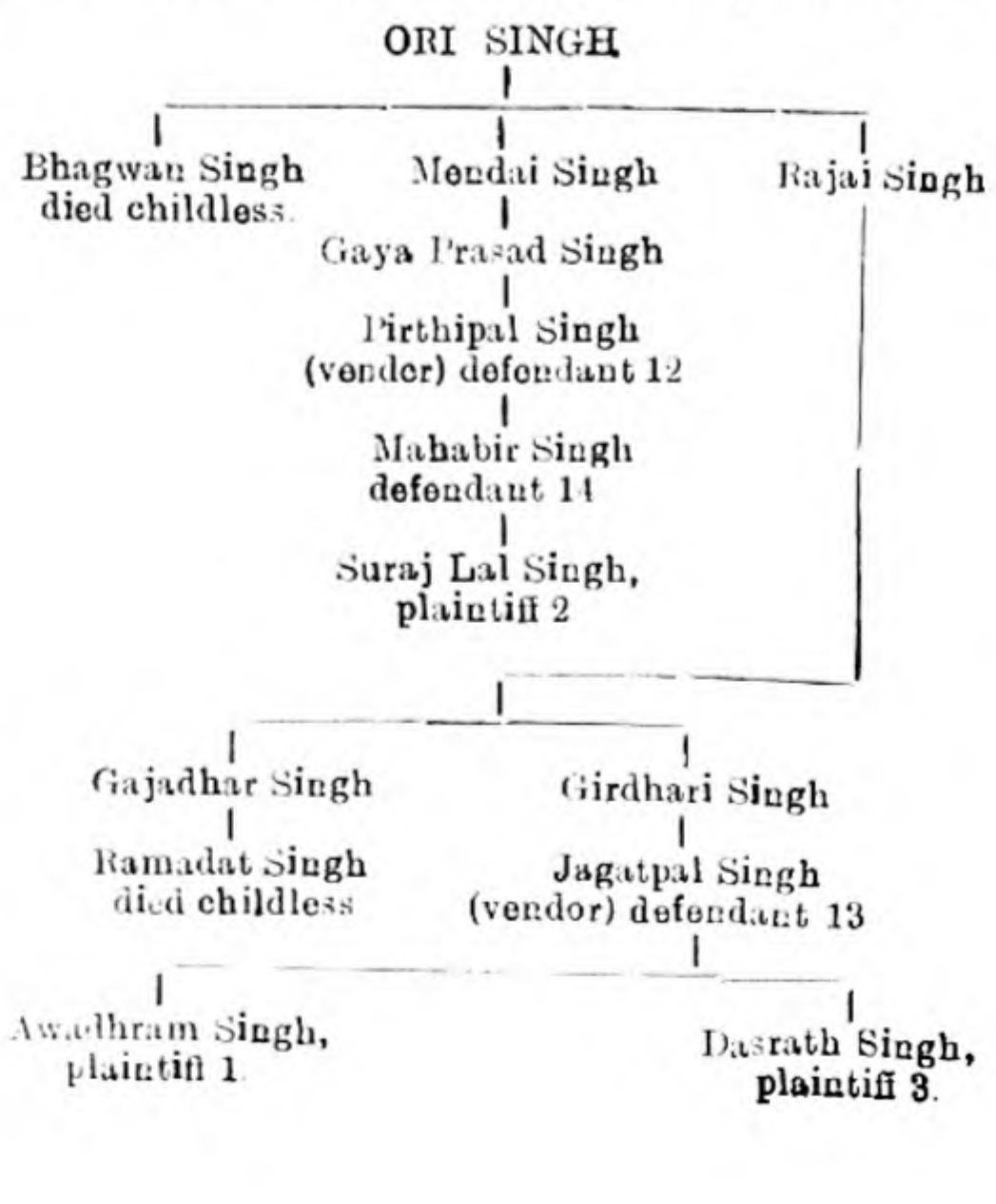
Even where property is held by a joint Hindu family mutations are often made in favour of individual members of the family. Unsupported by any other circumstance of division, they do not raise a presumption of separation.

Appeal from the decree of the Subordinate Judge, Gonda, dated the 30th January 1922.

Mr. *M. Wasim*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The suit in the Court of the Subordinate Judge of Gonda was for possession of a one-third share of one Mahal Abdul Ghafur Khan and about one-fifth of another known as *patti* Ghunnu Khan by Hindu sons from the vendee of their fathers. The followlng pedigree will indicate the relationship between the vendors and the plaintiffs:—



AWADH RAM SINGH *v.* MAHBUB KHAN

On 9th August 1904 Jagatpal Singh, father of plaintiff No. 41, and Pirthipal Singh, grandfather of plaintiff No. 2, sold the property in suit to Mian Bakhsh Khan for an ostensible consideration of Rs. 14,000 (Exhibit I, p. 24). The consideration was made up of the following eleven items :—

	Rs.	a.
(1) For payment to certain mortgagees under a usufructuary mortgage of 20th March 1894, executed by Gaya Prasad and Ram Dat ...	1,500	0
(2) For payment to the same mortgagees on a deed of further charge of even date executed by the same persons ...	600	0
(3) For payment to Chola and Bulla Kalwar in satisfaction of a usufructuary mortgage of 27th June 1892 executed by Gaya Prasad and Ram Dat ...	1,500	0
(4) For payment to the same mortgagees on account of a deed of further charge of 14th July 1892 executed by the same mortgagors ...	600	0
(5) For payment to the same mortgagees on account of a deed of further charge dated 2nd July 1901 executed by Pirthipal Singh ...	737	8
(6) Credit given for money due on an unregistered hypothecation-bond of 12th May 1903 executed by Pirthipal Singh in favour of the vendee ...	300	0
(7) Credit given for money due on a bond of 31st July 1904 executed by Pirthipal Singh and Jagatpal Singh in favour of the vendee ...	1,000	0
(8) For payment to Mian Abdul Ghafur Khan on account of an unregistered bond of 13th July 1904 executed by the vendors Pirthi Singh and Jagatpal Singh ...	3,000	0
(9) Received for cost of stamp-paper ...	140	0
(10) Due on a pro-note executed by Pirthipal Singh in favour of the vendee on 12th May 1903.	21	0
(11) Received in cash at the time of the registration ...	4,601	8
Total ...	14,000	0

Subsequently, Abdul Ghafur Khan (who is now dead and is represented by the defendants No. 1 to 5) and Ghunnu Khan (who is now dead and represented by the defendants 7 to 9) sued for pre-emption and obtained a decree on the 24th November 1905 on the basis of a compromise entered into between them and the vendee Mian Bakhsh Khan. The vendors obtained from the pre-emptors on payment in Court of Rs. 12,000.

The plaintiffs based their claim for possession on the following allegations. They were in existence at the time of the sale and so had a right to have it set aside on the ground that it was not executed by the managing members of the joint family for any valid necessity or for the payment of antecedent debts. It was their case that since the time of their ancestor Ori Singh the family had been joint and the property in their possession ancestral joint family property. Both the plaintiffs Awadh Ram Singh and Suraj Lal Singh were in existence at the time of the sale and attained majority within three years of the institution of the suit. The third plaintiff Dasrath Singh was born subsequently. The defence was that the suit was barred by limitation, that the burden lay on the plaintiff Hindu sons to prove the immoral nature of the consideration of the sale, that part of the property in suit was self-acquired property of Jagatpal Singh, that the sale was executed by the managing members for valid necessity and for payment of antecedent debt and, finally, that the sale cannot be set aside as the bulk of the consideration was binding on the plaintiffs.

The learned Subordinate Judge held that the suit was within time, that the entire property in suit was the joint ancestral property of a joint Hindu family consisting of the plaintiffs and the transferors, that the burden of proving legal necessity lay on the defendants and that the consideration was binding on the plaintiffs except to the extent

of Rs. 4,622-8-0 made up of items 10 and 11 out of the items enumerated above in this judgment. In the result, the lower Court granted to the plaintiffs a decree for possession of the property in suit on payment of Rs. 9,377-8-0 to the defendants who were legal representatives of the pre-emptors Ghafur Khan and Ghunnu Khan.

Both parties have appealed. Appeal No. 17 is that of the plaintiffs and appeal No. 25 of the defendants who are the successors-in-interest of the pre-emptors. The appeal by the defendants must be considered first because in case of its success, there will be no necessity to consider the other appeal.

The suit will be within time if either of the plaintiffs Awadh Ram Singh and Suraj Lal Singh was under 21 years of age at the date of its institution. On their behalf four different classes of evidence were produced, medical evidence of a Civil Surgeon, statement of age made by their parents or other relations at the time they joined school, horoscopes as are ordinarily prepared at the birth of Indians of the respectability and standing in life of the plaintiffs and oral testimony of their mothers. The second class of evidence is the most reliable as it does not depend on mere conjecture, is not likely to be prejudiced or fabricated and came into existence at a time when there was no thought of the present suit. First of all, both the plaintiffs were entered at the Paihar School, where their dates of birth were recorded in the School Register. According to these dates the plaintiffs were between 19 and 20 years of age at the date of the institution of the suit on 26th November 1919. These entries have been tampered with. The teacher Daulat Rai has deposed that this was done recently after the school building was broken into. It is, however, not necessary to inquire into this matter because Awadh Ram was transferred to the Utraula School in February 1915 and the entry of the date of birth in the register of that school gives no cause for suspicion. The date of birth given there is 5th February 1900.

When this independent and reliable evidence is not negatived by any defence evidence, which was ignored and not referred to by the defendants' learned Counsel during arguments here, we feel satisfied that the plaintiff Awadh Ram was between 19 and 20 years of age when the present suit was brought.

It was conceded by the defendants' learned Counsel, as indeed it must be after the Privy Council decision in *Chet Ram* v. *Ram Singh* (1), that if Mian Bakhsh had continued in possession, the burden would have laid on him to prove the binding necessity of the sale consideration. According to him, the burden now lies on the plaintiff Hindu sons because a decree has been obtained by the pre-emptors Abdul Ghafur and Ghunnu Khan and they have taken possession in execution thereof. This argument is based on a misapprehension of the effect of a pre-emption decree. The Hindu father who made the sale had no concern with this decree; he was not a necessary party thereto. In the present case a compromise was effected between the pre-emptors and the vendee to which the vendors were no parties and the decree was passed on the basis of this compromise *ex parte* against the vendors. By no stretch of the doctrine of representation can the Hindu sons be said to have been represented in such a litigation. We agree with the observations of a learned Judge of this Court in *Jamna Pershad* v. *Balbhaddar* (2): "It is clear that a pre-emptor cannot stand in a better position against the sons than the vendee from the father except that, being in a less favourable situation than the vendee to prove proper inquiry as to the existence of necessity or of antecedent debts of the father, less strict poof of inquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree.

The decree which shifts the burden on the sons is one in execution of mortgage by the father. This is emphatically stated by their Lordships in *Sahu Ram Chandra* v. *Bhup Singh* (3), and in the passages from two judgments, one of Sir James Colvile and the other

(1) 67 Ind. Cas. 560; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 93; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P.C.) 64; (1922) A. I. R. (P.C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C).

(2) 74 Ind. Cas. 353; 9 O. L. J. 601; 25 O. C. 388; (1923) A. I. R. (O) 147.

(3) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 38 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C).

LEE LIM MA HOCK *v.* SAW MAH HONE

the deceased intestate was also a Buddhist lies on the adopted son alleging such fact.

Shanmugam Pillai v. *Syed Gulam Ghose*, 27 M. 116 ; *Chokalinga Pillai* v. *Kumara Viruthalam*, 4 M. H. C. R. 354 ; 17 W. R 381 note ; *Kedar Nath Mitter* v *Denobandhu Shaha*, 31 Ind. Cas. 626 ; 42 C. 1043 ; 19 C. W. N. 724, distinguished.

Kyin Wet v. *Ma Gyoke*, 9 L. B. R. 179, relied on.

There is nothing in the Succession Act which requires an administrator to obtain the previous sanction of the Court for the sale of any portion of the estate of the deceased.

Where a creditor or one of the next-of-kin of a deceased institutes an administration suit against an executor or administrator, the mere institution of the suit or the obtaining of a mere administration decree does not deprive the executor or administrator of the general power to dispose of assets, unless and until the plaintiff has obtained an order appointing a Receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in the executor or administrator. The doctrine of *lis pendens*, therefore, does not apply to a sale made by an administrator during the pendency of an administration suit.

Case-law discussed.

Appeal from the decree of the District Court, Insein, in Civil Regular No. 34 of 1921.

Mr. *Burjorjee*, for the Appellant.

Mr. *Ah Yain*, for the Respondents.

JUDGMENT.

Lentaigne, J.—This is an appeal against the judgment and decree of the District Court of Insein dismissing the plaintiff-appellant's suit against the respondent defendants, and granting costs to the fourth respondent. One Lee Byaw, who was the owner of the combined Oil and Flour Mill in dispute, died intestate in May 1916, leaving one Saw Ewe Lyan, who claimed to be an adopted son, and four daughters of whom three were married. The adopted son applied on the 12th November 1917 for Letters of Administration to the estate of Lee Byaw deceased in Civil Miscellaneous No. 80 of 1917, and he headed his application as one under the Indian Succession Act, 1865 and described Lee Byaw as a Confucian by religion without adding any allegation that she was also a Buddhist or that she professed any religion which would cause her estate to be excepted from the operation of the Indian Succession Act, 1865, under section 331 or section 332 of that Act. He valued the nett assets likely to come to his hands at Rs. 3,379-7-9, and when setting out the combined Oil and Flour Mill now in dispute as part of the assets, valued the site at Rs. 1,000 and the Mill at Rs. 63,378 in accordance with a valuation by one A. E. Oliveiro, Engineer and Contractor.

Fifteen days later, the three married daughters filed a rival application for Letters of Administration in Civil Miscellaneous No. 82 of 1917 and in it disputed the claim of Saw Ewe Lyan to be an adopted son. In this application Lee Byaw was also described merely as a Confucian by religion.

Saw Ewe Lyan died intestate pending the decision of these rival applications, and the Letters of Administration to Lee Byaw's estate were eventually granted on the 21st January 1918 to the three married daughters, the grant being issued under the Indian Succession Act, 1865, because the deceased intestate had been described as a Confucian without any allegation that she professed Buddhism or any religion specified in section 331 of that Act. On the applications as then framed, the same result would presumbly have ensued even if Saw Ewe Lyan had still survied, because, as pointed out in *Kyin Wet* v. *Ma Gyoke* (1), the Indian Succession Act, 1865, does not recognise an adopted son.

On the 3rd January 1918 the appellant and Saw Swe Phie, as widow and uncle, respectively, of Saw Ewe Lyan deceased, applied for Letters of Administration to the estate of Saw Ewe Lyan, deceased, describing the deceased as a Confucian by religion and valuing the estate at Rs. 3,531-7-9 nett assests ; and Letters of Administration to the estate of Saw Ewe Lyan were granted to them under the Indian Succession Act, 1865. On the application as made, the grant could only have been issued under the Indian Succession Act, 1865, as there was no allegation that the deceased was also a Buddhist or that he professed any religion specified in the exceptions specified in section 331 or notified under section 332.

On the 9th August 1918 the appellant and Saw Swe Phie, as Administratrix and Administrator to the estate of Saw Ewe Lyan, de-

(1) 47 Ind. Cas. 148 ; 9 L. B. R. 179 ; 12 Bur. L T. 21.

LEE LIM MA HOCK *v.* SAW MAH HONE

ceased, instituted the suit Civil Regular No. 53 of 1918 against the three married daughters as administratrices to the estate of Lee Byaw, deceased, claiming that Saw Ewe Lyan had been the adopted son of Lee Byaw and as such was the sole heir of Lee Byaw, deceased, under the Customary Law prevailing among Confucians, and valuing the estate at Rs. 3,700 but making the usual request in a suit for an account that they be permitted to pay additional Court-fees should the estate prove to be in excess of that amount, and praying for a declaration that Saw Ewe Lyan was the sole heir to the estate of Lee Byaw, deceased, that the said estate be administered under the directions of the Court, for the costs of the suit, and for a Receiver. No schedule of property claimed was attached to this plaint, and on this error being pointed out, the plaintiffs filed, on the 26th August 1918, firstly, a copy of the Annexures A and B to the application made by Saw Ewe Lyan for Letters of Administration to the estate of Lee Byaw, deceased, secondly, a copy of Annexures A and B to the plaintiff's application for Letters of Administration to the estate of Saw Ewe Lyan, deceased, and, thirdly, a plan of the Mill site ; but the plaint was not in any way amended so as to even refer to these documents.

On this plaint *as so framed*, it is probable that the suit would have failed under the law as declared in *Kyin Wet* v. *Ma Gyoke and others* (1), because section 13 of the Burma Laws Act, 1898, does not authorise the application of the customary law in the case of the succession to the estate of any person who was not a Hindu, Mahomedan or Buddhist, and the statutory provisions of the Indian Succession Act, 1865, would apply and do not confer any right to a share in the estate of an intestate on the adopted son of the intestate.

On the 12th September 1918 the three married daughters, as administratrices to the estate of Lee Byaw, deceased, by a registered deed sold and conveyed the combined Flour and Oil Mill together with its site to the fourth respondent, Sin Seng Hin & Co., for a consideration of Rs. 75,500 described in the deed as made up of Rs. 46,000 amount due by the estate of Lee Byaw, deceased, to the purchasers, of Rs. 16,000 described as a debt due by Lee Byaw, deceased, to the purchasers, and Rs. 13,500 paid in cash to the vendors administratrices. The body of that deed contained the usual acknowledgment by the vendors of the receipt of the last mentioned sum, and the registration endorsements also include the usual certificate signed by the Sub-Registrar that the vendors acknowledged receipt of consideration as stated in the document.

On the 13th September 1918, the day following the execution of the above deed, an issue was framed in Suit No. 53 of 1918 as to whether Chinese Customary Law could apply to the estate, and the pleader or lawyer for the defendants therein is recorded as admitting that if Chinese Customary Law could apply, Saw Eve Lyan would have been the sole heir to the estate of Lee Byaw deceased. Five months later, the legal defects of the original claim on behalf of Saw Ewe Lyan, deceased, must have become apparent to the plaintiffs in Suit No. 53 of 1918, and the diary in the record of that suit, under date the 17th February 1919, contains the first allegation that Lee Byaw was a Buddhist in the following entry : —" Mr. Maung Gyi says that his client and the deceased Lee Byaw were Buddhists as well as Confucians. Let the plaint be amended to make this clear." On the 24th February 1919 an amended plaint was filed alleging in paragraph 3 that "the late Lee Byaw, her deceased husband Saw Gyoke Ah and the late Saw Ewe Lyan were Chinese or Confucian Buddhists." On the 22nd March 1910 the plaintiffs were granted a preliminary administration decree against the two surviving administratrices of the estate of Lee Byaw, deceased, and against the representatives of the third administratrix who was then deceased. That decree was subsequently confirmed on appeal by the Divisional Court.

On the 29th August 1921 the appellant and Saw Swe Phie as Administratrix and Administrator to the estate of Saw Ewe Lyan, deceased, suing *in forma pauperis*, instituted the suit Civil Regular No. 34 of 1921, which is the case now under appeal, against the two surviving married daughters as administratrices of the estate of Lee Byaw, deceased, against the representatives of the third administratrix

then deceased, and against the fourth respondent, the firm of Sin Seng Hin & Co., as purchasers under the said conveyance, dated the 12th September 1918, and in the said suit they claimed to set aside the said conveyance on various grounds.

The following issues were framed :—

1. Is the decree in Civil Regular Suit No. 53 of 1918 of this Court binding on the fourth defendant ?
2. Is the question of the adoption of Saw Ewe Lyan *res judicata* against the fourth defendant ?
3. Is the sale of the Oil Mill by the administratrices of Ma Byaw's estate to the fourth defendant a collusive sale ?
4. Did the defendant have notice, before he purchased the Oil Mill, of Saw Ewe Lyan's claim as sole heir and that Ma Byaw was a Chinese Buddhist ?
5. If so, was any permission of the Court necessary for the sale of the Oil Mill ?
6. Was Saw Ewe Lyan an adopted son of Saw Gyoke Ah and Lee Byaw ?
7. If so, was he entitled to the whole estate of Ma Byaw ?
8. To what relief, if any, are the plaintiffs entitled ?

I may here point out that Lee Byaw was also known as Ma Byaw. By consent, the first five issues were argued first before the District Judge after the evidence had been recorded, and after deciding these issues the District Judge dismissed the suit and awarded costs only to the fourth defendant.

The plaintiffs then obtained leave to file this appeal *in forma pauperis* against that decision. The appellant Saw Swe Phie died pending the appeal, and the other appellant, as the sole surviving administratrix to the estate of Saw Ewe Lyan, deceased, has been permitted to continue the appeal. It is convenient to discuss the questions raised on the appeal in the same order as they were discussed in the judgment of the District Court.

I have explained above that Lee Byaw was described as being a Confucian by religion without any allegation or suggestion that she was also a Buddhist or that she professed any religion specified in section 331 of the Indian Succession Act, 1865, or in section 13 of the Burma Laws Act, 1898, both in the application of Saw Ewe Lyan for Letters of Administration to her estate and in the rival application of the three married daughters for Letters of Administration, and that the grant of Letters was made under the Indian Succession Act, 1865. I have pointed out also that the same position was taken as regards the religion of Saw Ewe Lyan and was repeated as regards Lee Byaw in the original plaint in the Administration Suit Civil Regular No. 53 of 1918, and that the first allegation that Lee Byaw was also a Buddhist was first made about five months after the execution of the conveyance, the subject-matter of this suit. If that allegation had not been made, it is clear that, under the decision in *Kyin Wet* v. *Ma Gyoke and others* (1), Saw Ewe Lyan, as an adopted son of Lee Byaw, (and after his death his legal representatives) would have had no claim to the estate of Lee Byaw or to any share therein and the present suit would necessarily fail. In the same decision it was also held that in the case of a claim by an adopted son to a share in the estate of an intestate Chinese Confucian who was also alleged to be a Buddhist the onus of proof that the deceased intestate was also a Buddhist lay on the adopted son alleging such fact. Several questions arising in this appeal must, therefore, to a great extent turn on the question whether the alleged fact that Lee Byaw was a Buddhist, though first asserted five months after the conveyance in suit, can be given retrospective force prior to the assertion of it as a fact so as to invalidate the conveyance or the grant of Letters of Administration under which the administratrices purported to have authority to execute such conveyance.

On the fourth issue the District Judge held that the fourth defendant had notice of Saw Ewe Lyan's claim as sole heir to the estate of Lee Byaw, deceased, but that the fourth defendant did not know or have any notice that Lee Byaw was a Buddhist before he purchased the Oil Mill. The second portion of that finding has been challenged by the appellant. Having regard to the decision cited above, it is obvious that notice or knowledge of the claim of Saw Ewe Lyan to be the heir, coupled with knowledge of the facts

that the deceased Lee Byaw had been merely alleged to be a Confucian and that Letters of Administration had been granted to her estate under the Indian Succession Act, would be merely notice or knowledge of a claim which as then formulated was obviously invalid in law. Consequently, the second portion of the finding must to a great extent nullify any advantage which the appellant could hope to obtain from the first portion of the finding. It is obvious that the fourth issue is framed not merely in support of the third issue as to collusion, but also in support of the fifth issue, and is based on the assumption that if the plaintiffs could show that the fourth defendant was aware that Lee Byaw was a Buddhist, the fourth defendant would be thereby fixed with knowledge or constructive notice of the fact that the Indian Succession Act, 1865, could not ordinarily apply to the estate, and, therefore, with knowledge or constructive notice of the facts forming the basis of the contention that the grant of Letters under that Act would be either invalid or, if valid at all, valid merely to the same extent as like Letters under the Probate and Administration Act, 1881, would be valid ; and such assumptions are based on the presumption that everybody knows the law and on the like principles of law underlying the maxim "*Ignorantia legis haud excusat.*" I will discuss these points and erroneous assumptions under the fifth issue.

It should be first noted, however, that any such argument is a two-edged weapon in this case, and that the converse application of the maxim would re-act against the plaintiff's case because in that respect the application filed by Saw Ewe Lyan for Letters would raise a presumption that Lee Byaw was not a Buddhist and that Saw Ewe Lyan was, therefore, justified in applying for the grant under the Indian Succession Act, 1865. This aspect was obviously realised by the plaintiffs who produced evidence to the effect that Saw Ewe Lyan's Advocate was informed from the beginning by Saw Ewe Lyan that Lee Byaw was a Buddhist and that he was subsequently informed that Saw Ewe Lyan was a Buddhist, the suggestion being that the omission to mention these facts in the applications for Letters and in the original plaint in Suit No. 53 was the mistake of the Advocate. I may say at once that I do not believe that evidence, and I am convinced that the initial mistakes, if they were mistakes, were the mistakes of the client and not of the Advocate. So far as third parties are concerned, it should not matter who made the mistake, because the third parties would have been misled in either event if they had not independent knowledge.

Taking the bearing of the above point on the fourth issue, it is obvious that an adopted son should have better knowledge of the religion of his adoptive mother than the fourth defendant who was at most only a partner and friend of the parent, and the failure of Saw Ewe Lyan to allege that his adoptive mother was a Buddhist, and the like failure of his widow after his death until five months after a clear and defiute issue had been raised as to the legal right of the adopted son, render it very probable that Buddhism was not a prominent feature of Lee Byaw's religion and that, therefore, the fourth defendant might not have had any definite knowledge that Buddhism was part of her religion

The District Judge has pointed out that no oral evidence has been produced to show that the fourth defendant was aware, prior to the 17th February 1919, that Lee Byaw had been a Buddhist. He also refers to the evidence of the first plaintiff, Saw Swe Phie, to the effect that the fourth defendant knew that Lee Byaw's religion was Buddhism, because the fourth defendant was on friendly terms and on visiting terms with her and because *all* Chinamen worshipped Buddha : and the District Judge has correctly pointed out that this assertion carries no weight at all and obviously cannot be relied on. A reference to *Kyin Wet* v. *Ma Gyoke* (1) would show that the religion of and law of succession applicable to Chinamen has been the subject of considerable litigation in the Burma Courts. The fourth defendant (who has been sued in his firm name of Sin Seng Hin and Company) is Lim Peng Nga and in cross-examination he stated that Saw Ewe Lyan was the adopted son of Lee Byaw but that he did not know that he was entitled to a share of her inheritance ; and that answer was not challenged by any further questions tending to fix him with knowledge of Lee Byaw's religion. I agree with the finding of the District Judge

that it is not established that the fourth defendant had knowledge or notice that Lee Byaw was a Buddhist prior to his purchase of the Oil Mill from the administratrices.

As regards the fifth issue, the form of the question would suggest that it does not arise if the previous issue is answered in the negative. The argument as addressed to this Bench appeared, however, to contend that the question arose on either answer of the previous issue. The issue has reference to the important distinction between the Indian Succession Act, 1865, and the Probate and Administration Act, 1881, as regards the powers of an Administrator to sell property. Under the Indian Succession Act it is not necessary to obtain the previons sauction of the Court to the sale, but under section 90 of the Probate and Administration Act, 1881, there are various restrictions on the power to sell or mortgage immoveable property, and sub-section (3) renders the previous permission of the Court obligatiory for the sale of immoveable property, whilst section 91 enacts that, in the event of a failure to obtain such previous permission, the sale shall be voidable at the instance of any one interested in the property. The conveyance now in question was executed by administratrices holding their Letters of Administration under the Indian Succession Act, 1865, and it should be a sufficient answer that no previous permission of the Court is necessary under that Act.

Reliance has, however, been placed on the provisions of section 150 of the Probate and Administration Act, 1881, which enact that on proceedings to obtain Probate of a Will or Letters of Administration to the estate of any Hindu, Mahomedan or Buddhist or person exempted under section 332 of the Indian Succession Act, 1865, shall be instituted in any Court in British India except under this Act. The answer to the contention based on this section is that the proceedings under which the administratrices obtained their grant of Letters of Administration did not purport to be in respect of the estate of any Hindu, Mahomedan or Buddhist, and consequently there was nothing to show that they came within the bar under that section. Moreover, the provisions of section 41 of the Indian Evidence Act, 1872, can also be relied on in favour of the fourth defendant as enacting that the judgment granting the Letters of Administration shall be *conclusive* proof that the legal character conferred thereby accrued at the time when such Letters came into operation. If full force is given to this provision, it must also necessarily mean that the Letters of Administration in question came into operation as Letters under the Indian Succession Act, 1865, in accordance with the judgment, etc., conferring the legal character of administratrices under that Act. I would, therefore, find in the negative on the fifth issue.

On the third issue, as to whether the sale of the Oil Mill was a collusive sale, there are three questions of fact in issue between the appellant and the fourth respondent, firstly, as to whether the whole of the Rs. 13,500 in cash was, in fact, paid to the vendors; secondly, as to whether the Rs. 16,000 was in fact due by the estate of Lee Byaw to the fourth defendant, and, thirdly, as to whether the property was sold at such an undervalue as, taken with the other circumstances of the case, would show that the sale was collusive. The District Judge has decided all these points in favour of the fourth defendant, and has pointed out that it is admitted that the Rs. 46,000 was due to the fourth defendant as mortgagee of the same property. I have come to the conclusion that the District Judge is correct in all these findings. As regards the Rs. 13,500, the payment of that amount in cash to the administratrices is deposed to by an independent and reliable witness, Khoo Sein Kho, who was admittedly present at the Registration Office; and the District Judge is correct in his view that the story of Saw Ma Hone is improbable, and that her allegation that she asked Peng Nga at the Registration Office for an acknowledgment as to his retaining Rs. 2,700 as Saw Ewe Lyan's share (which is, in fact, the only portion of the Rs. 13,500 really in dispute) is shown to be untrue on an important point by the fact that Peng Nga was not present at the Registration Office, as is shown by the evidence of Peng Nga himself and the corroborative evidence of Khoo Sein Kho and by the further corroboration from the entry on the deed that it was presented for registration by Lim Chong Chee who, according to Peng Nga and Khoo Sein Kho, was representing Peng Nga at the Registration Office.

The debt of Rs. 16,000 is proved by the evidence of Peng Nga, and it was shown by the administratrices in the inventory filed on the 11th November 1918 and also in the account filed by them on the 6th June 1919. It is also recited in the deed ; and stronger and more reliable evidence than that of Saw Ma Hone would be required to convince me that the administratrices were not then satisfied that the debt was one properly due by the estate.

As regards the value of the Mill and site, the documentary evidence on the records of the appplications for Letters of Administration is all to the effect that the site and Mill were not worth more than the Rs. 64,378 and had been so valued for Saw Ewe Lyan by an expert employed by him. The valuation of the claim in Civil Regular No. 53 of 1918 also shows the nett value of the estate at only Rs. 3,700. The plaintiff has examined two clansmen or friendly Chinamen who depose to the effect that they and others were willing to pay Rs. 1,20,000 to Rs. 1,30,000 for the Mill. The first of these witnesses has admittedly no experience of the working of such a Mill, and the second refused to disclose the names of the supposed prospective partners on the absurd ground that it was not the custom to do so. I do not attach any weight to either of these two witnesses, and I can see no reason for holding that Rs. 75, 500 was not a fair price for the Mill and site. I likewise do not attach any importance to the purchase of another Oil Mill for Rs. 1,27,000 by the fourth defendant ; that purchase was in April 1920 about 19 months after the date of the conveyance in suit, and apart from the long interval between the two transactions which would prevent that purchase from being strong evidence as to the value in 1918, it is obvious that there is no reliable expert evidence to show the difference in values between the two Mills, and no materials have been produced to enable the Court to form any comparison between the two Mills or to estimate the value of the Oil Mill in suit at the date of such purchase in April 1920.

After considering every aspect of the evidence produced in this case, I am satisfied that no grounds have been shown which would justify any conclusion that the transaction was collusive. It is obvious that the first defendant is now anxious to help the plaintiff, and if there had been any collusion, the plaintiff would have had little difficulty in setting up at last a case of grave suspicion.

It is unnecessary to discuss the second issue, because the fourth defendant has admitted that Saw Ewe Lyan was an adopted son of Lee Byaw.

As regards the first issue, it is contended by the appellant that the Suit No. 53 of 1918 was a contentious proceeding in which the right to the Oil Mill was directly and specifically in question within the provisions of section 52 of the Transfer of Property Act, 1882, or the corresponding principles of law in force in Lower Burma prior to the extension of that section to the whole of Lower Burma, and that, therefore, the transfer cannot affect the rights of the plaintiff to recover the Oil Mill as administratrix to the estate of Saw Ewe Lyan. If the exact wording of section 52 is referred to, it will be seen that the rights which are protected under that section are the rights " under any decree or order which may be made" in such pending suit. The District Judge has pointed out that though the preliminary decree in Suit No. 53 declared that Saw Ewe Lyan was the sole heir and solely entitled to the estate of Lee Byaw, the final decree did not touch the Oil Mill at all but merely gave a money-decree against the administratrices. It is difficult to see how that final decree could be enforced against the Oil Mill, even assuming that the principle of *lis pendens* could have been otherwise applicable to the case.

The question also arises whether the right to the Oil Mill was "directly and specifically in question" in Suit No. 53 of 1918. The Oil Mill was not specifically referred to in any paragraph of the original plaint in that suit, and paragraph 5 of the original plaint stated that the plaintiffs were desirous of having the estate of Lee Byaw administered by and under the directions of the Court and " *being paid the share* of Saw Ewe Lyan therein." Though they claimed that Saw Ewe Lyan was entitled to the whole estate, they valued the claim at only Rs. 3,700.

There is nothing in that plaint to show that the property now in suit was directly or specifically in question in that suit. The claim

was really one for a money-decree to be calculated on a realisation of the entire estate. Though the right to the Oil Mill may in fact have been directly in question as being the main part of the estate, it was not specifically in question.

The District Judge has quoted certain passages from an unreported decision of a Bench of the late Chief Court as showing that the principle of *lis pendens* does not apply to such a suit instituted against an administrator for the administration of the estate by or under the directions of the Court, because the right to the specific plot of land was not directly and specifically in question in such suit, and, consequently, a sale made by the administrator pending the suit could not be set aside except on the ground of fraud. The Advocate for the appellant has contended that this suit is in a different position on the ground that the Oil Mill constituted the whole of the estate or practically the whole of the estate ; but this argument overlooks the fact that the underlying principle is the same in each case and that the claim was not to the whole of the estate in either case but to the balance of the estate after all debts had been paid ; and it is the duty of the administrator to realise the estate by selling property or properties so far as may be necessary to pay the debts due out of the estate. If the estate consists of only one piece of land, it would be impossible for the administrator to perform this duty without selling that property, and for this reason it is obvious that the sale cannot be treated as invalid unless it can be shown that the institution of the administration suit operated either as a revocation or as a stay of the powers of the administrator to deal with the property constituting the estate or with the specific property now in question.

In the 11th Edition of Williams on Executors, etc., Volume 1, at page 704, it is pointed out that, "the executor's or administrator's power of disposal over the assets is not at all controlled or suspended by the mere commencement of an action on the part of a creditor of the deceased for the administration of the estate ; for the power of the personal representative to alienate and make a good title to any part of the assets continues until there has been judgment in the action." This principle of equity is recognised in the case of *Neeves* v. *Burridge* (2), where it was held that the Courts of Common Law take notice of this principle of equity, and that evidence to show a contrary practice is not admissible.

In the case of *Berry* v. *Gibbons* (3), it was sought to set aside a security created by an executor over a picture after the passing of a decree in an action for administration, and it was held that "the doctrine of *lis pendens* has no bearing on the case ; for a mere administration decree (no Receiver being appointed, nor any injunction granted to prevent the executrix from dealing with the assets), would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of these powers."

From these authorities it is clear that, where a creditor or one of the next-of-kin institutes an administration action against an executor or administrator, the mere institution of the action or obtaining of a mere administration decree does not ordinarily deprive the executor or administrator of the general power to dispose of assets, unless and until the plaintiff has obtained an order appointing a Receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in the executor or administrator. There are, of course, certain exceptions under the head of *lis pendens* which I will discuss below, but it would be necessary that the plaintiff should show that the case comes within the exception. It is obvious that an executor is under the duty to realise assets and pay the debts due by the estate, and it is only right that this duty to administer the estate should not be interfered with or stopped except by a specific order of the Court, especially as the object of such an action is often to hasten such administration and to obtain for the plaintiff that result, and in any case the rights of other creditors and persons interested in the estate should also be considered before any order is passed curtailing the powers of an executor or administrator.

(2) (1849) 14 Q. 504 at p. 507 ; 117 E. R. 196 ; 19 L. J. Q B. 68 ; 14 Jur. 177 ; 80 R. R. 292.

(3) (1873) 8 Ch. A. 747 ; 42 L. J. Ch. 89 ; 29 L. T. 88 ; 21 W. R. 754.

If the plaintiff had applied for the appointment of a Receiver in suit No. 53 of 1918 on the basis of the facts alleged in the original plaint, the application would presumbly have been rejected on the ground that these allegations did not disclose a cause of action, having regard to the provisions of the Indian Succession Act, 1865. If the happy thought had struck the plaintiffs to make the allegation as to Buddhism being part of Lee Byaw's religion prior to the execution of the conveyance, their proper course would have been to file an application to revoke the grant of Letters of Administration on the ground that the new allegation would modify the Statutary law applicable to the succession, and to obtain an *ad interim* order staying the further exercise of powers as administrators. The same result could have been attained by an application for the appoinment of a Receiver *pendente lite* on the same grounds. It was not until five months after the execution of the conveyance that the happy thought struck the plaintiffs to allege that Lee Byaw had been a Buddhist, and it was this allegatiou which gave plaintiffs their complete cause of action. A consideration of these points makes it obvious that the contention as to *lis pendens* is an attempt to obtain, merely on technical grounds, an advantage which they would not have been legally entitled to on the allegations and incomplete cause of action which they were propounding prior to the execution of the conveyance.

I have referred above to the fact that there are exceptional cases in which a creditor's action for administration may in England give rise to the right arising on a *lis pendens*. In the case of *Price* v. *Price* (4) we find it laid down that where debts are *charged upon* a testator's real estate by the Will, or as a judgment-debt under the old law, an action by a creditor for the administration of the real and personal estate is a *lis pendens* which when registered gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to any real estate under the Will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose that he is selling or mortgaging for the purpose of paying the testator's debts. In that decision it was also held that a creditor's action for general administration may be a sufficient *lis pendens* before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee *taking subsequently to the registration of the lis from a specific devisee* who is a defendant, *if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action*; a mere general claim for administration of the real and personal estate not being of itself sufficient indication of intention to make liable the specifically divised real estate. When that is the law as regards the right of a creditor as against the purchaser from a devise it is obvious that a claimant to a share or to the residue of the estate cannot be in a better position. For the above reasons, I would hold that the appellant is not entitled to relief on the ground of a *lis pendens*.

It only remains to mention some other decisions referred to in the course of the argument, but which cannot help the appellant. In the case of *Walker* v. *Flamstead* (5), the Lord Chancellor points out the rules applicable to the duty of the purchaser or mortgagee who comes in under a trust created for discharging certain and particular encumbrances, to see to the application of the purchase money to the discharge of these incumbrances, and how the same obligation does not arise where the estate is devised in trust or subject to the payment of the testators' debts in general, because it is impossible that he should know what these debts are.

The Advocate for the appellant has relied on the decision in *Scott* v. *Tyler* (6), but that decision does not help him because it is expressly pointed out in that case that "it is of great consequence that no rules should be laid down here which may impede executors in their administration, or render their disposition of the testator's effects unsafe or uncertain to the purchaser; his title is complete by sale and delivery; what becomes of the price is no concern of the purchaser; this observation applies equally to mortgages and pledges and even in the present instance where the assignable bonds were merely pledged without assignment." That decision

(1) (1887) 35 Ch. D. 207; 56 L. J. Ch. 530; 56 L. T. 812; 35 W.R. 386.

(5) (1754) 3 Keny 56, 96 E. R. 1306.
(6) (1788) 2 Bro. C. C. 431 21 E. R. 448.

then points out that fraud and covin will vitiate any transaction and turn it into a mere colour. If one concerts with an executor or legatees by obtaining the testator's effects at a nominal price or at a fraudulent under-value or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debts of the executor or in any other manner contrary to the duty of executor; such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value. It is obvious that this decision cannot help the appellant in this case.

The case of *Woodhead* v. *Fallows* (7) likewise cannot help the appellant, because this is a case in which the administratrix mortgaged certain leaseholds to an attorney for the private debt of the administratrix, and obtained the execution of the mortgage-deed by the next-of-kin by the false recital that £300 was paid as consideration. The case of *Hill* v. *Simpson* (8) likewise cannot help the appellant, because that case related to a transfer by an executor, immediately after death of the testator in order to secure a private debt of the executor as well as future advances, and the former fact should have put the transferee on enquiry. The case of *Ricketts* v. *Lewis* (9) likewise cannot help the appellant, as the mortgagee had notice that the money was raised for an *ultra vires* purpose to effect repairs of leasehold premises, which the executor was not bound to repair.

For the above reasons I would hold that the appeal must fail, and I would dismiss the appeal with costs in favour of the fourth respondent. I also direct that the appellant pay the Court-fees leviable on the appeal under O. XXXIII, r. 11, read with O. LXIV, r. 1.

Heald, J.—In Civil Miscellaneous Case No. 80 of 1917 of the District Court of Insein, Saw Ewe Lyan, whom the present appellant represents, claimed Letters of Administration under the Indian Succession Act in respect of the estate of Lee Byaw, whom he described as his mother. In his application he said that Lee Byaw was a Confucian by religion and in his affidavit he mentioned that he also was a Confucian. He gave the names of four daughters of Lee Byaw, one of them being a minor. He valued the entire estate at Rs. 3,379, entering the mill and its site which are the subject-matter of the present appeal at Rs. 64,478, but setting off a mortgage-debt of Rs. 46,000, and other debts of Rs. 13,498.

In Civil Miscellaneous Case No. 82 of 1917 of the same Court the three daughters of Lee Byaw who were of age, and who are represented by the first three respondents in this appeal, filed a counter-application for Letters and denied that Saw Ewe Lyan was Lee Byaw's son. Saw Ewe Lyan replied that he was a son by adoption. The three daughters also described Lee Byaw as a Confucian by religion. They valued the estate at Rs 2,500, assessing the mill and its site at Rs. 51,000, and setting off the mortgage-debt of Rs. 46,000.

Saw Ewe Lyan died during the pendency of the applications and Letters under the Succession Act were granted to three daughters on their giving security in Rs. 5,000. In his order granting Letters the learned Judge pointed out that the Succession Act does not recognise adoption.

In Civil Miscellaneous Case No. 1 of 1918 of the same Court the present appellant (along with another relative of Saw Ewe Lyan's since dead), claimed Letters in respect of Saw Ewe Lyan's estate, describing him as a Confucian by religion. In her application she valued Saw Ewe Lyan's interest in Lee Byaw's estate at Rs. 3,379. Her application was unopposed and Letters under the Succession Act were granted.

In Civil Regular Suit No. 53 of 1918 of the same Court, appellant as administratrix of Saw Ewe Lyan's estate sued the three administratrices of Lee Byaw's estate for a declaration that Saw Ewe Lyan was Lee Byaw's sole heir under the customary law prevailing amongst Confucians, and as such was entitled to Tee Lyaw's estate, which she valued at Rs. 3,700. She also claimed administration of that estate by the Court. Her suit was filed on the 9th of August 1918 and on the 17th of February 1919 her Advocate

(7) (1832) 1 L. J. Ex. 177; 149 E. R. 204; 2 Tyr. 460.

(8) (1802) 32 E. R. 63; 7 Ves. Jun. 152; 6 R. R. 105.

(9) (1882) 20 Ch. D. 745; 51 L. J. Ch. 837; 46 L. T. 868; 30 W. R. 609.

claimed for the first time that Lee Byaw was a Buddhist. The plaint was accordingly amended so as to allege that both Lee Byaw and Saw Ewe Lyan were "Chinese or Confucian Buddhists" and that Saw Ewe Lyan was the sole heir of Lee Byaw "under the Customary Law prevailing among Chinese or Confucian Buddhists."

Lee Byaw's three daughters denied that their mother had ever professed any religion other than Confucianism and said that succession to her estate was not governed by Chinese Customary Law.

Among the property shown in the schedules of Lee Byaw's estate filed by appellant, were the mill and its site now in dispute, the mill and site being valued at Rs. 64,478, and the mortgage-debt and other debts being entered as Rs. 46,000, and Rs. 13,498, exactly as in Lee Byaw's own application for Letters.

On the 12th September 1918 Lee Byaw's three daughters, as administratrices of her estate, sold the mill and its site by registered deed for Rs. 75,500, to Sin Seng Hin and Company, the present fourth respondents, to whom it had been mortgaged for Rs. 46,000, and leased for a rent exactly sufficient to cover interest on that amount. The price purported to include Rs. 46,000 due on the mortgage, Rs. 16,000 due by Lee Byaw's estate on other accounts, and Rs. 13,500 paid in cash at the time of the sale.

On the 22nd of March 1920 appellant obtained a preliminary decree in Suit No. 53 declaring that Saw Ewe Lyan was the sole heir of Lee Byaw and as such entitled to her whole estate, and after an enquiry as to the property of which the estate consisted, she was, on the 13th of March 1922, granted a final decree directing the administratrices to pay her Rs. 27,780 including costs.

In Civil Regular Suit No. 34 of 1921 of the same Court appellant, who at that time had not yet obtained the final decree, sued the fourth respondents for a declaration that the sale of the mill and its site to them was void and for possession of the property, subject to the admitted mortgage. She joined the first three respondents as representing the vendors.

The fourth respondents, who were not parties to Suit No. 53, denied that Saw Ewe Lyan was ever adopted by Lee Byaw or was heir to her estate, and pleaded that the sale of the property which was effected by administratrices acting under Letters granted under the Succession Act was neither voidable on the ground that it was not sanctioned by the Court nor void on the ground that it was collusive.

The Court found that the fourth respondents had notice of Saw Ewe Lyan's claim to be sole heir to Lee Byaw's estate at the time when they took the transfer of the property but that the doctrine of *lis pendens* did not apply to the sale. It found further that no leave of the Court was necessary under the Succession Act to validate the sale, and that it was not proved that the sale was collusive. It is held accordingly that appellant's suit as against the fourth respondents must fail and dismissed it with costs.

Appellant alleges in appeal that the lower Court was wrong in finding that the sale was not collusive and ought to have held that the doctrine of *lis pendens* applied to it. She seems to suggest also that the fact that in Suit No. 53 of 1918 Lee Byaw was found to be a Buddhist had the effect of converting the Letters granted to the three daughters under the Succession Act into Letters granted under the Probate and Administration Act so that the sale by the administratrices under the Succession Act becomes voidable under section 90 of the Probate and Administration Act because the leave of the Court was not obtained. This suggestion is to my mind so obviously untenable that it need not be further considered.

As for the allegation that the doctrine of *lis pen lens* applies, I am of opinion that the lower Court was right in holding that it did not apply. My learned brother Lentaigne has fully discussed the case-law on the subject, and I am content to refer to the decision of the Chief Court in the case of *A. L. A. R. Chetty* v. *Maung Thwe* (1), Civil Miscellaneous Application No. 14 of 1921, where we said that the doctrine of *lis pendens* is not ordinarily brought into operation by the institution of an administration-suit. There is a good reason for this in the facts that it is not desirable that administrators should be impeded in their administration and that any person aggrieved has a right of suit against the administrator who ordinarily in this country

gives security for the full value of the estate. I, therefore, agree that the doctrine of *lis pendens* does not apply and that the sale ot the fourth respondents should not be set aside on the ground that it was effected after the institution of Suit No. 53 of 1918.

There remains the question of the alleged inadequacy of the consideration as evidence of collusion.

I have already pointed out that Saw Ewe Lyan, whom appellant represents, himself valued the mill and its site at only Rs. 64,478, and that appellant in her former suit accepted that valuation. It seems obvious, therefore, that a sale for Rs. 75,500 does not *prima facie* indicate any inadequacy of consideration and that even if we deduct the difference between the debts admitted by appellant, namely, Rs. 13,498, which it is not suggested represent debts other than those in respect of which the fourth respondents claimed at the time of the sale, from the amount which they then claimed, and which was entered in the deed as part of the consideration, namely, Rs. 16,000, the consideration will still be in excess of any of the estimates of the value of the property which were embodied in the various applications for Letters. There is certainly no credible evidence that the property was worth more than the amount for which it was sold and I agree that there is no basis for the suggestion that the sale was fraudulent and collusive.

I agree, therefore, that the appeal should be dismissed with costs for the fourth respondents, and that appellant must be ordered to pay the Court-fees which would have been paid by her if she had not been permitted to appeal as a pauper.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 993 OF 1918.

July 23, 1923.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Fforde.

DAULAT RAM—DEFENDANT—APPELLANT

versus

BHARAT NATIONAL BANK, LTD., DELHI—PLAINTIFF—BRIJ LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908) *s.* 10, *Sch. I, Arts.* 36, 90—*Suit by Company against Director to recover losses due to his negligence—Limitation—Director of Company, position and liability of.*

In each case it is a question of fact whether a Director of a Company whose acts are brought into question, was under the particular circumstances of the case in the position of a trustee, a partner, or an agent to the Company or to the body of share holders.

A suit by a banking Company to recover from a Director the amount of losses incurred by the Company on certain loans made by the Company on the authority of the Director, in sanctioning which the latter was guilty of gross negligence is governed by Article 90 and not by Article 36 of Schedule I or section 10 of the Limitation Act.

The Bank of Multan, Limited in Liquidation v. *Hukam Chand*, 71 Ind. Cas. 809, considered.

First appeal from the decree of the Subordinate Judge, First Class, Hoshiarpur, dated the 17th December 1917.

Mr. *Badri Das*, for the Appellant.

Mr. *Gokal Chand*, for the Respondents.

JUDGMENT.—The only question which has been fought in this appeal is as to the liability of Daulat Ram for certain losses incurred by the Hoshiarpur Branch of the Bharat National Bank, Limited, upon loans to defendants Nos. 1 to 10.

An objection has been raised by Mr. Badri Das, for the defendant Daulat Ram, that the suit is barred by time under the provisions of Article 36 of Schedule I of the Indian Limitation Act which provides a two years' period of limitation for "compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially

provided for;" the time starting from the date when the malfeasance, misfeasance or nonfeasance takes place. In the present case the last item advanced by the Bank, for which Daulat Ram is alleged to be liable in tort, was on the 17th July 1911. The suit was brought on the 28th August 1913, and, accordingly, if Article 36 governs this case the suit was late and should be dismissed. In support of his contention Mr. Badri Das relies on *The Bank of Multan, Limited in Liquidation* v. *Hukam Chand* (1), where it was held that "an application under section 235 of the Companies Act of 1913 to recover compensation from an *ex*-Director of a Company in respect of an alleged act of misfeasance or breach of trust is, by virtue of clause (3) of the section, governed by Article 36 of Schedule I to the Limitation Act, and is barred unless made within two years of the act complained of."

It is true that an application under this section is in the same position as a suit for the purposes of the Limitation Act, and accordingly the decision in the case referred to does give support to Mr. Badri Das's contention. But it has to be borne in mind that the only question argued in that case on the matter of limitation was whether Article 36 or section 10 applied. As the application in question was made in 1920 and the misfeasance complained of was committed in 1910, the only provision of the Limitation Act which could save the application from being barred is contained in section 10 which enacts that no suit against express trustees and their representatives shall be barred by any length of time. As Directors of a Company are not express trustees —the assets of the Company not being vested in them—the Court held that section 10 did not apply. Had the present question been presented to us as it was presented to the Court in the *Bank of Multan case*, (1) we would have come to the same conclusion, namely, that this suit was barred by Article 36.

Dr. Narang, however, in his very able and forcible argument has contended that the matter of limitation is governed not by Article 36 or section 10 but by Article 90 of the First Schedule of the Act which provides that in "other suits," that is to say, suits other than those referred to in Articles 88 and 89 "by principals against agents for neglect or misconduct" the period of limitation is three years from the date when the neglect or misconduct becomes known to the plaintiff.

Article 358 of Volume V of Halsbury's Laws of England states that "the true position of Directors is that of agents for the Company," and in Palmer's Company Law (9th edition) at page 179 the position is stated as follows "Directors, whether they are called 'directors or a 'council' or a 'managing committee', are in the eye of the law agents of the company, for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."

It is true that there are many *dicta* of English Judges to the effect that Directors are not mere agents, but may in certain cases be regarded as Trustees, as, for instance, of "assests which have come into their hands, or which are under their control, but they are not trustees of a debt due to the Company." [Sir George Jessel, in *In re Forest of Dean Coal Mining Company* (2), quoted by Ray, L. J., in *In re Land Allotment Company* (3).

In *Automatic Self-cleansing Filter Syndicate Co., Ltd.* v. *Cunninghame* (4), Cozens Hardy, L. J., observed: "I do not think it true to say that the directors are agents. I think it is more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the share holders." In the same case, however, at page 42, Collins, M. R., says, "no doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents."

(1) 71 Ind. Cas. 899.

(2) (1878) 10 Ch. D. 450, at p. 453, 40 L. T. 287; 27 W. R. 594.

(3) (1914) 1 Ch. 616; at pp. 617, 638, 63 L. J. Ch. 201; 70 L. T. 286, 42 W. R. 404.

(4) (1906) 2 Ch. 34, at p. 45, 75 L. J. Ch. 437; 94 L. T. 651; 13 Manson 156; 22 T. L. R. 378.

Jhelum District (Talagang was a part of the Jhelam District at that time).

Our attention has been invited to some judgments of the Punjab Chief Court in which it has been pointed out that the *Riwaj-i-am* compiled by Mr. Talbot is not a satisfactory document; but no adverse criticism has been, or can be, levelled against the entry relating to the testamentary power of the *Awans*.

We accordingly concur in the conclusion of Mr. Justice Broadway and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

MISCELLANEOUS CIVIL APPLICATION
NO. 64 OF 1922.

June 18, 1923.

Present :—Mr. Justice May Oung.

MAUNG HMEAN AND OTHERS—

PLAINTIFFS—APPELLANTS
versus

MA SHIN—DEFENDANT—RESPONDENT.

Letters Patent (Rangoon), cl. 13—Leave to appeal—Delay in making application—Justice of case.

Although no period of limitation is prescribed for making an application for leave to appeal under clause 13 of the Letters Patent (Ran.), yet where the judgment sought to be appealed against does substantial justice between the parties and is sought to be attacked on a technical point, the petitioners' delay in making the application for grant of leave may fairly be taken into consideration as against him.

Appeal, under section 13 of the Letters Patent, against the judgment of Mr. Justice May Oung, dated the 15th February 1923.

Mr. *Mya Bu*, for the Appellants.

ORDER.—Ma Sun Ma had two husbands, Pauk Kyi and Pya Young. Petitioners are her children by Pauk Kyi and respondent's husband Po Chit was her son by Pyu Young.

Petitioners sued respondent for possession of certain properties on the ground that they were Ma Sun Ma's sole heirs, Po Chit having already received his share.

I found that Ma Sun Ma had purported to transfer the lands in suit to Po Chit as his share of the inheritance, but that the transfer was ineffective for want of a registered deed. I held, however, that because petitioners were present at the transfer and signed the report for mutation of names in token of their knowledge of and consent to the transfer, they could not be allowed to impugn it.

My judgment was delivered on the 15th of February 1923 and on the 11th of June 1923, that is, nearly four months after the date of the judgment, petitioners apply for a declaration under clause 13 of the Letters Patent that the case is a fit one for appeal.

Their case is that I was mistaken in holding that there was any estoppel against them.

It may be that I was mistaken in applying the law of estoppel, but I am satisfied that my order did substantial justice between the parties. There can be no doubt that petitioners agreed to the transfer of the lands to Po Chit, and if respondent had sued them as heirs and legal representatives of Ma Sun Ma for a registered conveyance of the lands I do not see how they could have met his claim, respondent's defence that Po Chit was put into possession by Ma Sun Ma, under whom petitioners claim under an agreement to transfer the lands to him outright, is a good defence to petitioners' suit so long as respondent has a right to specific performance of that agreement, and if she had no right to the lands as her share of the inheritance, then her claim as representing one of the heirs of Ma Sun Ma would revive, since she would have been deprived of what she received as her share and petitioners' remedy would be by way of a suit for partition of the estate and not for possession of these particular lands.

It is true that no period of limitation has been prescribed for appeals under the particular provisions of clause 13 of the Letters Patent which are invoked in this case, but in my opinion the petitioners' delay in making this application can fairly be considered against them. It seems to be perfectly clear that

they are attempting to take advantage of a technical defect in the transfer to which they themselves agreed and their case has no real merits.

I, therefore, see no reason to declare that the case is a fit one for the special appeal allowed by clause 13 of the Letters Patent and I dismiss the application.

N. H. *Application dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 309 OF 1923.

July 10, 1923.

Present:—Mr. Justice Rankin and
Mr. Justice Ghose.

BINDUBASHINI ROY CHOWDHURY—
APPLICANT—APPELLANT
versus
SECRETARY OF STATE FOR INDIA—
OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—"Other sufficient reason," meaning of—Adjournment, when to be granted—Secretary of State, position of—Government Pleader, whether entitled to special consideration.

The words "other sufficient reason" in O. XLVII, r. 1 of the Civil Procedure Code, must be construed in the light of the previous words and on the principle of *ejusdem generis*. The reason must be one having sufficiency of a kind analogous to the two cases specified in the rule, that is to say, analogous to executable failure to bring to the notice of the Court new and important matter or analogous to error on the face of the record. [p. 746, col. 2.]

Chajju Ram v. *Neki*, 72 Ind. Cas. 566; 49 I. A. 144; 26 C. W. N. 697; 3 L. 127; 43 M. L. J. 322; 24 Bom. L. R. 1238; 30 M. L. T. 295; 41 P. L. R. 1924; 8 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 87; 17 P. W. R. 1922; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), followed.

A Court is not entitled to re-open a matter by granting a review in every case where there is some little excuse for a manifest negligence [p. 747, col. 1.]

Courts have the very widest discretion as to granting adjournments; but it should always be based upon something reasonable. It is not the duty of the Courts to maintain, still less to invent, any special practice as regards the grounds upon which adjournments of cases are granted. Parties whose cases are fixed for hearing on a particular date have no right to assume that they can get an adjournment without any reason being given provided that somebody else undertakes to keep the Court busy. [p. 747, cols. 1 & 2.]

Obiter: The Secretary of State for India in Council should be treated exactly like everybody else. [p. 747, col. 1.]

It often falls to the Court in dealing with applications by poor people, negligent people or rather stupid people, to refuse to meet their particular necessities and to exact a particular reasonable standard of diligence, exacting it from everybody alike; and the safer and the better way is to treat the learned Vakil who has the honour to appear for Government with the same stringency as, but with no greater stringency than, any of his learned friends appearing for other litigants. [p. 747, col. 2.]

Civil Rule issued in Review Case No. 1 of 1923, arising out of Miscellaneous Case No. 2 of 1922, of the Court of the Additional District Judge, Faridpur.

Babu *Rupendra Coomar Mitter* (with him Babu *Shyama Prosad Mukherjee*), for the Appellant.

Babu *Surendra Nath Guha*, for the Respondent.

JUDGMENT.

Rankin, J.—This is an application in revision whereby an applicant for probate complains of an order made by the Court below granting a review in a proceeding under section 19 II of the Court-Fees Act being a proceeding wherein the Collector moves the Court to hold an enquiry into the true value of the the estate of testator. Broadly speaking, the facts are that the case was ordered to come on for hearing on the 6th January 1923. On that date neither party was ready. Both parties appear to have applied for an adjournment, and the learned Judge at first was minded to grant them an adjournment, till the 21st January. Shortly afterwards, two witnesses for the Collector put in appearance and the order granting the adjournment was vacated and the case commenced notwithstanding the objections of the pleader for the present petitioner. The two witnesses on behalf of the Collector were heard and they

did not take the case for the Collector any further. The Government Pleader wanted an adjournment but it was not granted. It would appear that the petitioner also at one time wanted an adjournment : but the learned Judge insisted on proceeding. A third witness on behalf of the Collector after some delay was called. He again took the case no further. Thereupon, the learned Judge reserved his judgment and, on the 9th January, he recorded his order in favour of the applicant for probate that the value of the property was as stated in the affidavit filed by her. Thereupon, on the 16th January 1923, a petition for review was lodged before the learned Judge who tried the case by the Collector. That petition appears to have contained some seven grounds. In my judgment, the learned Judge's comments upon these grounds as being insufficient for the granting of a review are well justified. However, having some doubt about the matter, the learned Judge directed notice to issue, upon the Collector depositing Rs. 100 as security for the present petitioner's costs, and the matter came on before another learned Judge who recorded his order on the 24th February 1923. Against that order the present application in revision is made and it is said that the learned Judge misdirected himself as to his own power and failed on his findings of fact to arrive at a position in which he was entitled to order a review.

Now on the question of jurisdiction, the judgment of the 24th February 1923 appears to me to amount to this : On the evidence of the Government Pleader who deposed in the case, the Judge was satisfied that the Government Pleader was under the impression that on the 6th January the case would not be taken up. He appears to think that this impression was not altogether without some element of reason ; but that the impression was a justifiable impression—that it was reasonable for the Government Pleader or his client to take the risk of acting upon it—is a fact which is not found by the learned Judge and, to my mind, it is a finding which would be very difficult indeed to come to upon these materials. In these circumstances, the learned Judge thought that it was a case for the exercise of his powers to grant a review not under the two express provisions of r. 1 of O. XLVII, Civil Procedure Code, namely, the provisions about discovery of new and important matter or evidence and the provision about mistake or error on the face of the record, but under the words " for any other sufficient reason." The question of law is whether the facts as found constitute, within the meaning of the rule, " other sufficient reason " remembering that the Privy Council in the case of *Chajju Ram* v. *Neki* (1) have laid it down that those words are to be construed in the light of the previous words and on the principle of *ejusdem generis*. The case is perhaps near the border line. The effect of *Chhajuram's* case (1), in my judgment, is that, under the words " other sufficient reason," the reason must be one having sufficiency of a kind analogous to the two specified cases, that is to say, analogous to excusable failure to bring to the notice of the Court new and important matter or analogous to error on the face of the record. Now, the case of a person who has discovered a new and important matter or who has discovered evidence which could not be produced by him at the time when the decree was passed is dealt with very strictly by rule 4. There is to be *strict proof* of the discovery of the new matter or evidence, which the applicant alleges was not within his knowledge or could not be adduced by him, when the decree or order was passed or made. On the whole, I am of opinion that the findings of fact made by the learned Judge did not entitle him to exercise the power granting a review. In this case, there is not merely an element of negligence, that is to say, it is not merely that by greater diligence the person could have had better knowledge of his case or a better chance of producing evidence which he knew not ; but the present case seems to me on these findings to be a case where, for no adequate reason, the party had not been ready on the date solemnly fixed for the purpose and had no real excuse for not being ready. When the rule makes the jurisdiction dependent upon a reason being sufficient, it is very undesirable that orders of the learned Judges who have applied their minds to the rule properly should be interfered with in revision so long as there is a case for thinking that the

(1) 72 Ind. Cas. 566 ; 49 I. A. 144 ; 26 C. W. N. 697; 3 L. 127 ; 43 M. L. J. 332 ; 24 Bom. P. R. 1238 ; 30 M. L. T. 295 ; 41 P. L. R. 1922 ; 3 P. L. T. 435 ; (1922) A. I. R. (P. C.) 112 ; 16 L. W. 37 ; 17 P. W. R. 1922 ; 4 U. P. L. R. (P. C.) 99 ; 36 C. L. J. 459 (P. C.).

reason was sufficient in a sense anologous to the cases specially dealt with. I cannot help, however, in this case feeling that the logic of the order made by the Court below is this : that in almost every case where there was some little excuse for a manifest negligence, the Court would be entitled to re-open the matter by granting a review. I think this case, if we refuse to interfere, would be *pessimi exempli* and would make a large gap in the safeguard intended by O. XLVII of the Code. For that reason and because it seems to me that the ground here was very thin and was not really analogous in point of excuse to the cases mentioned in r. 1 itself, I think we are in a position to give effect in revision to our opinion which is that this order which is complained of is bad in form and in substance.

I would point out, in view of what has been said by the learned Judge who tried the case, that I do not understand it to be the duty of the learned Judges in the Courts below to maintain, still less to invent, any special practice as regards the grounds upon which adjournments of cases are given. I cannot help thinking that some of the present troubles have arisen by reason of the notion that parties whose cases are fixed have a sort of right to get adjournments without any reason being given, provided that somebody else undertakes to keep the Court busy. If there is any such practice in any Court, so far as I know, there is no authority for it. A learned Judge has the very widest discretion as to granting adjournments, but it should always be based upon something reasonable.

In the course of the case in the Court below, a reason was given as being a reason why discretion should be exercised in favour of granting a review to the effet that the matter was one affecting revenue and that, therefore, any negligence on the part of the Government Pleader should not be allowed to damage the public. When a matter is one in which a Judge is called upon to exercise a discretion, it is generally impossible to say *a priori* that a particular thing can never properly be considered and should always be excluded. As a matter of my own individual opinion, I desire to say that I should treat the Secretary of State for India in Council exactly like anybody else. It often falls to the Court in dealing with applications by poor people, negligent people or rather stupid people, to refuse to meet their particular necessities and to exact a particular reasonable standard of diligence, exacting it from everybody alike ; and, speaking for myself, I think the safer and the better way is to treat the learned Vakil who has the honour to appear for Government with the same stringency as, but with no greater stringency than, any of his learned friends appearing for other litigants. These observations, however, are *obiter*. I think that in this case it is not open to us to refuse to exercise our discretion. In my opinion, we should set aside the order of the Court below and direct that the original decision of the learned Judge be restored. The costs of this application and the costs incurred in the application for roview are to be paid by the opposite party to the present petitioner. We assess the hearing fee in this Court at three gold *mohurs*.

Ghose, J. —I agree.

Z. K. *Rule made absolute.*

RANGOON HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 46 OF 1923.

July 7, 1923.

Present: —Mr. Justice Heald and Mr. Justice Lentaigne

MAUNG CHIT HLAING —APPELLANT
versus
FIRM N. A. R. M. CHETTY —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 72, 84, 86—Auction sale—Prohibition to bid—Failure to make deposit or pay balance within time—Irregularity—Prejudice—Extention of time.

Order XXI, r. 72 of the Civil Procedure Code has no application to the holders of decrees other than those in execution of which the property is sold.

Delay in making the deposit under O XXI, r 84 of the Civil Procedure Code is not more than a material irregularity which does not vitiate the sale unless it has caused substantial injury.

MAUNG CHIT HLAING *v.* FIRM N. A. R. M. CHETTY

Delay in paying the balance of purchase money under O. XXI, r. 86 of the Civil Procedure Code does not necessarily invalidate the sale and the Court has a discretion to extend time.

Mr. *Ko Ko*, for the Appellant.

JUDGMENT.—Respondent applied for the sale of certain lands together with two mills and various buildings standing thereon in execution of a mortgage-decree for sale against appellant, the debt on respondent's mortgage being about Rs. 80,000. There were second and third mortgages over the property and it was alleged that an engine and boiler in one of the mills was separately subject to still another mortgage for Rs. 20,000.

Notice was issued to appellant for settlement of the terms of the proclamation for sale, but the process-server's affidavit showed that appellant avoided personal service and that the notice was affixed to his house, and the Court proceeded to settle the terms of proclamation in his absence.

Appellant then raised numerous objections to the terms of the proclamation so settled and on his application the proclamation was amended so as to show the amount of municipal taxes payable on the property, an assignment of the second mortgage and the consent of the assignees to the sale of the property free of mortgage, a claim made by appellant on behalf of his children to an interest in the property, and a claim that the engine and boiler were subject to a separate mortgage for Rs. 20,000.

Appellant was not satisfied with those amendments and filed an application for revision in this Court. He also applied to the District Court to have the fact that he had filed an application for revision notified to bidders at time of the sale.

It was so notified and the properties were sold, free of the second and third mortgages, for Rs. 1,35,000.

The sale took place on the 3rd of May last and on the 8th appellant applied for it to be set aside on the grounds,—

(1) that the property which was worth Rs. 2,00,000 had been sold for Rs. 1,35,000;

(2) that the deposit of 25 per cent. of the price payable under O. XXI, r. 84 by the purchaser immmediately after his being declared purchaser was not so paid, and

(3) that the purchasers and the bidders were holders of other decrees against him.

On the 19th of May appellant filed a petition stating that he was contemplating redeeming the property under the provisions of O. XXI, r. 89 but did not make any application or deposit under that section.

On the 22nd of May appellant filed still another application for the sale to be set aside on the same grounds as before with an additional ground that the Court had no power to extend the time for the deposit of the full amount of the purchase money under O. XXI, r. 85.

On the application of the 8th of May the Court recorded that it saw no reason to set aside the sale.

On the application of the 19th of May the Court said that orders were unnecessary until appellant filed his application under O. XXI, r. 89 and made the necessary deposit.

On the application of the 22nd of May the Court said: "The judgment-debtor's own acts have caused delay and I see no necessity to take action on this petition."

Appellant now appeals apparently against the orders passed on his petitions of the 8th and 22nd of May for the sale to be set aside.

He suggests that the District Court had no power to extend the time for payment of either the deposit under O. XXI, r. 84 or the balance of the price under O. XXI, r. 85 and that the sale was invalid because the amounts were not paid within the time fixed by law, and he also alleges that because the purchasers held decrees obtained against him in other suits they were not entitled to bid at the auction without the permission of the Court. He urges further that the reference in the proclamation of sale to his claims on behalf of his children and the notification at the time of the sale of the fact that he had filed an applica-

tion for revision, adversely affected the price which the property fetched.

As for the last of these grounds both the acts to which he now objects were done on his own application, and he has obviously no ground for complaint.

The wording of O. XXI, r. 72 shows that that rule has no application to the holders of decrees other than those in execution of which the property is sold, so there is clearly no basis for this second objection.

As for the other objection, the High Courts of Calcutta, Madras and Allahabad *Bhim Singh* v. *Sarwan Singh* (1), *Venkata* v. *Sama* (2), *Ahmad Bakhsh* v. *Lalta Prasad* (3), have all held that delay in making the deposit under O. XXI, r. 84 is not more than a material irregularity which does not vitiate the sale unless it has caused substantial injury, and I agree with those rulings. The ground on which the Court granted time for payment of the deposit was that at the time of the sale it was notified that appellant had applied to this Court in revision for cancellation of the order for sale, and that if the order for sale should be set aside by this Court the payment of the deposit would become unnecessary. That was, in my opinion, a reasonable ground under the circumstances and I fail to see how the grant of time for payment of the deposit could cause substantial injury to appellant. The deposit, I may note, was actually paid into Court on the 10th of May, apparently before this Court's order dismissing appellant's application for revision was passed.

The provisions of O. XXI, r. 86 show that delay in paying the balance of the purchase-money does not necessarily invalidate the sale, the Court having a discretion in the matter. The extension of time for one month from the 18th of May, that is, from date on which the balance of the purchase-money was payable under O. XXI, r. 86, was granted by the Court as the result of an express agreement made between the auction-purchaser on the one side and the decree-holder and the assignees of the second mortgage on the other side that interest should not be charged against appellant on either the decree-holder's mortgage or on the second mortgage after that date, so that the appellant should not be prejudiced ; and as the sale proceeds were apparently not sufficient to pay off those two mortgages it is difficult to see how any loss could be caused to appellant by the grant of further time.

I, therefore, see no reason to believe either that appellant sustained substantial injury by reason of the delay in making the deposit under O. XXI, r. 84, or that the case was one in which the Court ought to have ordered a forfeiture of that deposit and a re-sale of the property under O. XXI, r. 86.

I would, therefore, dismiss the appeal under the provisions of O. XLI, r. 11.

N. H. *Appeal dismissed.*

(1) 16 C. 33 ; 8 Ind. Dec. (N. S.) 22.
(2) 14 M. 227 ; 5 Ind. Dec. (N. S.) 159.
(3) 28 A. 238 ; A. W. N. (1905) 263.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 164 OF 1922.

January 7, 1924.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BAI JAYAGAVRI—DEFENDANT —APPELLANT
versus
RAMANLAL CHHOTALAL—PLAINTIFF —RESPONDENT.

Bombay Pleaders Act (XVII of 1920) s. 18 (1)—Application for execution after commencement of Act—Pleader's fees, calculation of.

In an application for execution instituted after the coming into force of the Bombay Pleaders Act, pleaders' fees must be calculated at the rates prescribed in the third Schedule to the Act.

Appeal from the decision of the First Class Subordinate Judge, Broach, in *Darkhast* No. 37 of 1922.

Mr. *R. J. Thakor*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.—Suit No. 211 of 1919, filed in the Court of the First Class Subordinate Judge of Broach, was dismissed with costs. The plaintiffs presented in November 1920

FOUCAR AND CO. *v.* M. C. T. MUDALIAR

Appeal No. 419 of 1920 in the Bombay High Court. The appeal was dismissed with costs. The respondent then presented a *Darkhast* in the First Class Subordinate Judge's Court to recover the costs awarded to the respondents in Appeal No. 419 of 1920. The costs, it appears, were paid but the *Darkhastdar* asked for the costs of the *Darkhast* on the ground that he was entitled to such costs under Bombay Act XVII of 1920. By section 18 (1) of the Act, where costs are awarded to a party in any proceeding, the amount of the pleader's fee to be taxed in the bill of costs as recoverable by such party, if represented by a pleader, from his adversary, shall be computed in accordance with the rules in Schedule III, unless such fee has been settled under the provisions of section 17 for a lesser amount in which case no more than such lesser amount shall be recoverable.

Under Schedule III, clause IV, in execution proceedings the pleader's fee to be allowed shall be one-fourth of the fee calculated at the rates specified in rule 1 on the amount or value of the relief or money claimed in the application to execute the decree.

The claim of the respondents to have the costs of the *Darkhast* taxed and awarded in this fashion was disallowed by the Subordinate Judge on the ground, we take it, that when the appeal was filed the question of the pleader's fee was governed by Regulation II of 1827, and as section 52 of the Regulation contemplated that in execution proceedings no fresh pleader's fee could be awarded since the pleader was retained not only till the disposal of the suit or appeal but until the decree was fulfilled, therefore, under section 33 of Bombay Act XVII of 1920 this *Darkhast* was a proceeding pending in the Court at the commencement of the Act, and, as such pending proceeding, it should be governed until its final disposal by the Court in which it was pending in respect of such matters, by the laws and rules in force immediately before the commencement of the Act. What was pending at the commencement of the Act was Appeal No. 419 of 1920, and it is even doubtful whether the respondent seeking execution for the costs of the appeal would not have been allowed separate pleader's fees under the Regulation. However, it is not necessary to consider that, because we think that this *Darkhast* was a proceeding instituted after the commencement of the Act, and it cannot be treated as a proceeding pending in the Court of the Subordinate Judge at the commencement of the Act. It would follow then that, under section 18 (1) of Bombay Act XVII of 1920, the respondent would be entitled to the fee prescribed under the third Schedule. Therefore, the appeal must be allowed. We now make the order which should have been made by the Subordinate Judge that the appellants in Appeal No. 419 of 1920 should pay the costs of the *Darkhast*, and they must also pay the costs of this appeal.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 42 OF 1923.

December 14, 1923.

Present:—Mr. Justice Heald and Mr. Justice May Oung.

FIRM FOUCAR AND CO.—DEFENDANT—APPELLANT
versus
M. C. T. MUDALIAR—PLAINTIFF—RESPONDENT.

Principal and broker—Sale of land—Transaction not completed owing to default of purchaser—Brokerage, whether payable.

It is the duty of a broker to introduce a person willing and able to complete the purchase.

Ordinarily, a broker is entitled to a percentage which he succeeds in realising for his principal, but, where the transaction cannot be completed because the money is not forthcoming and consequently the principal realises nothing, the broker cannot be said to have earned his brokerage.

Defendant commissioned the plaintiff as a broker to obtain a purchaser for a piece of land, agreeing to pay him brokerage at a certain rate on the price on completion. A would-be purchaser was obtained by the broker and an agreement in writing was entered into between the defendant and the purchaser, but

the latter was unable to complete the purchase owing to lack of funds :

Held, that the plaintiff was not entitled to any brokerage.

Pusingham v. *King*, 14 T. L. R. 302, distinguished.

Appeal against the decree of this Court on the Original Side in Civil Regular No. 246 of 1922.

Mr. *McDonnell*, for the Appellant.

Mr. *Cowasjee*, for the Respondent.

JUDGMENT.

May Oung, J.—The admitted facts in this case were as follows:—

On the 20th September 1921, the defendant-firm commissioned the plaintiff as a broker to obtain a purchaser for a piece of land, agreeing to pay him "a brokerage of 2½ per cent. on the price on completion" (Exhibit. A). On the following day, a would-be purchaser was obtained and an agreement in writing (Exhibit B) was entered into between the firm and the purchaser, whereby (1) the price of land measuring about 3½ to 4 acres (but in any event not less than 3 acres) was fixed at Rs. 1,75,000 per acre; (2) a sum of Rs. 25,000 was to be paid as earnest-money; (3) the balance was promised to be paid on or before the 21st January 1922, earnest money to be forfeited in default; (4) a transfer was to be executed on payment of the purchase price in full, and (5) the firm guaranteed a good title on completion of purchase. These terms were set out in the receipt (Exhibit B). The earnest-money was paid, but the transaction was never completed. The main, if not the only, reason for the falling through of the sale was, in my view, the purchaser's inability to pay the price agreed upon, a sum well over five lakhs. The plaintiff said:—

"At Mulla's (the purchaser's) request, I suggested part payment to Nuding (the firm's manager). I know Mulla well. As the amount was large, Mulla would have been pleased to pay by instalments.

"I asked Mulla why he did not complete his contract. He said there was time before him to do so. I asked him about 3 or 4 times. His last reply was that he was making arrangements direct with Nuding. This was about the end of December. Mulla told me later that he was arranging for part payments, to which Nuding had consented. Mulla could not pay the full amount and said he would make part-payments."

There was also, apparently, some dispute between the parties concerning the exact area of the land, which had been left indefinite in Exhibit B. Plaintiff's witness, Ady, was sent by Mulla to try and bring about a settlement. Ady saw Nuding and obtained from the latter two slips of paper (Exhibits G and H), both dated the 24th January 1922, whereon are noted certain terms as to the land and as to payments which were to be deferred; the transfer was to be made at once, but the land was to remain as collateral security.

Considering that Mulla had, as early as December, told the plaintiff that he was arranging for part payments it is, in my view, only reasonable to suppose that the matter of the payment of the purchase price was what really caused the hitch and that the so-called dispute as to the area of the land was a subsidiary matter which, in any case, had to be decided because of the indefiniteness in this respect of Exhibit B.

The terms contained in Nuding's notes were, after some haggling as to the rate of interest on the sums deferred, agreed to, but no formal agreement was executed.

Ady deposed :—

"Mulla agreed to the conditions on the slip I gave to him, except the rate of interest. He said he would agree to 8 per cent. I telephoned this to Nuding and he authorized me to alter the 9 per cent. to 8 per cent. and to initial it which I did. This arrangement was concluded some time in the forenoon of the day the slips were made. On the same day Nuding phoned to say that he could not carry out this arrangement. This was about 3 or 4 hours after the arrangements had been concluded. Nuding told me that he could not accept the mortgage and that his lawyers had instructed him that collatral security was a mortgage. This was his reason for backing out."

Both Exhibits G and H (supported by Ady's evidence) show that promissory-notes and an "agreement" were to have been executed, but, owing, apparently, to Nuding's

inability to obtain his Director's consent to the new transaction, nothing was actually done and the negotiations fell through.

The real point in the case, however, seems to be that on the 21st January 1922, the date originally fixed for completion, Mulla was unable to pay, and, as appears from what followed, had no prospect of being able to pay within a reasonable time ; Exhibit H shows that he wanted six months to pay half the price and one year to pay the remaining half.

Herein the defendant firm was in no way at fault. If Mulla had been in a position to pay as agreed upon they would have been under an obligation to convey the land. Mulla was not only unable to pay on the due date, but, three days later, sent Ady to Nuding with what was tantamount to a request for postponement of payment for one year.

So far as the plaintiff was concerned, he had obtained for the firm a purchaser who could not pay and had no expectation of being able to pay within a reasonable time. The subsequent negotiations through Ady clearly showed that the purchase price would not be forthcoming for many months and the plaintiff had not adduced any evidence to shew that Mulla could have fulfilled his obligation. His failure to cite Mulla as his witness on this point must, I think, be weighed against him.

Ordinarily, a broker is entitled to a percentage on the money which he succeeds in realising for principal but, where the transaction cannot be completed because the money is not forthcoming and consequently the principal realises nothing, it is difficult to see how the broker has earned his brokerage. If, in the present case, the defendant firm had, *before the 21st January* 1922 extended the time for completion and thus taken the negotiations out of the broker's hands, and those subsequently fell through, it might be held, on the authority of *Passingham* v *King* (1), that the full brokerage is nevertheless payable. But the point does not arise, since there is nothing to show that the defendant-firm did anything in the matter until Ady went to see Nuding on the 24th January. The plaintiff suggests vaguely that Nuding began to make arrangements with Ady "about a month or 10 or 15 days' before the 21st January, but a careful perusal of Ady's evidence shows that the entire negotiations occupied only one day, the 24th January.

It is argued that, as time was not the essence of the contract for sale, the defendant-firm was bound to wait for a reasonable time and to serve notice on Mulla calling upon him to complete within a stated period, and, as the firm did not do so but, instead, entered into fresh negotiations with him, that the plaintiff is not to blame and that he had done everything he had contracted to do. But all that the plaintiff had done was to obtain a purchaser who could not pay on the agreed date and who, thereafter, sent his own broker to plead for concessions. Had those concessions been refused, the plaintiff would have been in exactly the same position ; in my judgment, the fact that the firm was willing at first to grant the concessions, but a few hours later recanted, because Nuding had no power to accept a mortgage, makes no difference so far as the work done for the firm by the plaintiff is concerned. The non-completion of the sale was not the result of the firm's act in formulating new terms and then withdrawing them but was directly due to Mulla's inability to pay. It is true that if defendants had followed up the new arrangement, they might have, by holding the land as security, ultimately realised the sale price. If Mulla had on his part fulfilled his obligation, half the balance would have been recovered in July 1922, and the remaining half in January 1923, with interest ; if, on the other hand, Mulla did not pay, the firm could have sued for a mortgage decree and realised their money by sale of the land in execution. But such recovery or realisation would not have been the outcome of plaintiff's services to the firm. He had been asked to find a purchaser who would pay ready money ; the arrangement for which he was responsible was that the purchaser should pay on or before a certain date, and there was to be neither delay nor trouble to the firm. He now asks that, although he failed to get the purchaser to pay on the date fixed, he should be given the benefit of a new transaction whereby the firm would certainly have had to wait for a long time to realise their money and would possibly have had to go to the trouble of suing the purchaser. In my judgment, he has no claim on this score, and I am fortified

(1) (1898) 14 T. L. R. 302.

P. N. Das,
Advocate High Court
Jammu & Kashmir

in my view by Lord Justice Vaughan Williams' remark in the case above cited to the effect that it is the duty of a broker to introduce a person willing *and able* to complete the purchase.

It is further argued that the defendant firm should have taken steps against Mulla to obtain specific performance of the contract. The answer to this is that there is no law which compels a vendor to insist on specific performance. There usually is, and there was in the present case, an alternative remedy, *viz.*, forfeiture of the earnest-money. The question whether the firm could or could not legally claim a forfeiture does not now arise; but it is clear that the defendants purported to exercise the right given in Exhibit B.

In the result, I would hold that the plaintiff was not entitled to the brokerage claimed by him. I have considered the question whether we can, in these proceedings, award the appellant a decree for the sum which respondents were willing to pay, namely, $2\frac{1}{2}$ per cent on the amount of the earnest-money, but there being yet no decision of the question whether or not that earnest money was rightly forfeited, I would hold that we cannot and should not do so.

I would reverse the decree passed on the Original Side and order that the suit be dismissed with costs. The respondent will also pay the appellant's costs in this appeal.

Heald, J.—There can be no doubt that in this case the prospective purchaser, Mulla, whom respondent introduced to appellants, was neither willing nor able to purchase the property on terms which were substantially those which appellants employed respondent to obtain for them. If appellants had actually accepted the terms offered by Mulla and a sale had resulted, respondent would probably have been entitled to receive brokerage although the terms of the actual sale might be different from which he was employed to obtain. But appellants were not bound to accept any terms other than those which they offered through respondent, and if they refused to accept the less favourable terms offered by Mulla, so that no sale resulted, I do not see how respondent could be entitled to the brokerge which was payable only for an actual sale. The case would of course have been different if Mulla had been willing to buy on appellants' terms and appellants had been unable to carry out the sale, or if, after employing respondent, appellants had taken the negotiations out of his hands before the agreement which was actually made between them and Mulla had been broken. I do not think that respondent can as yet claim brokerage in respect of the Rs. 25,000 which appellants received and claim to retain as earnest-money forfeited under the agreement which, as they allege, Mulla broke. Mulla is said to have filed a suit against them for the recovery of that amount and if that suit should succeed respondents' agency will have been entirely infructuous. If, however, appellants should be hold entitled to retain the earnest-money, they may possibly be regarded as having made a profit Rs. 25,000 on the transaction which resulted from respondent's agency, and the question may then arise whether respondent is not entitled to a *quantum meruit* from appellants in respect of that profit. That question does not, however, in my opinion arise at present and we do not consider it. So far as the present case is concerned, it seems clear that respondent failed to bring about the sale which he was employed to effect and that no sale in respect of which he can claim brokerage was effected, and I agree with my learned brother May Oung that his suit must be dismissed with costs of appellants throughout.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 62 OF 1922.

November 16, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

ACHYUT VISHNU PATANKAR—DEFENDANT—APPELLANT

versus

TAPIBAI KRISHNAJI JOSHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review of judgment, effect of—Procedure.

ACHYUT VISHNU PATANKAR *v.* TAPIBAI KRISHNAJI JOSHI

When a review of a judgment is granted it is the party who has applied for the review who must move the Court further in the matter. The other party stands by the order already made, and if the party to whom review has been granted takes no steps to re-argue the matter, the original order still remains, though, it cannot be enforced until the review order has been discharged for non-prosecution.

The effect of an order granting a review is to hold the original order in suspense until it has been decided whether it should stand or not.

Appeal from the order of the District Judge, Ratnagiri, in Application under O. XXII, r. 9, Civil Procedure Code, in Appeal No. 195 of 1919.

Mr. *G. B. Chitale*, for the Appellant.
Mr. *D. S. Varde*, for the Respondent.

JUDGMENT.—This appeal raises a very curious point with regard to the procedure to be followed in cases where a review has been granted of the judgment of a Court, and the party obtaining the review has taken no steps to proceed further in the matter. There seems to be no authority on the point. The history of the case is as follows. The plaintiff filed a suit in the Subordinate Judge's Court for possession of certain property and obtained a decree. On appeal to the District Court, the decree of the lower Court was set aside and the plaintiff's suit was dismissed with costs. The plaintiff then applied for a review of the judgment of the Appellate Court, and, on 19th February 1920, the District Judge granted the application. In the judgment as first written the District Judge not only granted the review application, but confirmed the decree of the lower Court by setting aside the decree of the Appellate Court. But evidently it was pointed out to him that this was not the correct course to follow, for the words, "Decree of the lower Court is confirmed" were struck out ; and the learned Judge added "I shall re-hear the case on its merits. Both sides to argue the appeal on its merits over again." That was the proper order to make.

The real question is whether, when a review of a judgment has been ordered, the judgment is set aside or only held in suspense until the case has been reheard. Although it is not material for the purpose of this judgment, I may mention that defendant No 2 appealed against the order granting a review to the High Court. That appeal was unsuccessful.

On 17th September 1921, the plaintiff died, and, on 28th April 1922, as his heirs had not been brought on the record for about eighteen months, when an application was made to substitute the heirs of the plaintiff, the Judge considered that the appeal had abated. If that order were correct, it follows that the Appellate Court's order dismissing of plaintiff's suit would disappear, and the decree of the lower Court would be restored. We think that the order made by the District Judge on 28th April 1922, directing that the appeal abated was wrong. The effect of the review order was not to restore the decree of the Trial Court but to hold in suspense the decree of the Appellate Court until it had been decided whether it should stand or not. Therefore, the death of the plaintiff-respondent could not in any way affect the status of the appellate decree.

Another way of looking at the question would be to consider who is the party to move the Court after a review application has been granted. Clearly, the party who has applied for a review. The other party stands by the order already made, and if the party to whom the review has been granted takes no steps to re-argue the matter, it is perfectly clear that the original order still remains though it could not be enforced until the review order had been discharged for non-prosecution. It was the plaintiff, therefore, or his heirs to appear before the Court of the District Judge to re-argue the appeal. What arguments may be put forward or what issues may be raised on such an appearance, it is not for us to say. We merely decide now that the order of the District Judge directing that the appeal abates must be set aside, and it remains for the plaintiff's heirs to take such steps as they may be advised to get the Appellate Court's decree dismissing the plaintiff's original suit with costs set aside. The appeal is allowed and the order of abatement of the appeal of the District Court set aside. The appellant to get his costs of this appeal.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

SPECIAL FIRST CIVIL APPEAL
No. 9 OF 1923.

May 28, 1923.

Present :—Mr. Justice Heald and
Mr. Justice Lentaigne.

K. E. A. K. AHMED SAHIB & Co.,—
PLAINTIEF—APPELLANT

versus

M. K. PAKIR MAHOMED ROWTHER.—
DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. II, r. 2—Transactions, series of—Goods, delivery of, at different times—Separate suits—Single cause of action—Burden proof—"Cause of action", meaning of.

Where there is a series of transactions between the parties in which goods have been delivered at different times under separate vouchers, each delivery is *prima facie* a separate transaction and constitutes a separate cause of action, unless there is either a contract or a course of dealings from which an implied contract might be inferred that the entire series at a particular time or for a specified period should be treated as a single cause of action for the purposes of O. II, r. 2 of the Civil Procedure Code. The question whether there is such a contract is one of fact and the onus would lie on the defendant pleading O. II, r. 2 of the Civil Procedure Code in bar of separate suits in respect of the transactions to prove the contract.

Shanmugam Pillai v. *Syed Gulam Ghose*, 27 M. 116; *Chokalinga Pillai* v. *Kumara Viruthalam*, 4 M. H. C. R 334; 17 W. R. R. 381 note *Kedar Nath Mitter* v. *Denobandhu Shaha*, 31 Ind. Cas 626; 42 C. 1043; 19 C. W. N. 724, distinguished.

If goods are delivered under a single contract, the parties may stipulate that each delivery shall be deemed to be a separate contract.

The meaning of the expression "cause of action" as used in O. II, r. 2 of the Civil Procedure Code should be gathered from that rule and the authorities on that rule and it should not be assumed that the expression has the same meaning in that rule as it has either in English decisions or in decisions on questions relating to the law of limitation.

Appeal against the judgment of the Small Cause Court, Rangoon.

Mr. *Chari*, for the Appellant.

JUDGMENT.

Lentaigne, J.—This is an appeal against the judgment of the Court of Small Causes, Rangoon, dismissing the plaintiff-appellant's suit for Rs. 1,637-8-0 claimed as the price of goods supplied to defendant-respondent under fourteen vouchers of which one bears the date of 24th March 1922, and the others bear various dates in April 1923. The suit was dismissed under O. II, r. 2, of the Civil Procedure Code, on the ground that plaintiff had previously instituted and obatined a decree against defendant in another suit for goods supplied under vouchers dated May 1922 and that he should have included this claim with that claim in a single suit based on the same cause of action.

The defendant filed a written statement raising this defence and alleging that the dealings between the defendant and the plaintiff were as between traders and were not intended to terminate with one dealing or contract, but to be continuous, as it was agreed between the parties that the plaintiffs were to supply goods from time to time at defendant's request, and that the admitted twenty-two vouchers were given for goods supplied between 24th March and 31st May and that each item when not paid for became united with another and formed one continuous demand and the whole together formed one cause of action " admittedly by plaintiffs as alleged" by them in paragraph 6 of the plaint in this suit Paragraph 6 of the plaint so referred to was an obviously incorrect allegation that "the cause of action arose in Rongoon on 9th August 1922 when the last demand was made by an Advocate's notice," and such an allegation would not have saved the suit from the bar of limitation as regards particular orders for the goods if such orders had been more than three years old.

The plaintiff filed a reply denying the above allegations that he was to supply goods whenever defendant requested and as to the same constituting one continuous demand, and he asserted that each voucher represented a distinct transaction and as such gave rise to a distinct and different cause of action. In such reply the plaintiff also alleged that the plaint in the said previous suit so relied on by defendant together with the plaint in the suit

now under appeal and five other plaints were presented to the Chief Clerk of the Court of Small Causes, all together, on the 21st August 1922; and that after admitting two of such plaints, the Chief Clerk had discovered that certain vernacular vouchers had not been translated and had then returned to the plaintiff the plaint in the present suit and four other plaints with a request to have such vouchers translated before the plaints would be accepted.

Fortunately for the plaintiff, there is no evidence on the record which would justify a finding that the cause of action in the previous suit is the same as the cause of action in the present suit. *Prima facie*, each order and delivery of goods is a separate transaction and separate cause of action, unless they are successive claims arising under the same obligation within the "Explanation" at the end of r. 2 of O. II. The question is really one depending on the contract between the parties. If all the goods were delivered under *a single contract* it would be within the 'Explanation," unless there was an express stipulation that each delivery or each month's deliveries should be deemed to be a separate contract That it is open to 'the parties to make such exceptions is recognised by the Chamber of Commerce forms of contract, prevalent in Rangoon and in some of the Presidency Towns, in which it is expressly agree that each delvery shall be deemed to be a separate contract. The validity of such a clause has been recognised in the decision of the Madras High Court in the case of *Volkart* v. *Sadju Saheb* (1) decided in 1896 and again by the Calcutta High Court in the more recent decision of *Mandal & Co.* v. *Fazul Ellahie* (2), decided in 1914. In both of these cases a plaintiff was premitted to split up claims made under the same contract for the purpose of bringing them within the jurisdiction of the Small Cause Court.

The present case relates to the converse of the above question, and the question raised is whether a series of transactions which purport to be independent transactions must be treated as so mixed up or connected that the Court should hold that they constitute a single cause of action for the purposes of O. II, r. 2, of the Civil Procedure Code. In my opinion it is possible that in particular cases there may be either a contract, or a course of dealing from which an implied contract might be inferred, to the effect that the entire series in a particular month or for other specific period should be treated as a single cause of action. The defendant evidently realised that possibility when he pleaded a contract to such effect, and the plaintiff evidently realised the danger that such a contract might be an answer to his suit, if admitted, so he expressly denied the existence of any such contract. The question whether there was such a contract would be one of fact, and the onus of proof would lie on the defendant to prove such a contract. No evidence has been tendered by the defendant in support of his contention, which was evidently not intended to be based on evidence, but on a request that the Court should assume the existence of such a contract from the lax drafting of the plaint and by reason of certain decisions cited before the Court. I shall show below that such decisions do not justify such contention.

Before I do so, I may point out that this Court has recently discussed the meaning of the expression "cause of action" in section 20 of the Code of Civil Procedure when applied to suits based on contract. [See *The Jupitter General Insurance Company, Limited*, v. *Abdul Aziz* (3)], and we have there pointed out that there are numerous definitions of the expression, and we have held that the meaning of the expression as used in that section must be gathered from the previous legislation in India and not from definitions of the expression adopted in certain English decisions. I am likewise of opinion that the meaning of the expression used in O. II, r. 2, should be gathered from that rule and the authorities on that rule or on the sections of the previous Codes re-placed by that rule, and that it should not be assumed that the expression had the same meaning in that rule as it has either in English decisions or in decisions on questions relating to the law of limitation.

The lower Court has relied on the decision of *Shanmugam Pillai* v. *Syed Gulam Ghose* (4), but the facts of that case show that it

(1) 19 M. 301; 6 Ind. Dec. (N. S.) 917.
(2) 26 Ind. Cas. 209; 41 C. 825

(3) 76 Ind. Cas. 179; 1 R. 220; (1923) A.I.R. (R.) 185.
(4) 27 M. 116.

was a case of a suit for rent in different years (which is obviously a case of successive claims arising under the same obligation within the terms of the explanation to r. 2 of O. II), and was also within the "Explanation" to section 43 of the Code of 1882. It is in fact the actual illustration given below such "Explanation." The giving of separate *muchilkas* was not considered as altering that single cause of action. No doubt this decision contains a passage referring to a contention that the case was similar to an old case of *Chockalinga Pillai* v. *Kumara Viruthulam* (5) and erroneously stating that it had been held in such case that, where several articles are sold in succession by *A* to *B*, the vendor must sue for the price of all the goods sold up to the date of his suit and cannot sue separately first for one and then for another. The remark in that decision as to the effect of the previous decision was *obiter* and erroneous.

On referring to this old case I find that it was also a case of claim for three years' rent under a single agreement and again a case clearly arising under a single obligation. Curiously enough, there is a similar *obiter dictum* in that case referring to some previously unreported case of a claim for price of goods sold and delivered at different times where the intention was that they should form one entire demand, but even that *obiter dictum* did not justify the *obiter dictum* in the later case quoted above.

The other case relied on in the judgment under appeal is the case of *Kedar Nath Mitter* v. *Denobandhu Shaha* (6). That was a decision on the law of limitation and not on the question of the construction of O. II, r. 2, at all; and, as I have pointed out above, it is very questionable whether a decision on the construction of an expression for the purposes of the Indian Limitation Act, 1908, is applicable to the construction of the expression "cause of action" in O. II, r. 2.

Moreover, if the facts of that case are examined it will be found that there had been a long standing account between the parties in which there had been a settlement and in which various goods had been returned and various cheques had been paid to account at different times, and I do not dispute the contention that there may be cases where, from the course of dealing and previous settlements between the parties, there may be evidence of an implied contract that all goods supplied in a particular month or in a particular quarter or even in an entire account should be treated as a single cause of action, but in my opinion it would require clear evidence to justify a Court in dismissing a suit on such ground.

In the present case there is no evidence at all of such contract and *prima facie* every order of goods should be treated as a separate contract. As the defendant has in other respects admitted the plaintiff's claim, plaintiff is entitled to a decree as prayed.

For the above reasons, I would set aside the judgment and decree of the lower Court and direct that the plaintiff-appellent be granted a decree for Rs. 1,637-8-0 with costs in both Courts.

Heald, J.—I concur.

N. K. *Appeal allowed.*

(5) 4 M. H. C. R. 334; 17 W. R. 381 Note.
(6) 31 Ind. Cas. 626; 42 C. 1013; 19 C. W. N. 721.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 146 OF 1922.

July 10, 1923.

Present:—Justice Sir Asutosh Mookerjee and Mr. Justice Rankin.

CHANDANMULL BENGANEY—
PLAINTIFF—APPELLANT
versus
NATIONAL BANK OF INDIA, LTD.—
DEFENDANT—RESPONDENT.

Banker and Customer—Letters of credit, what are—Construction of document—Guarantee, extent of—Mercantile usage, evidence as to, admissibility of.

The defendant Bank wrote the following letter to the plaintiffs who carried on business in Calcutta as exporters of Jute:—

"We beg to inform you that we are in receipt of advice by wire from our London Office, that a

confirmed irrevocable credit has been opened under which we are authorised to negotiate your bills, as offered, on Messrs. Mildred Goyenche & Co., to the extent of £16,875 (sixteen thousand eight hundred seventy five only) on the following conditions:—

"Bills to be drawn payable three months after sight and to be accompanied by invoices, full sets of Bills of Lading, made out to order and blank endorsed, and policies of Insurance war risk representing shipment of 2,000 (two thousand) bales jute marked (Jajodia) from Calcutta to Antwerp, during November, December 1920.

"Such shipping documents are to be delivered on acceptance of the bills and should bear the following clause: Drawn under cable credit No. . . . dated 22nd November 1920.

"Please note that this advice does not release you from the liability attaching to the drawer of a Bill of Exchange.

"The credit will expire on—

"When negotiating drafts please produce this letter to have the amounts recorded on the back thereof. *P. S.* Under present conditions we can give no undertaking to negotiate bills drawn under this credit."

On the faith of this letter plaintiffs shipped 2,000 bales of jute in December 1920 and drew in favour of themselves against such shipment at three months' sight on the firm of Mildred Goyenche & Co., for the value of the goods, and the drafts were discounted in Calcutta.

The drafts were, on presentation, duly accepted by Mildred Goyenche & Co., in London, who received the shipping documents. The acceptors, however, suspended payments, before the drafts matured. The result was that the plaintiffs were compelled to pay the amount of the drafts without prejudice to their rights under the letter of credit. They then sued the defendant Bank to recover the sum paid together with interest thereon under the terms of the lettter of credit;

Held (1) that by the terms of the letter of credit the defendant Bank did not pledge its credit for the ultimate payment of the drafts as guarantor, its intention was only to give intimation to the plaintiffs that arrangements had been made under which the defendant Bank was satisfied to take such risk as there might be in negotiating the plaintiffs' drafts upon their buyers,

(2) that, therefore, the defendant Bank was not liable to the plaintiffs for the amount of the drafts,

Letters of credit, perform a clearly recognised function in effecting exchage. While no set form of words may be necessary, yet a letter of credit as known to the law must contain a request (general or special) to pay the bearer, or person named, money or sell him some commodity on credit or give him something of value and look to the drawer of the letter for recompense, and it partakes of the nature of a negotiable instrument. The rules governing bills of exchange and negotiable promissory-notes are always the same, fixed and determinate; while letters of credit are to be construed with reference to particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them, and the usages of the particular trade or business contemplated. Letters of credit are accordingly not construed with technical nicety; but are considered as being usually framed with more or less informality and looseness of expression, and hence Courts have sometimes indulged in considerable freedom of interpretation in the effort to arrive what is designated as the true intention of the parties. [p. 760, col. 1.]

Though letters of credit should receive liberal, fair and reasonable interpretation so as to attain the object for which the instrument is designed and the purpose to which it is applied, there is room for this principle, only when the provisions of the agreement are ambiguous, loose, or susceptible of more than one fair interpretation; if it admits of two fair interpretations and the guarantee has advanced money on the faith of that most favourable to his rights, that interpretation will prevail. [p. 760, col. 2.]

In order that a mercantile usage may be imported into the construction of a written agreement the usage must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. [p. 762, col. 2.]

Though evidence of known usage is receivable to supplement the provisions of the written agreement on the hypothesis that the contract is in truth partly expressed and in writing, partly implied or understood or unwritten, the evidence cannot be admitted to contradict the positive stipulations in the written contract. [p. 762, col. 2.]

Case-law discussed.

Sir *B. C. Mitter* and Mr. *N. R. Mehta*, for the Appellant.

Messrs. *L. P. E. Pugh* and *S. M. Bose*, for the Respondent.

JUDGMENT.

Mookerjee, J.—This is an appeal from the judgment of Mr. Justice Greaves in a suit for recovery of money on the basis of what is described as a letter of credit. The material facts relevant for the determination of the rights of the parties are really beyond controversy.

The plaintiffs carry on business in Calcutta as exporters of jute against orders placed with them by approved constituents. They allege

that this export business was carried on by them in co-partnership with the firm of Udoychand Pannalall who have been joined as defendants, upon their refusal to join as plaintiffs. On the 25th November 1920, the contesting defendant, the National Bank of India, Ltd., wrote to the defendant-firm the following letter :

"We beg to inform you that we are in receipt of advice by wire from our London Office, that a confirmed irrevocable credit has been opened under which we are authorised to negotiate your bills, as offered on Messrs. Mildred Goyenche & Co., to the extent of £16,875 (sixteen thousand eight hundred seventy-five only) on the following conditions :—

"Bills to be drawn payable three months' after sight and to be accompanied by invoices, full sets of Bills of Lading, made out to order and blank endorsed, and policies of Insurance war risk representing shipment of 2,000 (two thousand) bales jute marked $\frac{\text{(Jajodia)}}{\text{M}}$ from Calcutta to Antwerp, during November, December 1920.

" Such shipping documents are to be delivered on acceptance of the bills and should bear the following clause :—Drawn under cable credit No. . . . dated 22nd November 1920."

"Please note that this advice does not release you from the liability attaching to the drawer of a Bill of Exchange."

" The credit will expire on —

" When negotiating drafts, please produce this letter to have the amounts recorded on the back thereof. *P.S.* —Under present conditions we can give no undertaking to negotiate bills drawn under this credit."

The plaintiffs state that, on the faith of this letter and in reliance thereupon, they, in co-partnership with the defendant-firm, shipped 2,000 bales of jute in December 1920, and that the defendant-firm thereupon drew in favour of themselves (for the joint benefit of themselves and the plaintiffs), against such shipment at three months' sight in accordance with the terms of the letter of credit, on the firm of Mildred Goyenche & Co., for the value of the goods. The drafts were discounted in Calcutta by the Chartered Bank of India, Australia and China, the Mercantile Bank of India and the National Bank of India. The drafts were, on presentation, duly accepted by Mildred Goyenche & Co., in London, who received the shipping documents. The acceptors, however, suspended payment on the 14th March 1921, before the drafts matured. The result was that the plaintiffs and the defendant-firm were compelled to pay the amount of the drafts without prejudice to their rights under the letter of credit. The plaintiffs now sue to recover the sum paid together with interest thereon making an aggregate of Rs. 2,26,931-3-4. The defence of the Bank is a denial of liability. Mr. Justice Greaves has upheld this contention and has dismissed the suit. The determination of the relative rights of the parties must depend upon the true construction of the letter of credit.

There has been some discussion at the Bar as to the nature of letters of credit and the principles which should guide the Courts in their construction. The nature of a letter of credit was concisely explained by Story in a well-known passage of his commentaries on the Law of Bills of Exchange (Section 459, 4th Ed., p. 573) which is still quoted by modern text-writers as an accurate statement :—

" In respect to letters of credit, which are in common use in our commerce with foreign countries, it may be stated that a letter of credit (sometimes called a bill of credit) is an open letter of request, whereby one person, usually a merchant or a banker) requests some other person or persons to advance moneys, or give credit, to a third person, named therein, for a certain amount, and promises that he will re-pay the same to the person advancing the same, or accepts Bills drawn upon himself, for the like amount. It is called a general letter of credit, when it is addressed to all merchants or other persons in general, requesting such advance to a third person ; and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person."

Letters of credit, which are thus instruments long and well-known in commercial and mercantile usage, perform a clearly

recognised function in effecting exchange. While no set form of words may be necessary, yet a letter of credit as known to the law must contain a request (general or special) to pay the bearer, or person named, money or sell him some commodity on credit or give him something of value and look to the drawer of the letter for recompense, and it partakes of the nature of a negotiable instrument. The rules governing bills of exchange and negotiable promissory-notes are always the same, fixed and determinate ; while letters of credit are to be construed with reference to particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them, and the usages of the particular trade or business contemplated. Letters of credit are accordingly not construed with technical nicety, but are considered as being usally framed with more or less informality and looseness of expression, and hence Courts have sometimes indulged in considerable freedom of interpretation in the effort to arrive at what is designated as the true intention of the parties. The governing principle of construction was lucidly stated by Mr. Justice Story in delivering the unanimous opinion of the Supreme Court of the United States in *Lawrence* v. *McCalmont* (1) :—

" Some remarks have been made on the argument here upon the point in what manner letters of guarantee are to be construed ; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of gurantee are commercial instruments generally drawn upon by merchants, in brief language sometimes inartificial, and often loose in their structure and form, and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits so often sought in the present active business of commerce throughout the world. The remarks made by this Court in the case of *Bell* v. *Bruen* (2) meet our entire approbation. The same doctrine was asserted in *Mason* v. *Pritchard* (3), where a guarantee was given for any goods he hath or may supply W. P. with, to the amount of £100 ; and it was held by the Court to be a continuing guarantee for goods supplied at any time to W. P. until the credit was re-called, although goods to more than £100 had been first supplied and paid for ; and the Court on that occasion distinctly stated that the words were to be taken as strongly against the guarantor as the sense of them would admit of. The same doctrine was fully recognised in *Haigh* v. *Brooks* (4) and in *Mayer* v. *Isaac* (5) and especially expounded in the opinion of Baron Alderson. It was the very ground, in connection with the accompanying circumstances, upon which this Court acted in *Lee* v. *Dick* (6) and in *Manran* v. *Bullus* (7). Indeed. if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favourable to his rights, that interpretation will prevail in his favour : for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury."

The observations of Baron Alderson in *Mayor* v. *Isaac* (5) referred to by Mr. Justice Story, may by usefully re-called : " There is a considerable difficulty in reconciling all the cases on this subject, arising principally from their not being at one as to the principle of decision : some laying it down that a liberal construction ought to be put upon the instrument in favour of the person giving the

(1) (1814) 2 Howard 426 at p. 449 ; 11 Law. Ed. 326.

(2) (1843) 1 Howard. 169 at p. 186 ; 11 Law. Ed. 89.

(3) (1810) 12 East 227; 2 Camp. 486; 11 R. R. 369; 104 E. R. 89.

(4) (1839) 10 A. & E. 309; 2 P. & O. 477 ; 50 R. R. 399; 113 E. R. 119.

(5) (1840) 6 M. & W. 605; 9 L. J. (N. S.) Ex 225; 4 Jur. 437; 55 R. R. 734; 151 E. R. 554.

(6) (1836) 10 Peters 482; 9 Law. Ed. 503.

(7) (1842) 16 Peters 528; 10 Law. Ed. 1056.

guarantee, as in *Nicholson* v. *Paget* (8) others that it ought to be strictly construed, as in *Mason* v. *Pritchards* (3). Undoubtedly, the generally received law is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party. And, therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason* v. *Pritchards* (3) than with the opinion of Bayley,B., in *Nicholson* v. *Paget* (8). It was not, however, at all necessary for the decision in the case of *Nicholson* v. *Paget* (8) that it should depend upon the principle so stated." The substance of the matter is that, though letters of credit should receive liberal, fair and reasonable interpretation so as to attain the object for which the instrument is designed and the purpose to which it is applied, there is room for this principle, only when the provisions of the agreement are ambiguous, loose, or susceptiable of more than one fair interpretation ; if it admits of two fair interpretations and the guarantee has advanced money on the faith of that most favourable to his rights, that interpretation will prevail. The claim put forward by the plaintiffs must be tested from this standpoint. It is consequently superfluous to examine the decisions in *British Linen & Co.*, v. *Caledonian Insurance Company* (9). *In re Agra and Masterman's Bank* (10) and *Morgan* v. *Larivieri* (11) which turned upon the construction of agreements not expressed in the same terms as the one in the case before us ; nor is it necessary to examine the applicability of the elementary rule that a person who in reliance upon and in accordance with the terms of a letter of credit has given credit to the holder is entitled to resort to the banker who has signed the letter and is not affected by the state of the accounts between him and his customer.

The letter of the 25th November 1920, must be taken and interpreted as a whole. We cannot ignore the two important qualifications embodied in the following passages :

" (*a*) Please note that this advice does not release you from the liability attaching to the drawer of a Bill of Exchange ;

" (*b*) Under present conditions, we can give no undertaking to negotiate bills drawn under this credit."

But an attempt has been made to elucidate the meaning of the document by reference to the correspondence between Mildred Goyenche & Co., and the London Office of the defendant Bank as also to the telegrams received by the defendant Bank from London on several occasions. The letter of the 19th November 1920, was as follows :—

" The National Bank of India, Ltd.,
London, E. C. 3.

Gentlemen,

We hereby establish a confirmed irrevocable credit in favour of Messrs. Udoychand Pannalal or order, Calcutta, for :—

£16,875 :—(say sixteen thousand eight hundred and seventy-five pounds) to be availed of in drafts on us at three months' sight, against shipping documents of 2,000 bales of jute (Jajodia over M) to be shipped from Calcutta between 1st November and 31st December 1920, to Antwerp, and we guarantee acceptance of drafts negotiated under this credit delivery of the corresponding shipping documents, Insurance both against Marine War Risk to be effected in India.

Please telegraph to Calcutta at our expense advising the opening of this credit and request your office there to kindly notify the beneficiary.

Yours faithfully,
P. P. Mildred Goyenche & Co.,
Stanley & Smith."

(8) (1832) 1 C. & M. 48; 149 E. R. 309; 3 Tyr. 164; 5 Car. and P. 395; 2 L. J. Ex. 18.
(9) (1861) 4 Macq. 107; 7 Jur. (N. S.) 587; 9 W. R. 581; 4 L T. (N. S.) 162; 123 R. R. 929.
(10) (1867) 2 Ch. App. 391; 36 L. J Ch 222; 16 L. T. 162; 15 W. R. 414.
(11) (1875) 7 H. L. 423; 44 L. J. Ch. 457; 32 L. T. 41; 23 W. R. 537.

The telegrams were as follows :—

7th February 1920—Irrevocable credit opened £22,000, Udoychand Pannalall on Mildred Goyenche & Co.

Dfts. at 3 months against full set of shipping documents 2,500 bales jute to London or Dundee. Advice drawers.

17th February 1920—Our wire 3rd further credit opened Udoychand on Goyenche but for £5,000 against 500 bales jute to Great Britain, otherwise same.

24th November 1920—Renew credit 235 but for £16,875 against 2,000 bales jute marked Jajodia over M during November and December, otherwise same.

Advise Udoychand.

Let it be assumed that reference is permissible to these materials ; they do not, in my opinion, advance the contention of the plaintiffs. The intention of the contracting parties must be gathered from the unambiguous terms set out in the letter of the 25th November 1920. That letter, as the examination of the original shows, is on a printed form with the important additions. The expression "confirmed irrevvocable" has been inserted before the word "credit" and the postscript has been typed at the end. This must have been done deliberately and the amendments cannot be ignored when the document is interpreted. I cannot persuade myself to spell out of the document an intention on the part of the defendant Bank to pledge their credit for the ultimate payment of the drafts as guarantors. The purpose of the document, if I may so put it, was to facilitate negotiation and not to furnish an ultimate guarantee. There is no doubt that the document is not by its terms and was not intended to be an ordinary banker's credit, and the two clauses set out above—one of them an addition to the printed form—lend support to this view. In my judgment, Mr. Justice Greaves has correctly held that the document was intended to show and does show that Mildred Goyenche & Co., have made arrangements with the London Office of the Bank whereby the Bank can negotiate the bills of the defendant firm drawn on Mildred Goyenche & Co., but this is coupled with the warning that there will still attach to the drawers the ordinary liability which attaches to the drawer of a bill of exchange, in other words, if the drafts are not accepted and paid, the Bank will look to the drawers for payment. The expression "confirmed irrevocable credit" does not amount to a guarantee by the Bank of the solvency of Mildred Goyenche & Co., or that the bills would be accepted by them and honoured at maturity. The arguments advanced by the plaintiffs could be allowed to prevail, only if material clauses of the document were deleted.

In this view I need not consider how far evidence of practice amongst bankers was admissible. The rule on that point was concisely stated by Sir John Coleridge in *Juggomohan* v. *Manikchand* (12), namely, that the usage must be so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract : see also *Maitland* v. *Chartered Mercantile Bank* (13). It is well-settled, however, that though evidence of known usage is receivable to supplement the provisions of the written agreement on the hypothesis that the contract is in truth partly expressed and in writing, partly implied or understood or unwritten, the evidance cannot be admitted to contradict the positive stipulations in the written contract : see *The Reeside* (14), *Brown* v. *Bryne* (15).

I see no escape form the conclusion that the claim made by the plaintiffs against the Bank on the basis of the so-called letter of credit cannot be sustained and the suit has been rightly dismissed. In my opinion, the appeal fails and must be dismissed with costs.

Rankin, J.—The firm of Udoychand Pannalall carry on business in Calcutta in the course of which they are exporters, among other things, of jute. For the purposes of this judgment they may be taken as the plaintiffs. They sue the defendant Bank, the National Bank of India, Limited, upon a document dated the 25th November 1920, the meaning

(12) 7 M. I. A. 263; 4 W R. P. C. 8; 1 Suth. P. C. J. 357; 1 Sar. P. C. J. 681; 19 E. R. 308.
(13) (1865) 38 L. J. Ch. 363; 2 H. & M. 440; 12 L. T. 372; 71 E. R. 534.
(14) (1837) 2 Summer 567.
(15) (1854) 3 El. and Bl. 703; 2 Com. L. R. 1599; 23 L. J. Q. B. 318; 18 Jur 700; 97 R. R. 715; W. R. 471; 118 E. R. 1364.

of which is the question at issue in this cause. The claim is that the defendant Bank, upon that document, have become liable to pay to the plaintiffs the amount due upon certain bills of exchange whereon the plaintiffs were the drawers and a firm of Messrs. Mildred Goyenche & Co. were the drawees. The drafts were in due course accepted, payable at the Bank of England by Mildred Goyenche & Co., but this firm, after acceptance suspended payment and the bills were not met. On the 19th November 1920, Mildred Goyenche & Co., addressed the head office in London of the defendant Bank, stating : " We hereby establish a confirmed irrevocable credit in favour of Messrs. Udoychand Pannalall or order, Calcutta for, £16,875 to be availed of in drafts on us at 3 months' sight against shipping documents of 2,000 bales of jute $\frac{\text{Jajodia}}{\text{M}}$ to be shipped from Calcutta between 1st November and 31st December 1920 to Antwerp, and we guarantee acceptance of drafts negotiated under this credit against delivery of the corresponding shipping documents . . . . .

"Please telegraph to Calcutta at our expense advising the opening of this credit and request your office there to kindly notify the beneficiary."

Upon this the defendant Bank who appear on previous occasions to have had exactly similar business in connection with shipments of jute by Udoychand Pannalall to Mildred Goyenche & Co., cabled to their Calcutta branch on 22nd-24th November : —
" Renew credit 235 but for £16,875 against 2,000 bales of jute marked $\frac{\text{Jajodia}}{\text{M}}$ during November and December, otherwise same, advise Udoychand."

On receipt of these instructions, the Calcutta branch of the defendant Bank sent to the plaintiffs the document whose meaning is now in dispute : —

" Dear Sirs,

" We beg to inform you that we are in receipt of advice by wire from our London Office, that a confirmed irrevocable credit has been opend under which we are authorised to negotiate your bills, as offered, on Messrs. Mildred Goyenche & Co., to the extent of £16,875, (sixteen thousand eight hundered seventy-five only) on the following conditions :—

" Bills to be drawn payable 3 months after sight and to be accompanied by invoices, full sets of Bills of Lading, made out to order and blank endorsed and policies of Insurance war risk representing shipment of 2,000 (two thousand) Bales of jute marked $\frac{\text{Jajodia}}{\text{M}}$ from Calcutta to Antwerp during November-December 1920. Such shipping documents are to be delivered on acceptance of the Bills and should bear the following clause : "Drawn under Cable Credit No. , dated 22nd November 1920."

" The credit will expire on . . . .

" When negotiating drafts please produce this letter to have the amounts recorded on the back thereof.

I am, dear Sir,

Yours faithfully,

Sd.

Manager.

" P. S.—Under present conditions we can give no undertaking to negotiate bills drawn under this credit."

This document is a printed form but a postscript has been typed thereon and two important words, among other matters, have been inserted (in the original printed text) these words being the two adjectives, " confirmed irrevocable " in front of the word " credit " at the commencement of the document. It is to be noticed also that the form has been left blank so far as regards the date on which the credit will expire.

The plaintiffs' case is that they understood this document to mean that the London Office of the defendant Bank would be responsible for the due payment of the bills at maturity; that, in addition to this, the Calcutta branch were authorised to negotiate the bills in the ordinary way, but in view of the difficult conditions of the foreign exchanges were not prepared to undertake to do so. According to the plaintiffs, the document is in the full sense of the word a " Banker's letter of credit." The defendant Bank contend that the document is not a Banker's letter of credit, but is a letter of " advice of credit " and that by the terms thereof all that it effects is this, that it intimates to the plaintiffs that if they

like to do the business with Messrs. Mildred Goyenche & Co., and to draw bills on Messrs. Mildred Goyenche & Co., then the Calcutta branch of the defendant Bank is authorised to negotiate the drafts, and but for the exceptional conditions affecting the foreign exchanges would promise so to do. The defendant Bank rely upon the notice stated plainly in the body of the document that "this advice does not release you from the liability attaching to the drawer of a bill of exchange."

In my opinion the question is one of construction. The question is whether by this letter of 25th November 1920 the defendant Bank in effect offered to guarantee due payment of the bills which the plaintiffs were clearly to draw not on the defendant Bank but on Mildred Goyenche & Co. If this question has to be answered contrary to the contention of the plaintiffs, the plaintiffs can make no better case by trying to take their stand upon a cause of action based on representation, the making good of representations, and so forth. If the representation alleged is in the document at all, then in my opinion, the document would be an offer which, when accepted, would become a contract.

The learned Counsel for the plaintiffs contended that the document of 25th November 1920 has to be construed according to its fair meaning by itself, and that it is not competent to construe it by taking evidence as to the different forms used by Banks in general or by the defendant Bank in particular, for effecting different purposes. I think this contention is correct, but in construing such a document one has to come to it with some capacity of appreciating its business meaning. An exporter of goods desires to secure two objects. *First*, he desires to make certain that he will be paid; *secondly*, he desires to ensure that he will in effect receive his money at once upon a shipment of the goods and without waiting until the goods, the documents, or the drafts, have reached foreign country. In order that the main purpose may be effected, it is every day business for the buyer to arrange with a Bank to consent that the seller shall draw on the Bank for the purchase price. In this, the common form of a banker's credit, the drawee is the Bank and when this procedure is adopted then in ordinary times the seller is not only sure of being paid ultimately, but he will have little difficulty in getting his drafts negotiated at once. Letters of credit are, however, by no means restricted to this form, and in particular there is another form or type of banking facilities, under which the purchaser arranges not that a Bank shall be ultimately responsible for payment of the drafts but merely that when the seller draws upon the buyer he will be able to negotiate his draft with a particular Bank. Such negotiation is in itself an important credit facility, and it may be important to an exporter who contemplates making different consignments of goods under a contract to know that this facility will be afforded to him for all his consignments, and is not likely to be withdrawn in the middle of the transaction. Apart from these considerations, it has to be noticed that a Bank will frequently be instructed as agent for another Bank, or firm, to advise an intending seller of the fact that for certain business between the seller and other people, facilities for negotiation of bills will be afforded or are likely to be afforded by the advising Bank.

In the present case it is not made certain by the evidence whether Mildred Goyenche & Co., in addition to being merchants did not carry on business as bankers. Ordinarily, a purchaser of goods, desiring to have established in favour of his seller, a form of credit with a Bank, would not use the language employed in the letter of the 19th November 1920. He would not write to say: "I hereby establish a confirmed irrevocable credit" and so forth. The letter of the 19th November, in substance, is a request on the defendant Bank's London Office to make arrangements in Calcutta that drafts on Mildred Goyenche and Co. would be negotiated there.

It is quite plain that the intention of the Calcutta branch in sending, on the 25th November 1920, to the plaintiff their printed form with amendments was not to pledge the credit of the defendant Bank for the ultimate payment of the drafts as guarantor, but only to give intimation that arrangements had been made under which the defendant Bank was satisfied to take such risk as there might be in negotiating the plaintiffs' drafts upon their buyers. The question is not whether the form used could be made clearer but whether

having regard to the phrasing of the document, and, in particular, to the postscript, the plaintiffs, if they interpreted it as a guarantee of the ultimate payment of the drafts, put upon it a construction that must be upheld as correct. The document does not say in terms that the London Office has itself granted in favour of the plaintiffs a confirmed irrevocable credit. When one looks at the way in which particulars of the bills to be drawn and of the shipping documents are introduced, it is impossibe not to notice that in all this the business of the document has reference to the terms or conditions on which the defendant Bank is open to negotiate the bills. In point of fact, Mildred Goyenche and Co., had purported to open a confirmed irrevocable credit in favour of the plaintiffs as beneficiary. This is the historical explanation, no doubt, for the appearance of the words "confirmed irrevocable." The plaintiffs, however, could not know this and were entitled to construe the document upon its face. It may be said, therefore, that information that a credit has been opened seems of little use, unless it is intended to convey that it has been opened by some body in particular. Also that, if the credit is a mere matter between Mildred Goyenche and Co., and the defendant Bank, the plaintiffs would not be much concerned to know details about it. On the other hand, the seller might well be concerned to know that negotiation of their drafts was not likely to be stopped in the middle of the transaction. The first few lines of the letter of 25th November, standing by themselves, are singularly lacking in clearness, but the document as a whole is a very extraordinary document even at first sight, if it be intended as a variant of the ordinary banker's credit. It is quite plain that it is mainly concerned with the question of negotiation; and while it may be possible to give a meaning to the warning that the drawers were not released from liability consistent with a guarantee of the bills by the defendant bank, such a warning in a printed form intended to convey such a guarantee is at least remarkable.

As regards the postscript, as this is plainly an addition to the original scheme of the printed form, I do not think that it will bear the stress laid upon it by the plaintiffs. In ordinary times a banker satisfied with a draft, is able to negotiate it. In 1920, as every intelligent man knew, the ability of a banker to negotiate bills was hampered by the fact that, unless he could sell at the same time as he was purchasing exchange, he might often be unable to cover his remittances before the rate of exchange had altered against him. In spite of this, letters of advice of credit or statements that a Calcutta Bank would be disposed to negotiate particular bills, drawn on third parties, have, according to the evidence, continued in use as indeed every body knows. The postscript, therefore, does not make the document a meaningless document, or compel a reasonable construction to be found by treating it as a meaning that the defendant bank would guarantee the drafts.

There is no reason to doubt that the plaintiffs' construction, if correct, could be brought within the definition of "letter of credit" to be found in the text books, though plaintiffs' Counsel have not referred us to any reported case of a letter of credit guaranteeing the seller's bills upon the buyer in any form at all comparable to this.

In my opinion, the learned Judge has correctly held against the plaintiffs. I would add, however, that in my opinion no difficulty should in this case arise over the question of giving leave to the plaintiffs to amend their plaint, so as to raise the real issue in the case. An application was made to us that Hazarimul Boid and Jahurimul Boid should be joined as plaintiffs and that the firm of Udoychand Pannalall, whereof they are partners, should be removed from the record as a party defendant. We reserved consideration of this until the disposal of the appeal, and had the plaintiffs' case been well founded otherwise, I should certainly have been in favour of granting leave to amend.

In the result, I think the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Messrs. *O. C. Gangoly & Co.*, Attorneys for the Appellants.

Messrs. *Kesteven, Gooding & Co.*, Attorneys for the Respondents.

MA LON *v.* MA NYO

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 515 OF 1922.

September 3, 1923.

Present :—Mr. Justice Pratt and
Mr. Justice Macgregor.

MA LON AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
MA NYO AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage—Subrogation—Part-payment of mortgage debt—Charge, creation of—Suit to recover payment—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 132.

A partial payment of the debt on an earlier mortgage by a subsequent mortgagee does not give a claim for subrogation.

Subrogation is by redemption and that there can be no subrogation, where there has been no redemption.

Gurdeo Singh v. *Chandrikah Singh*, 1 Ind. Cas. 913; 36 C. 193 ; 5 C. L. J. 611, relied on.

Where a person interested in a mortgaged property makes partial payment of the mortgage-debt to save the property, although the doctrine of subrogation does not strictly apply, the payment constitutes a charge on the property.

A suit to recover a payment made in the above circumstances is governed by Article 132 of Schedule I to the Limitation Act.

Appeal against the judgment and decree of the District Court, Magwe, in Civil Regular No. 4 of 1922.

Mr. *Ganguli*, for the Appellants.

Mr. *Mukerjee*, for the Respondents.

JUDGMENT.

Pratt, J.—The salient facts in this appeal are that the first plaintiff Ma Lon purchased oil-well site No. 170 at Yenangyaung from Maung Nyo Sein and Maung Tun by registered deed on the 30th August 1907. At the time of the purchase the well-site was subject to a mortgage for Rs. 2,500 executed by Ma Lon's vendors in favour of the Burma Oil Company on the 19th June 1907. In Suit No. 4 of 1910 in the District Court of Magwe, first defendant Ma Nyo obtained a decree for pre-emption of the well in question for Rs. 6,666-10-0 against Ma Lon and her vendors, Maung Nyo Sein and Maung Tun, on the 8th August 1910. On appeal the Judicial Commissioner confirmed the decree, but directed payment of the money to Ma Lon. No time was fixed for payment of the purchase-money by Ma Nyo, and as she failed to make payment, Ma Lon, in execution proceedings No. 7 of 1915 of the District Court, obtained an order for restoration of possession against Ma Nyo, and for removal of attachment on the 4th January 1916. According to the plaint, possession was restored to Ma Lon. It should be observed that the decree in Civil Suit No. 4 of 1910 assumes that Ma Lon was in possession. Having obtained possession by the Court's order of the 4th January 1916 Ma Lon sold the well by registered deed on the 17th January following to Maung Ye second plaintiff for Rs. 10,000. In the meantime, in Civil Regular Suit No. 48 of 1915, the Burma Oil Company had obtained a decree on their mortgage against Maung Nyo Sein, Maung Tun, Ma Su, Ma Nyo and Maung Yan Shin on the 2nd September 1915 for Rs. 4,674-12-0 and further interest accruing. In her deed of sale in favour of Maung Ye, Ma Lon directed her vendor to withhold Rs. 4,670 from the sale price and pay it in discharge of the Burma Oil Company's decree.

Maung Ye made an arrangement with the Oil Copany to pay their decree, and to prevent the property being sold. Rs. 3,099-12-0 was paid in the names of Maung Ye and Ma Lon to the Oil Company towards satisfaction of the mortgage-decree by various instalments. Meanwhile, the Judicial Commissioner, in Civil First Appeal No. 111 of 1916, on the 15th September 1916 set aside the order of the District Court restoring possession of the well to Ma Lon. As Ma Nyo still abstained from paying the pre-emption money into Court, further contests took place in the District Court, and on appeal, till finally, in consequence of the order of the Judicial Commissioner, dated 28th November 1919, Ma Nyo paid into the District Court Rs. 6,666-13-4 and a

warrant for delivery of possession issued on 9th January 1920. Having finally lost possession and failed to recover the Rs. 3,099-12-0 from the Burma Oil Company, Ma Lon and Maung Ye instituted the suit now under appeal No. 4 of 1922 of the District Court, Magwe, to recover the sums paid by them towards discharge of the Burma Oil Company's mortgage.

On the preliminary issue as to limitation, the Judge found that Article 61 of the First Schedule to the Limitation Act applied and dismissed the suit as time-barred.

The Judge was of opinion that the doctrine of subrogation did not apply to the facts of the suit and could not be invoked by plaintiffs.

In this he appears to have been strictly correct. The doctrine of subrogation was examined and explained at length in the judgment of a bench of the Calcutta High Court in *Gurdeo Singh* v. *Chandrikah Singh* (1).

It was there pointed out that subrogation is by redemption and there can be no subrogation, where there has been no redemption.

A partial payment of the debt on an earlier mortgage by a subsequent mortgage does not give a claim for subrogation.

Similarly, in the Madras ruling, now relied upon by appellants, of *Chama Swami* v *Padala Anandu* (2), the doctrine of subrogation was extended to a purchaser who had *wholly* discharged an incumbrance, and is not, therefore, an authority for an extension of the doctrine of subrogation to the facts of the present suit, where the purchaser has only paid off a portion of the mortgage-debt.

We do not, however, agree with the view of the District Court that Article 61 applies.

Plaintiffs did not pay the money on defendants' behalf, but to save the land of which they were then in lawful possession from being sold under a mortgage-decree. The well did not at the time belong to Ma Nyo although she had obtained a decree for pre-emption. She had only a right of purchase.

(1) 1 Ind. Cas. 913; 36 C. 198; 5 C. L. J. 611.
(2) 31 M. 439; 18 M. L. J. 306 ; 3 M. L. T. 339.

It is contended on behalf of plaintiffs that the correct Article to apply is 132 for enforcement of money charged upon immoveable property.

The question, therefore, is whether plaintiffs have obtained a charge upon the property by their payments towards satisfaction of the mortgago-decree, if the facts of the present case are to be brought within the scope of Article 132. This aspect of the case does not appear to have been considered by the learned District Judge.

He was apparently satisfied with the conclusion that the doctrine of subrogation did not apply and was much impressed by the argument that plaintiffs were volunteers, possibly having in his mind the Calcutta ruling already referred to where it was laid down that the doctrine of subrogation did not extend to payments by a mere stranger or volunteer.

On the facts, however, it cannot be held that at the time of payment plaintiffs were mere volunteers.

The learned District Judge appears to be in error in saying that the Judicial Commissioner held on the 17th March 1915 that plaintiff Ma Lon had no right or claim to the land in dispute.

It is clear she purchased from Maung Nyo Sein and Maung Tun subject to their mortgage.

At the time when plaintiffs paid off a portion of the mortgage-debt, Ma Lon had been restored to possession by the District Court, having apparently been in some way displaced by Ma Nyo, who had no title whatever at the time, but merely a right of pre-emption.

Ma Lon was, therefore, the owner subject to the mortgage in favour of the Oil Company and to Ma Nyo's right of pre-emption.

Had Ma Nyo not exercised her right of pre-emption, Ma Lon's, and consequently her vendee Maung Ye's, title would have remained good. Plaintiffs made the payment to the mortgagees to prevent the well being sold in execution of the mortgage-decree.

Had the payments not been made and the well sold under the decree, the well would have been lost and Ma Nyo's decree for pre-emption would have been valueless.

MA LON *v.* MA NYO

The payments were necessary to save the well and defendant Ma Nyo has reaped the benefit of them. The amount due by her under the mortgage has been reduced by the amounts paid by plaintiffs. The principle of sections 69 and 70 of the Contract Act apply and plaintiffs are entitled to be reimbursed by Ma Nyo

The payments having been made to save the well, I have no hesitation in holding that they constitute a charge if not within the meaning of section 100 of the Transfer of Property Act certainly within the meaning of Article 132 of the First Schedule to the Limitation Act.

Although the doctrine of subrogation does strictly apply, the position is analogous and plaintiffs are entitled to retain a charge on the property for the monies paid to preserve it from sale under the mortgage-decree, despite the fact that not having discharged the mortgage in its entirety they have not stepped into the shoes of the mortgagees.

To take any other view would be wholly inequitable under the peculiar circumstances of the case.

On this view, Article 132 applies and the suit was not bared by limitation.

The result of this finding is to decide the suit on its merits, as well as on the question of limitation, so far as the first two defendants are concerned, and it is not necessary to remand the case for trial on its merits as between plaintiffs and these defendants

The pleader for plaintiffs says he is content to take a decree against the first two defendants only.

On the various judgments, orders and other documentary evidence before us, plaintiff's right to the sum claimed as against Ma Nyo cannot be disputed and in order to decide the question of limitation, it has been necessary to come to a finding that the plaintiffs have a charge on the well.

In view of the enormous delays which have occurred in the final disposal of the claims to the well and the vicissitudes through which the claims have passed in various stages and phases of litigation, it is in the highest degree undesirable that further delay should be incurred by a remand to the Trial Court for disposal of the suit on its merits, when there is already on the record sufficient material for a final adjudication on plaintiffs' claim.

Plaintiffs will be granted a decree for the amount claimed as against defendants, Ma Nyo and Maung Yan Shin personally, and there will a declaration that the amount constitutes a charge on the well, which plaintiffs are at liberty to enforce by sale of the well, if the decree is not satisfied within the period fixed. Six months will be allowed before the sale order issues.

Plaintiffs will be granted costs in both Courts.

Macgregor, J.—The facts of this case are peculiar. The following are the circumstances in which Ma Lon and Maung Ye paid off part of the money due under the Burma Oil Company's mortgage. Ma Nyo obtained her decree for pre-emption on 8th August 1910 on payment of Rs 6,666-10-0 and it was upheld on 25th October 1911 on appeal to the Judicial Commissioner. In Civil Execution No. 7 of 1915 the District Judge, on 4th June 1915, allowed her till 30th July 1915 to pay the money to Ma Lon the applicant in that case, failing which the well would be attached and sold. The money was not paid, and Ma Lon then applied for removal of the attachment, which in the meantime had been made, and for a declaration that Ma Nyo's right of pre-emption had lapsed and that Ma Lon was the owner. The District Judge ordered the attachment to be removed and the possession to be restored to Ma Lon. That was on 5th January 1916. Later in the same month Ma Lon sold the well to Maung Ye, and Ma Nyo did not obtain possession till she paid the money in Jauuary 1920 although the Judicial Commissioner by his order, dated 15th September 1916, in Civil First Appeal No. 111 of 1916 set aside the District Judge's order. Maung Ye was not a party to that appeal.

So that, when Maung Ye made the payments to the Burma Oil Company, between May 1916 and May 1917 inclusive, on the one hand Civil First Appeal No. 111 of 1916 was pending and was decided against Ma Lon, but, on the other hand, Ma Nyo was aware of the mortgage-decree and took no steps to exercise her right of pre-emption or to save the well from being sold under the decree

She paid off the balance of the mortgage-money after she had obtained passession in 1920.

It was not till 28th November 1919, by an order of the Judicial Commissioner in Civil Appeal No. 139 of 1918, that under O. XX, r. 14, a time was finally fixed within which Ma Nyo must pay Rs. 6,666-10-0, six weeks being allowed.

It is clear, therefore, that if Ma Nyo had paid the pre-emption money within a reasonable time, she would have been bound to pay off the whole amount of the Burma Oil Company's mortgage-decree against the well, and that as the result of the payments made by Maung Ye to the Company in 1916 and 1917 the well was preserved for Ma Nyo. In these circumstances, although I agree with my learned colleague that the equitable doctrine of subrogation does not apply, yet Ma Lon and her vendee Maung Ye were interested in making the payments as owners at that time of the well and it would be inequitable to hold that the payments are not now chargeable upon it. The charge is not, in my opinion, one of the kind contemplated in section 100 of the Transfer of Property Act, but Article 132 of the Second Schedule to the Limitation Act, 1908, is very wide in its terms and may embrace any kind of charge. There are conflicting decisions of the High Courts on the question whether a co-owner of an estate who pays the revenue to save the estate from being sold, can charge such payment upon the shares of his co-owners, but there is at least weighty authority for the view that he can, and that Article 132 would apply in such a case. In the present case the payments were made by the owner, into whose shoes Ma Nyo who was one of the mortgagors was subsequently enabled to step by reason of those payments, having in spite of her interest as pre-emptor taken no steps to save in the well in the meantime, and equity demands that ithose whom she has displaced should have a charge on the property for the amount which they paid to save it. I agree with my learned colleague that Article 132 applies and that the suit is not barred by limitation. I also agree that it is open to us, as it is highly desirable, to decide the suit now as against first and second defendants, and I concur in the proposed order.

N. H. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL APPEAL NO. 46 OF 1923.

November 20, 1923.

Present :—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

CHATURBHUJ BHAWANIDAS—PETITIONER—APPELLANT

versus

DEOKARAN NANJI—OPPOSITE PARTY—RESPONDENT.

East India Cotton Association Rules, rr. 42, 43—"*Nominate*", *meaning of—Objection to nomination, waiver of—Representative of member, firm whether can act as umpire—Award made by umpire without hearing parties, validity of—Award made after expiry of ten days—Extension of time—Exclusion of Sundays and holidays—Construction of rules—Practice of Association, whether relevant—Waiver, conditions of.*

The word "nominate" in clause B of rule 43 of the Rules of the East India Cotton Association means "finally appoint", that is, when the arbitrator has accepted the appointment, and there can be no effective nomination of an arbitrator until he agrees to act as such. [p 772, col. 1.]

Where the appointment of an arbitrator is open to objection under the rules, but the parties appear before him and raise no objection to his appointment, they must be taken to have accepted the appointment and to have waived the objection. [p. 772, col. 1.]

A representative nominated by a firm, which is a a member of the East India Cotton Association Ltd., to act as an arbitrator is eligible to act as an umpire within the meaning of clause A of rule 43 of the Rules of the Association.

The expression "purposes of arbitration" in rule 42 (a) of the Rules of the East India Cotton Association Ltd., is comprehensive enough to include acting as an arbitrator or as an umpire, within the meaning of clause A of rule 43. [p. 772, col. 2.]

An award made by an umpire without giving notice to the parties and without giving them an opportunity of being heard is invalid, but where a party fails to take objection to the validity of the award on the ground of absence of notice, before the Appeal Committe, the objection must be deemed to have been waived. [p. 773, col. 1.]

The provision as to the extension of time for making an award contained in clause A of rule 43 of the Rules

of the East India Cotton Association Ltd., applies only to arbitrators and not to umpires. [p. 773, col. 2.]

Under sub-clause (iv) of clause B of rule 43, an umpire is bound to make his award within ten days from the date of his appointment. If he fails to make his award within that period, the result is that the arbitration is completely superseded, and the arbitrators have to be appointed afresh and the arbitration must commence *de novo*. [p 775, col. 1.]

Where the language of a rule is unambiguous, the practice of the Association is not relevant to the construction of the rule, nor can the rule be construed in the light of the practice contrary to the plain meaning of the words used. [p. 775, col. 1.]

The provision contained in rule 58 of the Rules of the East India Cotton Association Ltd, as to the exclusion of Sundays and holidays in computing any period of time prescribed under the rules is not applicable to periods fixed under r. 43. [p. 776, col. 2.]

Waiver must be an intentional act and with knowledge of the necessary facts.

Earl of Darnley v. *London Chatham, and Dover Railway*, (1867) 2 H. L. 43 ; 36 L. J. Ch. 401 ; 16 L. T. 217 ; 15 W. R. 817, relied on.

Mr. *M. V. Desai*, for the Appellant.

Mr. *Kanga*, for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—This is an appeal from the decision of Mr. Justice Mulla on a petition to set aside an award. The facts which gave rise to the petition were these: The petitioner purchased 600 bales of Oomra Cotton from the firm of Deokaran Nanji on September 11, 1922 for September delivery. The petitioner was not a member of the East India Cotton Association, Ltd., but the respondents, the firm of Deokaran Nanji, were members of that Association. The contract was expressly subject to the rules and regulations of the East India Cotton Association, Ltd. Apparently, the petitioner sold these bales to the firm of N. V. Dossa & Co., and they sold to Sangidas Jesiram. The respondents gave dilivery orders for 500 bales, but did not deliver 100 bales. These delivery orders were passed on to N. V. Dossa and Co., and tendered to Sangidas, out of which he failed to take delivery of 400 bales and objected to 100 bales as not being of the contract quality. On October 5, 1922, Sangidas was declared a defaulter and subsequently N. V. Dossa Co. became defaulters in their turn. The respondents sought to hold the present appellant responsible in respect of the 400 bales. Anyhow, there were differences between the parties with reference to the said contract of 600 bales ; and in pursuance of the provisions relating to arbitration in the rules of the East India Cotton Association, the respondents wrote to the petitioner on October 26, 1922, informing him that they had appointed Mr. Cedraschi their arbitrator and asked him to nominate his arbitrator. The petitioner did not reply before November 1. According to the rules the Chairman of the Association nominated, on 31st October 1922, two arbitrators, Mr. Cedraschi and Mr. Mulji Luxmidas. On November 1, the appellant wrote to the Chairman of the East India Cotton Accociation, Ltd., stating that he could not appoint his arbitrator as he was not a member of the Clearing House, and that, with a view to bring the dispute to an end, he had appointed from his side Mr. Haridas Madhavdas of Messrs. Umersey Damodar & Co. as an arbitrator. This letter, however, was of no effect, as by that time the Chairman of the Association had appointed two arbitrators in accordance with the rules of the Association.

On November 8, 1922, Mr. Cedraschi wrote to the Manager of the Association declining to act as an arbitrator and requesting him to appoint somebody else in his place. On the same day the Vice-Chairman appointed Mr. H. E. Brandon in place of Mr. Cedraschi. Thereafter, the petitioner and the respondents appeared before the arbitrators. At the request of the arbitrators the Chairman of the Association extended the time for making the award up to December 27, 1922. The two arbitrators, however, did not agree, and they appointed Mr. Fleming as an umpire between December 14 and 21. The two arbitrators prapared their notes, each stating his opinion and grounds thereof and the notes were handed over to Mr. Fleming.

On December 27, Mr. Brandon, one of the arbitrators, wrote to the Secretary of the Association to extend the time for the umpire to make his award. The Deputy Chairman extended the time to January 10, 1923. This was done apparently on the same day, *i. e.*, December 27. Mr. Fleming made his award

on 5th January 1923, without giving any notice to the parties and without hearing them.

In accordance with the rules of the Association the petitioner (the appellant) appealed from this award to the Appeal Committee on January 25. The Appeal Committee decided the matter on 9th February as follows:—

"Having gone through the papers and having heard both the parties the Board confirmed the award of the umpire, with the modification that the claim of Messrs. Deokaran Nanji is reduced to Rs. 17,700."

Apparently the award was filed by the respondents on 14th March 1923, and the present petition was made on 5th April 1923, for a declaration that the award filed was void, inoperative and not capable of execution. Several objections were taken to the validity of the award, and in view of the doubt felt as to whether all the objections were such as would fall within the scope of section 14 of the Indian Arbitration Act, the Court made the following note on 25th June 1923, in the course of the hearing of the petition:—

"Deokaran Nanji and Tulsidas Morarji consent to the question of jurisdiction to be tried on the petition. Either party to be at liberty to call such evidence as he thinks proper as if the matter was tried in a suit. Parties to give intimation to each other in writing as to what evidence they porpose to lead. Petition adjourned into Court."

The petition was heard and six objections were urged against the award, which have been set forth in detail at page 33 of Part I of the Paper Book. The learned Judge after considering these objections came to the conclusion that they were not sustainable. He accordinly dismissed the petiton with costs.

The original petitioner has appealed to this Court and before us all the objections except No. 1 have been pressed in support of the appeal. At the outset I may mention that no point has been made as to the procedure to be followed for setting aside an award either under section 14 of the Indian Arbitration Act, or by way of suit. A reference was made to the decision in *E. D. Sassoon* v. *Ramdutt Ramkissen Das* (1), but in the present case there is really no point as to the procedure to be adopted in the case.

The first objection raised in the Trial Court was in these terms :

"That the relation between the petitioner and the respondents being that of agent and constituent within the meaning of r. 88, the contract ought to have been made in the 'official clients contract form,' being the form given on pages 84 to 86 of the Rule Book and not in the 'official form for forward contracts' being the form given on page 88 of the book."

This objection, as I have already indicated, has not been pressed before us, and was rightly overruled by the Trial Court. The form used makes no difference so long as it is clear that the contract in question was made subject to the rules of the Association.

Objections 2 and 3 are connected and may be dealt with together. The objections are these:—

(1) That Mr. Cedraschi having refused to act, the Chairman had no power under the rules to appoint Mr. Brandon or any other person as arbitrator in his place.

(2) That Mr. Brandon's appointment as arbitrator being illegal, he could not validily appoint Mr. Fleming or any other person in his place.

I have alredy stated the facts with regard to the second objection. The respondents had appointed Mr Cedraschi.

Under r. 43B (*i*) the Chairman nominated two arbitrators on October 31, one of whom was Mr. Cedraschi. He intimated his unwillingness to act on November 8 and on the same day Mr. Brandon was appointed in his place. The objection is based upon the wording of clause B of r. 43. The expression there used is "shall nominate the two arbitrators." It is urged that the Chairman having once nominated Mr. Cedraschi, his power was exhausted, and that, under sub-clause (*iii*) of clause B, as one of the arbitrators after the appointment refused to act, the other arbitrator was bound to give notice to the parties provided in the last sub-clause of clause B of r. 43. This objection is based upon the meaning to be given to the word "nominate." It is urged that "nomination" is to be distinguished from "appointment". It is doubtful, however, whether the rules have

(1) 70 Ind. Cas. 777 : 49 I. A. 366 ; (1922) A. I. R. (P. C.) 374 ; 37 C. L. J. 336 ; 44 M. L J. 758 ; 27 C. W. N. 660 . (1923) M. W. N. 372 ; 50 C. 1 ; 18 L. W. 587 (P. C.).

uniformly used the words "nominate" and "appoint" in really different senses. For instance, in caluse D of the same rule in the third paragraph the word used is "appoint" with reference to arbitrators. Similarly, in clause (*a*) of "Instruction to Arbitrators" page 25 of the Rule book the word used is "appointed." It appears to me that the word "nominate" in clause B would mean there "finally appoint" *i. e.*, when the arbitrator has accepted the appointment. Assuming, however that the word "nominate" has a more restricted meaning than these rules apparently appear to give to it, I am of opinion that there was no effective nomination of Mr. Cedraschi until he agreed to act as an arbitrator. Until he agreed to act, there would be no effective nomination, and the nomination of Mr. Brandon on November 8 appears to me to have been made in accordance with the rules.

Even assuming that the nomination of Mr. Brandon was open to the objection urged, it is clear that when the parties appeared before the arbitrators in pursuance of the notice of the hearing, which they received from the arbitrators and when they failed to raise any objection to the nomination of Mr. Brandon by the Chairman, the parties must be taken to have accepted his nomination, and to have waived the objection. On both these grounds the Trial Judge has overruled the objection, and I agree with learned Trial Judge in disallowing this objection.

The third objection is dependent upon the second objection, for, if Mr. Brandon's appointment is not open to any objection, it would be open to the arbitrators to appoint Mr. Fleming as an umpire, and their would be no objection on the score of the umpire having been appointed by the two arbitrators, one of whom was Mr. Brandon. The third objection must also be disallowed.

The fourth objection is that Mr. Fleming was not a member of the Association and that no person other than a member could act as an umpire.

This objection is based upon r. 43, clause A, which provides that "the arbitrators will have power to call in an umpire who must also be a member" (of the Association), The objection in effect is that Mr. Fleming is not personally a member of the Association. But the firm of Prier de Saone & Co., is a member of the Association, and Mr. Fleming is a partner in that firm. In accordance with the rules of the Association this firm appointed two persons as their representatives for the purposes of arbitration and one person as their authorised representative. It is admitted that Mr. Fleming was a partner of this firm, and that he was elected as one of the representatives "for purposes of arbitration."

It is urged that as Mr. Fleming himself is not a member of the Association he was not qualified to be an umpire. This objection has been pressed before us with some force; but I am unable to see any substance in the objection. Under the rules of this Association, it is clear that individuals as well as any firm or company engaged in cotton trade in Bombay can be members of the Association, as provided in r. 2; and it is provided that for the purposes of arbitration in the case of a firm or company which is a member, only two representatives of the firm or company shall be eligible to act as arbitrators. The said firm or company shall, from time to time, notify to the Secretary the names of the representatives whom it desires to nominate. This is provided in the second paragraph of clause (*a*) of r. 42. It is not disputed before us that Mr. Fleming was qualified to act as an arbitrator. But it is urged that unless he was a member in his own personal capacity, he could not act as an umpire. This contention does not appear to me to derive any support from the rules. It seems to me that the expression "purposes of arbitration" is comprehensive enough to include acting as an arbitrator or as an umpire. He was one of the persons elected by the firm for the purposes of arbitration.

It is needless to consider further the rules in detail on this point. I may, however, mention the fact, which has been proved by the evidence of the Chairman of the Association, that most of the members of the Association are firms, and that the individual members are comparatively very few. If the interpretation contended for by the appellant is accepted as regards the qualification of an umpire, it would follow that the working of the scheme of arbitration contemplated by the rules would be rendered practically nugatory.

Taking the form provided in the rules with the rules, the meaning seems to me to be fairly clear that for all the purposes of arbitration Mr. Fleming was a member of the Association. For these reasons, I overrule this objection.

I shall next take up the last objection, No. 6, that the petitioner had no notice of the appointment of Mr. Fleming and that Mr. Fleming made his award without giving any opportunity to the petitioner of being heard.

As a fact, Mr. Fleming gave no notice and did not hear the parties. It is urged that this is sufficient to vitiate the award. It is not contended before us on behalf of the respondents that an umpire can make his award without giving the parties an opportunity of being heard. But, undoubtedly, when the present appellant appealed to the Appeal Committee under the rules, he did not raise any objection to the award made by Mr. Fleming on the ground that he did not give him any opportunity of being heard. The learned Trial Judge has drawn the inference that the present petitioner must be taken to have waived the objection. I have read the grounds of appeal to the Appeal Committee carefully, and I am unable to find any indication therein of the objection now raised. I think it was open to the Court to draw the inference that the present appellant had waived this particular objection to the award.

It is quite true that, for the purposes of waiver, knowledge of the essential facts is necessary. But, in the present case, when the petitioner appealed to the Appeal Committee, it could not possibly be said that he had not the necessary knowledge of the essential fact, namely, that he was not heard and that he was given no notice. I agree, therefore, within the Trial Court that this objection should be disallowed.

I now come to the remaining objection, No. 5, namely, that Mr. Fleming's award was not made within ten days from the date of his appointment as required by rule 43, clause (iv). The contention of the appellant is that, though there is no direct provision requiring the umpire to make his award within a particular period, it is a necessary implication of sub-clause (iv) of clause B of rule 43 that the umpire has to make his award within ten days from the date of his appointment. It is further urged that it is a substantial right inasmuch as it is provided by clause B of rule 43, that, where the award is not made within ten days, the arbitrators have to give notice of the fact to the parties, and the result is that under those conditions the Chairman, Deputy Chairman or General Manager can nominate the two arbitrators having power to appoint an umpire. The contention of the appellant goes further. He contends that when notice is given by the arbitrators, in consequence of the umpire having failed to give his award within ten days, the parties practically get the right of nominating their arbitrators again, and that, in the event of failure on their part, the Chairman would get the right to nominate the two arbitrators as contemplated by clause B of rule 43. But, in any case, the contention is that, where an umpire fails to make his award within ten days, the parties are entitled to notice of the fact, and the procedure to be followed then is such as would affect the rights of the parties substantially. It is urged on these grounds that as Mr. Fleming failed to make his award within ten days from the date of his appointment and as there is no provision in the rules for extending the time, his award is invalid.

On the other hand, it is urged that the provisions which relate to the extension of time, so far as the arbitrators are concerned, should be held to apply to an umpire also, and that, according to those provisions, which are to be found in clause A of rule 43, it would be open to the Chairman, Vice-Chairman or the General Manager to extend the time even in the case of an umpire.

Further, it is urged that even if there was no power to extend the time, and if the award is open to the objection that it was made more than ten days after the date of the appointment of the umpire, the objection must be deemed to have been waived.

Apart from the question of waiver, the learned Trial Judge has found in favour of the appellant on this part of the case; and I agree with the view that under the rules the umpire is bound to make his award within ten days from the date of his appointment, and that the provisions as to the extension of time under rule 43, clause A, apply only to arbitrators, and not to umpires. This is a

matter which depends upon the construction of the rule. The rule is a very long one. It is not necessary to quote the whole of it. It has been quoted in the judgment of the Trial Court, and while there is a certain amount of difficulty in interpreting this rule as a whole, taking sub-clause (*iv*) of cl. B of r. 43, it is quite clear to my mind that an umpire has to make his award within ten days from the date of his appointment. If he fails to do so "from any cause", it is provided that the arbitrators are at once to give notice of the fact to the parties, and then under clause B the two arbitrators may have to be re-nominated. I express no opinion on the question whether the appellant is right in his contention that the parties would get the right of appointing the arbitrators in the first instance if such a contingency arises. But it is clear that there is an obligation on the umpire to make his award within ten days. I entirely agree with the learned Trial Judge that it is to be regretted that there should be no record of the date of the appointment, which is so important. It is not recorded anywhere, and it is clear from the present record that the fact came to be known when Mr. Brandon was examined as a witness. His statement on this point is as follows:—

"I did not make any award. I presented notes to the umpire. They are dated December 14, 1922 and December 21, 1922. Mulji and I appointed Mr. Fleming as umpire. I could not really tell you the date on which I made the appointment. It was between December 14 and 21 1922."

In the letter which Mr. Brandon wrote to the Secretary of the Association on December 27 for extension of time, he did not mention the date of Mr. Fleming's appointment, but he simply referred to the fact of his appointment. It must be taken as proved in this case that the appointment of Mr. Fleming was made somewhere between December 14 and 21 1922. Assuming it to have been made on December 21, which is the date most favourable to the respondents, it would appear that Mr. Fleming did not make his award within ten days. The award was in fact made on 5th January 1923. The fact of the extension of time by the Deputy Chairman up to January 10 does not help the respondents, because I am satisfied on the provisions of rule 43 that there is no power in the Deputy Chairman or the Chairman to extend the time. The provisions material to this point in clause A of rule 43 are these:—

"The arbitrators shall come to a decision within 15 days of the appointment, unless the Chairman, Vice-Chairman or General Manager shall, when, nominating arbitrators (in the manner prescribed below) or upon subsequent application of the arbitrators, grant an extension of this period.

"If the two arbitrators cannot agree upon an award they shall appoint an umpire within 15 days of the date on which the two arbitrators were originally appointed, or within such extended period as may be allowed by the Chairman, Deputy Chairman or General Manager."

These are all the provisions which relate to the power of the Chairman, Deputy Chairman or General Manager as to extension of time, and they clearly relate to the extension of time given to the arbitrators as distinguished from an umpire, and there is no provision whatever for extension of time under the Rules as regards the umpire. This conclusion derives further support from the language used in sub-clause (ii) of clause B of rule 43 with reference to arbitrators as compared with the language used with reference to an umpire in sub-clause (iv) of the same clause. For the purposes of this objection I cannot read "umpire" as meaning "arbitrator" under this rule. It is true that in dealing with another objection, I have accepted the view that an umpire is to be included within the scope of the expression "for the purposes of arbitration." But the words in the two paragraphs in clause A of rule 43 quoted above are very specific, and cannot possibly be read in their natural and plain meaning as having any application to the extension of time with reference to an umpire: and the language used in sub-clauses (ii) and (iv) of clause B is equally specific.

Clause B of rule 43, definitely provides that where the award is not made within ten days from the date of the appointment by the umpire, the arbitrators must give notice thereof to the parties, and it is also provided in terms that in that case the Chairman, Deputy Chairman or General Manager will have power to appoint two arbitrators having power to appoint an umpire. The implication

to my mind is clear that when the award is not made within ten days, the result is that that arbitration is completely superseded, and the arbitrators have to be appointed afresh and the arbitration must commence *do novo*.

It must be remembered that the appellant is not a member of the Association, and is not bound as such by the rules of the Association. The rules are made applicable by the contract between the parties, and to read anything more than what the words of the rules plainly mean or necessarily imply, would be incorporating a term in the contract which is not agreed to by the parties. I mention this for the purpose of making it clear that there is no scope in the present case for the argument which has been urged on behalf of the respondents that the evidence of the Chairman of the Association should be considered on this point as helping them. The evidence is to the effect that in practice the powers which are given for extension of time with reference to arbitrators are used also with reference to umpires. I am quite willing to accept the fact that the practice is to that effect. But I do no think that that practice is relevant to the present point where the language of the rule is unambiguous, nor do I think that the rules could be consrtued in the light of this practice contrary to the plain meaning of the wards, which would involve the incorporating of a new term in the contract which cannot be reasonably implied. I, therefore, agree with the learned Trial Judge that the award made by the umpire is open to the objection that it was made after the time limit fixed for making the award.

The other contention that remains to be considered with reference to this objection is whether the objection has been waived by the appellant. The burden of proving that there was a waiver on the part of the appellant would be on the respondents. There is no evidence in the present case that the present appellant had in fact any knowledge that the award was made more than ten days after the appointment of Mr. Fleming as an umpire. He had no means of knowing the fact, for the simple reason that no notice of his appointment was given to him before the award was made, and I do not see how it could be stated on the present record that he could have obtained the information even if he had made any attempt to get that information from the record of the arbitration proceedings. The date of Mr. Fleming's appointment does not appear anywhere in writing. In fact, the date was ascertained in the course of the hearing when Mr. Brandon gave his evidence. Under these circumstances, I do not see how it could reasonably be said that the present appellant waived this objection when he failed to urge it in his appeal to the Appeal Committee. As pointed out in the case of *Earl of Darnley* v. *London Chatham, and Dover Railway* (2), it is essential that the waiver must be an intentional act and with knowledge of the necessary facts. I am unable to hold that the mere fact of the appellant having appealed to the Appeal Committee as provided by the rules can operate as a waiver of this objection. On this point I may refer to the observations in the case of *Jungheim, Hopkins & Co.* v. *Foukelmann* (3).

"I wish to add that I do not think that the fact that the plaintiffs appealed to and appeared before the Committee of Appeal can make the award good when it was originally bad, or can alter the plaintiffs' legal rights in any way."

The appellant could not raise the objection before the Appeal Committee for the simple reason that he had no knowledge of the facts. I have carefully considered the reasons given by the learned Judge for holding that there was a waiver on the part of the appellant. The Trial Judge seems to me to have dealt with the point as if the burden of proving the absence of knowledge lay upon the appellant. It is really for the respondents to establish the plea of waiver, and in my opinion there is no evidence on the record to show that there was any waiver of this objection on the part of the appellant. In fact, the evidence tends to show that he had no knowledge of the necessary facts and that there was no conscious giving up of the point on his part It seems to me, therefore, that this objection must be disallowed.

It is urged on behalf of the respondents that r. 5 in Schedule I of the Indian

(2) (1867) 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817.

(3) (1909) 12 K. B. 948, at p. 957; 78 L. J. K. B. 1132; 101 L. T. 398; 53 S. J. 790; 25 T. L. R. 819.

Arbitration Act should be applied to this award so far as the power to extend the time is concerned. But I am unable to accept this contention, as the application of these rules is excluded by the terms of the contract under which the rules of the Association are made applicable to this contract by the parties.

So far I have dealt with the contentions as they were made at the hearing of the appeal when we took time to consider our judgment. Before we could deliver our judgment, an application was made on behalf of the respondents to allow them to argue a new point based upon rule 58. Accordingly, we have heard the parties on this point.

The contention is that the umpire should be taken to have been appointed on December 21 and that if the holidays and Sundays between December 21 and January 5 be excluded, as they should be excluded under rule 58, the award is made just in ten days. For the purpose of this point it is common ground that, including two Sundays, there were five close holidays, *viz.*, December 24, 25, 26 and 31 and January 1. If the date of the appointment be taken to be December 21 and if that be excluded, the award of the umpire would be just in time as made on January 5. By way of reply to this new point it is urged that the appointment must be taken to have been made some time before 21st and not on the 21st, according to Mr. Brandon's evidence, that rule 58 has no application to the periods fixed under Rule 43, and that the holidays and Sundays cannot be excluded.

This point is raised for the first time in appeal as stated above and there is no evidence in the case as to whether in practice the provisions of Rule 58 have been applied by the members of the Association to arbitrations under Rule 43. After considering the arguments I am satisfied that the appointment cannot be taken to have been made on the 21st but some time before. Mr. Brandon's evidence is clear on this point. I have already referred to his statement in the examination-in-chief. In cross-examination he says as follows :—

"I am absolutely certain that Mr Fleming was not appointed after December 21. Mulji and I might have approached Fleming about a week or ten days before December 21 because it was very evident that Mulji and myself could not agree."

This renders it highly probable that the appointment was made before the 21st : and in any case any date between the two dates, would exclude the possibility of its having been made on December 21. Thus, even if the holidays, including Sundays, be excluded, the award cannot be taken to have been made in time. Further, I am not satisfied that under clause (*b*) of Rule 58 Sundays and holidays could be excluded. It is clear that, apart trom this clause, they could not be excluded in computing the period of ten days under Rule 43. It is not suggested, or at any rate it is not supported by any principle or precedent, that Sundays and holidays should be excluded in computing the periods fixed under Rule 43, apart from any express provision to that effect under the rules.

The clause in Rule 58 bearing on this point is in these terms :—

"Sundays and holidays shall not be computed as forming portion of the time allowed for any purpose under these Rules except the calculation of interest."

I am not satisfied that this provision applies to periods fixed under Rule 43. In the first place, Rules 56 to 172 are to be known as Trading Rules and are in their nature applicable to members of the Association. There are various rules in this set of rules relating to particular arbitrations, as, for example, Rules 65 and 66, 78 and 79, and 128, under which short periods are fixed to which the clause in question can appropriately apply. The expression" time allowed for any purposes under these Rules" in the said clause in Rule 58 appears to me to refer to any purpose under the Trading Rules and not under all the rules of the Association generally. Rule 43 in terms contemplates arbitrations between members and non-members also and I find it difficult to hold that the clause in question applies to Rute 43 in computing the period of ten days. The point raised by the respondents must be disallowed.

It is rather unfortunate that the award should fall through on such a ground. But, however willing we may be to see that an award of the arbitrators or the umpire is upheld as far as possible, we cannot ignore an objection which is clear and effective.

CHATURBHUJ BHAWANIDAS *v.* DEOKARAN NANJI

I would, therefore, allow the appeal and declare the award to be void and inoperative. The appellant to have his costs throughout.

Crump, J.—The facts of this matter are set out fully and clearly in the judgment of the learned Trial Judge. It may, however, be stated that in both these cases the matter originally came before the Court in the shape of a petition under the Indian Arbitration Act, section 14, to set aside an award. In both by consent of parties, in order to avoid technical objections as to the procedure followed, the objections being not on the ground of misconduct only but also on the ground of jurisdiction, it was agreed that the petition should *pro tanto* be treated as a suit.

The only objections now raised to the award are the same six objections which are clearly and categorically stated in the judgment under appeal and, therefore, those six objections alone fall to be considered, The difficulty, such as it is, in the case, arises from the extremely loose manner in which the Rules of the East India Cotton Association have been drafted, more especially as to arbitration, and it is a matter for surprise that businessmen have not perceived the advantage which would be gained by having these rules re-drafted by a competent legal adviser. They would, no doubt, save much litigation with its attendant expense and uncertainty were they to follow that obvious course.

The first objection has not been pressed. The learned Counsel for the appellants while not relying on it did not specifically abandon it. It is enough to say that the contract between the parties clearly incorporates by reference the Rules and Regulations of the Association which must be read as terms of the contract. As to this objection, and indeed as to the other objections with the exception of No. 5 it would, perhaps, be sufficient to rely on the grounds stated by the learned Trial Judge but I will state briefly as to each my reasons for holding that it is not sustainable.

As to the second objection it was argued before us that when Mr. Cedraschi intimated, on November 8, 1922, that he declined to act as arbitrator the Chairman had no power to appoint Mr. Brandon in his place. It is urged that Rule 43 B (i) covers the case. The respondent appointed an arbitrator (Mr. Cedraschi) : the petitioner failed to appoint an arbitrator within 24 hours : the Chairman had, therefore, power to " nominate " two arbitrators and he accordingly "nominated"Mr.Cedraschi and Mr. Mulji Lakhmidas. It is urged that the Chairman's power to "nominate" was then exhausted. In my opinion the Rules make no real distinction between " nomination " and "appointment." This is clear from para. 3 of Rule 43 D and, therefore, no argument can be validly based on any supposed distinction between these two terms. Whether the process be called " nomination " or " appointment " it is not complete until the person selected has agreed to undertake the office. Therefore, the power was not exhausted. Further, the waiver of any objection on this score is too clear to need discussion.

The third objection falls to the ground with the second. The arbitrators being validly appointed had power to appoint an umpire, and they did appoint Mr. Fleming.

The fourth objection is that Mr. Fleming was not qualified under the Rules to act as umpire. In construing these Rules we should, I think, bear in mind the maxim *ut magis res valeat quam pereat.* The Association consists of members who are (1) firms, (2) individuals. It is in evidence that of the latter there are two only. Rule 43A lays down in para. (1) that the arbitrators must be members, and that " the umpire must also be a member." Rule 43C (ii) (last paragraph) is as follows: "The arbitrators must in all cases be members or authorized representatives of members" but this provision does not in terms extend to " umpires." Therefore, it is argued that Mr. Fleming not being a " member " cannot be qualified to act as an umpire. Mr. Fleming's position is as follows : The firm of Prier de Saone & Co. is a member and in their application for membership the firm appointed him as their "representative for purposes of arbitration " and also as their " authorised representative." An " authorised representative, " under Rule 1, has full authority to conduct or manage the cotton business of his principal, *i e.*, the firm which he represents. A firm must of necessity in all matters act through an individual, and if the strict literal construction contended for on behalf of the appellants were allowed to prevail, the intention of the rules would be entirely frustrated.

There would be only two individuals qualified to act as umpire, *viz.*, the two persons who are members in their individual capacity. In this connection reference may be made to Rule 51 (*b*) which clearly contemplates that an "authorized representative" may act as umpire if he is a member of the Appeal Committee. This would be repugnant to the construction for which the appellants contend. In my opinion the word "arbitrator" is loosely used in Rule 43 C (last para) as including also an "umpire" and in the absence of any provision directly excluding an "authorized representative" from acting as an umpire I am not prepared to hold that Mr. Fleming can be held to be disqualified by the inferential process of reasoning relied upon. Whether Mr. Fleming is a member of the Appeal Committee or not is a point on which the record is silent.

I reserve the fifth objection for the moment.

The sixth objection. Upon this point I have nothing to add to the reasons given by the learned Trial Judge. In my opinion the objection fails on the ground so stated.

The fifth objection is more serious. I am most unwilling to supersede an arbitration if that course can reasonably be avoided, but if an objection is good it must be allowed to prevail. The rules as to arbitration form part of the contract and either party is entitled to insist on substantial compliance with those rules. Mr. Fleming's award was made on January 5, 1923. It was made more than ten days after his appointment. Precisely when that appointment was made was not known until Mr. Brandon gave evidence before the Trial Judge, and even now it can only be said that it was some time between December 14 and 21, 1922. Whatever the exact date, more than ten days had expired before Mr. Fleming's award was made. Under Rule 43 B (iv) the intention plainly is that the umpire shall make his award within ten days. If he does not, the first paragraph of the Rule comes into operation and new arbitrators have to be appointed. There is no power to extend the time in the case of an umpire such as given by clause (ii) in the case of arbitrators. On December 27, the Chairman extended the time but I agree with the learned Trial Judge that he could not do so, and that on this ground the award is bad. But the learned Trial Judge has held that the appellants must be held to have waived this objection. The difficulty in supporting this view is that the defect was not known, and I am unable to hold that the doctrine of constructive notice can be applied to make out a case of waiver. The argument is that had appellants made such enquiries as were open to them they might have discovered that the time had been extended, and from this they might have deduced the fact that the umpire's award was out of time. Having done so, they could and ought to have taken this point in their appeal. But there can be no waiver without full knowledge. It is to be noted that no notice of the appointment of the umpire was given, and that the parties were not heard by him. Those irregularities can be waived for appellants must have been aware of them. But it is fairly clear that no one knew for certain that the umpire's award was beyond time until Mr. Brandon was examined before the Trial Judge. In my opinion this objection must prevail and the award is, therefore, bad.

Finally, as regards Rule 58 I am of opinion that in all probability the umpire was appointed before December 21. If that is so, the exclusion of Sundays and holidays enjoined by the last sentence of para (*b*) of this Rule would not bring the award within the ten days' time allowed by Rule 43B. Further, I do not think that the former Rule controls the latter.

I agree, therefore, that the appeal must be allowed.

Z. K. *Appeal allowed.*

Solicitors for the Appellant—Messrs. *Amarchand* and *Mangaldas.*

Solicitors for the Respondents—Messrs. *Captain* and *Vaidya.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 56 OF 1922.

October 2, 1923.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

MANYAM SURAYYA—PETITIONER—APPELLANT

versus

SUNKAVALLI VENKATARATNAM—COUNTER-PETITIONER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 11—Attachment before judgment—Claim proceedings—Title suit—Application for execution—Limitation.

When an execution application is brought and properties are attached in execution of that application, if any obstacle is placed in the way of the properties being sold and assets realised for the purpose of meeting the decree-debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Article 182 of Schedule I to the Limitation Act, but is in the nature of a revival of the original execution application and Article 181 of Schedule I to the Limitation Act will apply.

The same principle applicable to the case of an attachment after judgment applies equally to the case of an attachment before judgment and it is immaterial that the attachment before judgment was not followed by an application for execution of the decree after the decree was passed.

Chalavadi Kotiah v. *Poloori Alamelammah*, 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329; *Rameshwar Singh* v. *Homeshwar Singh*, 50 Ind. Cas. 636; 40 M. L. J. 1; 1 P. L. T. 731; 19 A. L. J. 26; (1921) M. W. N. 21; 33 C. L. J. 109; 25 C. W. N. 337; 13 L. W. 546; 6 P. L. J. 132; 23 Bom. L. R. 721; 30 M. L. T. 180; 48 I. A. 17 (P. C.), followed and applied.

Appeal against the order of the Court of the Additional Subordinate Judge, Rajahmundry, in A. S. No. 117 of 1921, preferred against order, dated the 19th April 1921 of the Court of the Principal District Munsif, Rajahmundry, made in E. P. No. 738 of 1920 in O. S. No. 352 of 1917.

Messrs. *G. Lakshmanna* and *V. Viyanna*, for the Appellant.

Mr. *T. S. Raghunatha Rao*, for the Respondent.

JUDGMENT.—This case raises a question of limitation in execution proceedings. The appellant before us brought a suit against the widow of one Narayya on a promissory-note executed by the said Narayya, and while the suit was pending he obtained an order of attachment before judgment of certain properties belonging to Narayya in the hands of the widow. He then obtained a decree against the assets of Narayya in the hands of the widow. Eight days thereafter a claim petition seems to have been put in by one Peramma claiming those properties to be hers and to be not attachable for the debt of Narayya. The claim petition was allowed. Thereupon the decree-holder had to bring a suit to contest that order in the claim proceedings, and having brought the suit he finally succeeded in getting a decree only on the 8th December 1920 that the properties belonged to his judgment-debtor. In the meanwhile, it is true that he took no steps to execute the decree. He then put in the present application, which is now before us, on the very day, that is, the 8th December, when the decree in the second suit was passed in his favour, to bring to sale the properties he had already attached in his application before judgment. That application was allowed by the District Munsif to the extent of the properties which he found were actually attached by the order of attachment before judgment and was dismissed as regards the rest of the properties. The Subordinate Judge on appeal ruled that, even as regards the properties taken in attachment before judgment, the application was barred by limitation as the application was made more than three years after the date of the decree.

The question thus before us is whether the view taken by the District Munsif that the present application is an application which could be treated as one for reviving the execution proceedings already commenced can be supported or not. It is clear from the authorities that, when an execution application is brought and properties are attached in execution of that application, if any obstacle is placed in the way of the properties being sold and

assets realised for the puropose of meeting the decree-debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Article 182 of the Limitation Act, but is in the nature of a revival of the original execution application and Article 181 of the Limitation Act will apply. If we apply that principle to the present case, there can be no doubt that the District Munsif's view is correct and that the application by the appellant before us to sell the properties already attached is entirely within time. That this is the principle applicable as regards an execution application put in after the decree is not disputed by the other side because the authorities are all in favour of that view: vide *Chalvadi Kotiah* v. *Poloori Alamelammah* (1) and *Rameshwar Singh* v. *Homeshwar Singh* (2). It is, however, contended by the learned Vakil for the respondent before us that that principle will not apply in the case of an attachment before judgment unless it had been followed by an application for execution of the decree after the decree was passed. We are unable to accept that contention. Under the Code the attachment before judgment enures to the benefit of the decree-holder when the decree is passed so that it is no longer necessary to attach the property: *vide* O. XXXVIII, r. 11 of the Civil Procedure Code. The principle applicable in the case of an application for execution after attachment applies equally to the case of an attachment before judgment, because, after all, the position is exactly the same whether the attachment was before judgment or after the decree, when a man is prevented from getting the fruits of his decree because of somebody else's improper obstruction and his claim has been wrongly decided and he has been obliged to bring a second suit to put the matter right. We think that the principle clearly applies to the present case and, therefore, we hold that the application is not barred by limitation in this case.

In the result, we set aside the order of the Subordinate Judge and restore that of the District Munsif with costs here and in the Courts below.

V. N. V. *Order set aside.*
Z. K.

(1) 31 M. 71 ; 18 M. L. J. 46 ; 3 M. L. T. 329.
(2) 59 Ind. Cas. 636 ; 10 M. L. J. 1 ; 1 P. L. T. 731 ; 19 A. L. J. 26 ; (1921) M. W. N. 21 ; 33 C. L. J. 109 ; 25 C. W. N. 337 ; 13 L. W. 546 ; 6 P. L. J. 132; 23 Bom. L. R. 721 ; 30 M. L. T. 189 ; 48 I A. 17 (P. C.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL APPEAL No. 20 OF 1923.

August 16, 1923.

Present :—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

MAHOMEDALLY ADAMJI MASALAVALLA—PLAINTIFF—APPELLANT
versus
ABDUL HUSSEIN ADAMJI MASALAVALLA—DEFENDANT—RESPONDENT.

Letters Patent (Bom.), cl. 12 — Administration suit, whether suit for land—Property situate outside limits of Original Jurisdiction, title to, whether can be investigated—Leave of Court, whether necessary.

An administration suit, as such, is not a suit for land within the meaning of clause 12 of the Bombay High Court, and the question whether certain immoveable property situate outside the limits of the Original Civil Jurisdiction of the High Court formed part of the estate of the deceased can be appropriately considered in such a suit. Such a question is only an incident of the administration suit and no question of leave under clause 12 of the Letters Patent arises with reference to it.

Mr. *Munshi*, for the Appellant.

Messrs. *Kania* and *Kanga*, for the Respondent.

JUDGMENT

Shah, Ag. C.J.—This appeal arises out of a suit filed for the administration of the estate of one Adamji Masalavalla. The suit was filed on October 25, 1920, by the two sons and a daughter of the deceased Adamji against his two other sons and another daughter.

MAHOMEDALLY ADAMJI *v.* ABDUL HUSSEIN ADAMJI

On behalf of defendant No. 1 an objection was taken that as the properties of the deceased included a house situate at Kurla, the Court had no jurisdiction to entertain the suit. It was contended on his behalf that it was really a suit for land within the meaning of clause (12) of the Letters Patent. But that objection was overruled and a preliminary decree was passed which contained a declaration that the Court had jurisdiction to administer the said Kurla property.

From this preliminary decree defendant No. 1 preferred an appeal to this Court: *Abdul Hussein* v. *Mahomedally* (1). In that appeal it was held that a suit for the administration of an estate was not a suit for land and that the Court had jurisdiction to proceed with the suit; but it was held that any declaration as to the Court having jurisdiction to administer the Kurla property was premature at that stage. The following observations in the judgment are pertinent :—

"It is only when the reference commences before the Commissioner on the accounts being filed that it can be ascertained what are the contentions of the parties and whether the accounts filed together with the objections and surcharges show that there are properties either inside or outside the jurisdiction belonging to the estate. When claims to such properties are raised before the Commissioner, then it is a matter for him to decide what actions to take, and even if he is of opinion that he has jurisdiction to decide questions of title to immoveable property, it will be open to the parties to ask him to make a reference for the opinion of the Court, when the Court will be in a position to decide how the disputed questions of title should be tried."

Thereafter the matter went to the Commissioner, and apparently after some hearing the Commissioner made a special report and directed the first defendant to bring it before the Court to try the question of title to the said immoveable property at Kurla.

It appears that defendant No. 1's case before the Commissioner was that this property was given over to him by his father in the year 1906 by way of gift, and that at the date of the death of Adamji it did not form part of his estate.

(1) 65 Ind. Cas. 160; 23 Bom. L. R 1326; 46 B. 772; (1922) A. I. R. (Bom.) 113.

On this special report, the matter was brought before the Court by notice of motion; and the learned Judge decided that the Court had no jurisdiction to entertain a suit with reference to the land outside the Original Civil Jurisdiction of this Court, that no leave under clause (12) was asked for and none was granted, and that this Court ought not to give leave now. The learned Judge declined to give any special leave to the Commissioner to determine the question of title to the property at Kurla on the ground that the Court had no jurisdiction to entertain such suit.

The plaintiffs have appealed from this decision.

It is urged on behalf of the plaintiffs that the Court has jurisdiction to determine the question as to whether this property belonged to the deceased at the date of his death and formed part of his estate, that the question of title to this property is merely an incident of the administration of the estate, and that it has really no reference to clause (12) of the Letters Patent.

On the other hand it is urged that though an administration suit may not be a suit for land, where any question as to title to immoveable property situate outside the Original Civil Jurisdiction of this Court arises, it is, in substance, a suit for land or other immoveable property within the meaning of clause (12) of the Letters Patent, and that as in this case no leave has been or could be obtained as the property is situate outside the island of Bombay, the Court has no jurisdiction to direct any inquiry as to title to this property in this suit.

On a consideration of the arguments on both sides I am satisfied that the Court has jurisdiction to determine in this suit whether the property belonged to the deceased Adamji or not. It appears from the form of the decree in an administration suit given in Seton on Decrees, Vol. II, page 1412 (7th Edition) and also in the Schedule I, Appendix D, of the Code of Civil Procedure that among the inquiries contemplated in the course of the administration the inquiry as to what immoveable property the deceased was seized of or entitled to at the time of his death is included. The question to my mind is not now whether the suit in respect of this property so far as it relates to this property is a

suit for land or not, but whether such an inquiry is appropriate in an administration suit. It must be taken now, as held by this Court in *Abdul Hussain* v. *Mohomedally* (1), that an administration suit as such is not a suit for land within the meaning of clause (12). This question is really an incident of the administration suit. This is supported by the following observations of their Lordships of the Privy Council in *Benode Behary Bose* v. *Nistarini Dassi* (2):—

"The primary object of the suit was the administration of the estate of a deceased person resident within the jurisdiction, the principal executor being also resident there and the actual administration going on there. The High Court of Calcutta, in its Ordinary Jurisdiction, had a right to order administration of this estate, and, as ancillary to such an order, to set aside deeds obtained by the fraud of the executor. Nor does the circumstance that a decree had been granted by the Court of the 24-*Pergunnhas* making a fraudulent award an order of Court protect that decree from the jurisdiction of the Calcutta Court, when redressing that fraud. In like manner, their Lordships consider the Calcutta Court entitled, for the due administration of the estate, to set aside leases of land outside the territorial limits of their jurisdiction, those leases having been made as an incident of the same fraud."

The effect of these observations is sought to be got over by the consideration, that in that case, in fact, leave was obtained under clause (12), and that the leave was obtainable because a part of the property was situate at Calcutta, and, secondly, it was really a question of fraud, and that could properly be dealt with as between the parties by the High Court at Calcutta. It is quite true that the judgment of the Court of Appeal at Calcutta in that case proceeded upon two grounds: one of which was that leave, in fact, was obtained. The ground, however, has not been referred to by their Lordships of the Privy Council, and the jurisdiction of the Court is determined on the general ground that the question as to title to the property outside Calcutta was really an incident of the administration of the deceased's estate. It is hardly necessary to refer to the decision of this Court in *Motibhai Shankarbhai* v. *Nathabhai Narayanbhai* (3) where also it was held that the question as to title of the property can be appropriately considered in an administration suit.

Mr. Kania has relied upon the observations in *Vaghoji* v *Camaji* (4). That was a case for establishing title to possession of land and to secure that possession from molestation. It was held that that was a suit for land within the meaning of clause (12). There are certain observations, however, upon which great reliance is placed on behalf of respondent No. 1. I have read the judgment in this case carefully, and I am unable to accept the contention for respondent No. 1 that this case is an authority in support of the proposition which he contends for. The whole argument on behalf of respondent No. 1 is based upon the assumption that the scope of the powers of the Court in dealing with an administration suit is to be determined with reference to the question as to whether, if it were a suit for land, it would be within the jurisdiction of the Court. It is quite true that if it had been simply a suit in respect of this immoveable property by one of the heirs against another person who claimed to be the owner of this property, it would be a suit for land outside the jurisdiction of this Court. But it does not follow that because the determination of the question as to whether the property belonged to the deceased at the date of his death is involved in an administration suit, to that extent it becomes a suit for land in the sense that if that property is situate outside the jurisdiction of the Court, this Court cannot deal with the question. No authority has been cited which really touches the point. But even assuming for the sake of argument, that the observations in *Vaghoji* v. *Camaji*(4) afford some guidance in determining whether the Court has jurisdiction to determine the question of title or not, I am unable to hold that there is anything in those observations which really helps the respondent. The observations are these:—

"Taking the words, therefore, in their fair natural meaning, can there be any doubt that this is a suit for land? Its leading purpose is

(2) 33 C. 180 at pp. 191, 192; 9 C. W. N. 961; 15 M. L. J. 331; 7 Bom. L. R. 857; 32 I. A. 103; 2 C. L. J. 169 (P. C.).

(3) 62 Ind. Cas. 24; 23 Bom. L. R. 444 at p. 445; 45 B. 1053.

(4) 29 B. 249; 6 Bom. L. R. 958.

to establish a title to possession of land and to secure that possession from molestation, and it is important to note that this claim is based not on any contract, trust or fraud, or any circumstance giving rise to privity between the parties, but is brought to vindicate rights resulting from ownership and possession alleged to be with the plaintiffs."

Apart from the consideration that these observations were not made with reference to an administration suit, it is clear that it could not be said in this case that there are no circumstances giving rise to privity between the parties in this case. It is quite true that this is not a case of fraud. But this is a case of privity between the parties to the suit where one of the heirs contends that the property was given over to him by way of gift by his deceased father and the other heirs contend that it continued to form part of the estate of the deceased. In such a case it is difficult to say that on the strength of the observations in *Vaghoji* v. *Camaji* (4), it can be held that the question between the parties so situated relating to the question of title would be outside the jurisdiction of this Court even though the immoveable property may be beyond the limits of the territorial jurisdiction of this Court. Reference was also made to the decision in *Abdul Karim Sahib* v. *Badrudeen Sahib* (5). In that case, however, it was expressly held that the suit which the Court had to deal with was not an administration suit, and the question whether in an adminstration suit the Court could deal with any dispute between the parties to the suit relating to the title to any immoveable property, which is said to have belonged to the deceased, was not decided in that case. On the whole, therefore, I do not feel any doubt that the Court in administering the estate of the deceased in this suit has power to inquire as to whether the particular immoveable property belonged to the deceased at the time of his death. As it is a question relating to the title to immoveable property, it is common ground that if the question can be determined in this suit, it ought to be determined by the Court, and not by the Commissioner.

I may add that because the Court has the power to determine the question of title to immoveable property situate outside its territorial jurisdiction in an administration suit, it does not necessarily follow that that Court itself will always determine the question. That must be decided with reference to the circumstances of each case. It may be more convenient in a given case to have it determined in a suit filed in the Court in whose jurisdiction the property is situated by the receiver in the administration suit or by any of the parties. In the present case the property is situated at Kurla, and having regard to the circumstances of this case the determination of the question by this Court is at least as convenient as, if not more convenient than, having it determined by the Court at Thana.

I would, therefore, allow this appeal and direct that an inquiry be made by the Trial Court as to whether the property at Kurla now in dispute formed part of the estate belonging to the deceased at the time of his death. It may be, as was pointed out in the course of the argument, for instance, that this Court could not effect division of this property by metes and bounds as prayed for in the suit. That, however, is a question which does not arise at this stage, and it is possible that even if the property is found to belong to the deceased at the time of his death, there may be no necessity for partition by metes and bounds. That question can be dealt with only when the question as to title is decided. It will be for the Trial Court to give further directions to the Commissioner, if necessary, which would be appropriate to his finding on this question.

Respondent No. 1 to pay costs of the plaintiffs in this appeal and of the Notice of Motion.

Crump, J.—I agree entirely with the judgment just pronounced and the reasoning on which it is based. But as we are reversing the judgment of the learned Trial Judge, I desire to state my reasons briefly.

It is necessary at the outset to set out precisely what was the effect of the judgment of this Court in the appeal that previously came before it. Now, it is quite clear that there were two points for consideration in that case. The first question was whether an administration suit was a suit for land within the meaning of clause 12 of the Letters Patent,

(5) 28 M. 216.

The second question was whether the Court, if it had jurisdiction to entertain the suit, had jurisdiction to decide questions of title to property outside the territorial limits of its jurisdiction. The decision of the Court upon the first point clearly was that an administration suit was not a suit for land and it follows, therefore, that the Court had jurisdiction to entertain such a suit, even though the property was situated outside the territorial jurisdiction by virtue of clause (12) of the Letters Patent. As to the second question the Court held that the question whether the title to the Kurla property could or could not be decided, had not really arisen for decision at that stage of the case, and that matter, therefore, was left open. It is that second point which has now been decided adversely to the plaintiffs in the appeal which has come before us for our consideration. Now if an administration suit as regards property situated outside the jurisdiction can be entertained by this Court, it appears to me to follow almost of necessity that the question as to title of this property must be determined. It is impossible for the Court to administer the estate without deciding what the estate is, and until the question of title has been settled, the Court does not know as to what property its orders are to operate. When that second question is decided, it will be for the Court to consider in what manner the administration should be effected. That is a stage which we have not yet reached, and as to which such directions as may be necessary will have to be given by the Court after the question of title is determined. To hold otherwise, would, in my opinion, lead to absurdity; for it would be a necessary conclusion that though the Court can entertain an administration suit as regards property outside the territorial jurisdiction, it cannot, in that suit, decide whether that property belongs to the estate or not. I know of no authority which forces me to that conclusion, and none has been cited. It appears to me clear that the decision of the Privy Council in *Benode Behari Bose* v. *Nistarini Dassi* (2) is an authority in a contrary sense. For these reasons, therefore, I agree with the orders proposed.

Z. K. *Appeal allowed.*

Attorneys for the Appellant—Messrs. *Mulla* and *Mulla*.

Attorneys for the Respondent—Messrs. *Soondardas & Co.* and *Mansukhlal, Harilal* and *Mehta*.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 14 OF 1922.

May 7, 1923.

Present :—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

RAJA BISHUNATH SARAN SINGH—PLAINTIFF—APPELLANT

versus

SITLA BAKHSH SINGH—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Declaratory relief—Express denial of title, absence of—Attitude and evidence of defendant—Cloud on title—Relief, grant of—U. P. Land Revenue Act (III of 1901), s. 233—Oudh Rent Act (XXII of 1886), s. 52—Document creating tenancy rights, interpretation of—Jurisdiction of Civil Courts.

The Courts have jurisdiction to grant declaratory relief even where on the pleadings of the defendant no case for the grant of such relief is made out, if the attitude of the defendant and the evidence put forward by him have the effect of casting a cloud on the plaintiff's title.

A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of the kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title and to stand in the way of a full and free exercise of his ownership, is a cloud upon his title, which he may remove.

The Civil Courts have no jurisdiction to interpret a document purporting to grant a lease of tenancy rights so as to declare whether under it the period of the lease has expired or not.

Case-Law reviewed.

Appeal from the decree of the Subordinate Judge, Partabgarh, dated the 25th November 1911.

RAJA BISHUNATH SARAN SINGH *v.* SITLA BAKHSH SINGH

Pandit *Gokaran Nath Misra* and Babu *Avadh Behari Lal*, for the Appellant.

Babu *Radha Krishna* and Pandit *Radhe Behari Misra*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Partabgarh, dated the 25th November 1921, by which the suit of the plaintiff has been dismissed. The plaintiff is the *taluqdar* of Tiloi which is a large estate in the district of Rae Bareli. Within the estate is included a village called Darrah, of which the plaintiff is admittedly the proprietor, and within this village lie the lands measuring 168 *bighas* 19 *biswas* 19 *biswansis* as specified in the schedule attached to the plaint. These lands constitute a block which is sometimes described in the Revenue papers as a hamlet of the main village Darrah. The defendant is admittedly in possession of this hamlet. It is also common ground that the defendant pays rent to the plaintiff for the use and occupation of these plots of land. The plaintiff prayed for the following reliefs in his plaint: — (1) "That the Court may make a declaration to the effect that the defendant is not the under-proprietor of the land in suit" and (2) "that according to the decree dated the 9th September 1868, awarded by Mr. Ferrar, Assistant Settlement Officer, the defendant was a 30 years' lease-holder of the said land and that period has expired." His suit has been, as mentioned before, dismissed in its entirety by the Court below. The first relief has been refused on the ground that no cause of action arose to the plaintiff for a relief of that nature. The second relief has been thrown out on the ground that the Civil Court has no jurisdiction to grant it. In the appeal before us the claim for a decree in respect of both the reliefs is urged and the grounds on which the Court below has refused these reliefs have been very seriously contested.

The facts of the case are very simple. Binda Bakhsh Singh, the ancestor of the defendant, brought a claim for sub-settlement in respect of the hamlet in question in the year 1868 in the Court of the Settlement Officer of Partabgarh against the then *taluqdar* of the Tiloi estate, Rae Jagpal Singh. The Settlement Officer rejected the claim for sub-settlement on the ground that it was not established as required by Act XXVI of 1866. By his judgment, dated the 9th September 1868, that officer, after having observed that as the defendant had expressed his willingness to give the plaintiff a lease for thirty years at a fixed rate, proceeded to give a decree to the plaintiff, Binda Bakhsh Singh, in the following terms :—" the Court accordingly decrees a lease for thirty years for 168 *bighas* 19 *biswas* 19 *dhurs*, two *mahua* trees and a mango tree at Rs. 291 per annum, the rent to be re-adjusted when new *malguzari* is declared." (Ext. I). This decree was confirmed on appeal by the Commissioner of Rae Bareli on the 25th November 1868 (Ext. 3) and on second appeal was again confirmed by the Financial Commissioner of Oudh on the 2nd March 1869 (Ext. 5). The new settlement of the district was made in the year 1893 and by proceedings, dated the 23rd November 1895 the rent of the lands in suit was adjusted as follows :—Government revenue Rs. 177, old *malikana* Rs. 127, local rates Rs. 2-1-7). *Patwari* cess Rs. 2-6 5, total Rs. 308-8-0 (Exts. 6 and 7). At the time of these proceedings the estate was under the management of the Court of Wards and the *taluqdar* was represented by the Deputy Commissioner of Rae Bareli, who was a party to these proceedings. While the estate was still under the superintendence of the Court of Wards the Special Manager issued a notice of ejectment against the defendant, Sitla Bakhsh Singh, under the provisions of the Oudh Rent Act (XXII of 1886) in respect of the lands in suit. Sitla Bakhsh Singh, who was a minor, then contested the notice of ejectment by instituting a suit through his mother under clause (8) of section 108 of the said Act. The Court of first instance decreed that suit and cancelled the notice of ejectment on the 9th June 1909 (Ext. 8). The Court of Wards appealed against the last-mentioned judgment and the Commissioner of the Fyzabad division allowed the appeal and remanded the case to the Court of first instance for the trial of some subsidiary issues which were left undetermined by the Court of first instance (Ext. 9). Sitla Baksh Singh preferred a second appeal to the Board of Revenue against the order of the Commissioner and the Board of Revenue by its judgment, dated the 19th November 1909 allowed the appeal, reversed the decision

of the Commissioner and restored that of the Court of first instance (Ext. 10). The present suit is in substance an attack on the interpretation placed by the Board of Revenue in its judgment, dated the 19th November 1909 on the decree of the Settlement Court of the 9th September 1863 already referred to.

One of the issues in the case before us was:—"Is the suit within limitation?" Having regard to the fact that the order of the Board of Revenue was passed when the plaintiff was admittedly a minor and that the present suit was filed within three years from the date of his attaining majority the Court below has held that the suit is within time. This finding has been accepted before us and need not any further be adverted to.

We are of opinion that the first relief prayed for by the plaintiff should have been allowed. It is true, as we understand the pleadings in the present case, that the defendant has not set up any under-proprietary right in the property in question and has defined his status as that of a lessee having only heritable and non-transferable rights but on the evidence in the case we have no doubt left in our mind that this is a fit case in which the first part of the declaration should be granted. The judgment of the Settlement Officer dated the 9th September 1868 does not in terms give either heritable or transferable rights to the ancestor of the defendant and if it is possible to construe that judgment as importing an estate of inheritance it is difficult to see why such an estate should not carry with it the right of alienation also. The defendant construes it as conferring a heritable interest in the lands in suit but that it does not also confer a right to alienate is a pure question of interpretation which can always be re-opened till a final adjudication by a competent Court is obtained, to obtain which is the aim of this suit. The original judgment in English of Mr. Ferrar, the Settlement Officer, was followed by an order in vernacular dated the 9th September 1868 in which the effect of Mr. Ferrar's order is described as granting a perpetual *theka* (Ext. A1). Then followed a formal decree in vernacular in column 8 of which the particulars of the decrees are stated in the following words:—"For the reasons given in English it is decreed that a perpetual lease be given to the plaintiff in respect of 168 *bighas* 19 *biswas* 19 *biswansis* land, two *mahua* trees and one mango tree on a *jama* of Rs. 291|- as per admission of the defendant's agent and that the defendant shall have a right of the settlement of rent after the expiry of the period of the regular settlement." (Ext. A2.) The language used in both these exhibits A1 and A2 are susceptible of being interpreted as denoting a complete estate of inheritance which would embrace, in the absence of any limitation, both heritable and transferable rights. It appears that Mr. Ferrar's decree was forwarded to the *Tahsildar* for the purpose of the specification of the plots comprising the 168 *bighas* 19 *biswas* 19 *biswansis* land which was the subject-matter of that decree. In carrying out the instructions the *Tahsildar* construed the decree of the 9th September 1863 to mean "a perpetual, heritable and non-transferable lease (Ext. A4). In his grounds of appeal to the Commissioner of Rae Bareli against the decree of Mr. Ferrar, Binda Bakhsh Singh, again claimed that he was entitled to under-proprietary rights (Ext. 2) and when he carried the further appeal to the Financial Commissioner of Oudh he asserted that he held possession of the village as a *zamindar* and was entitled to a decree for under-proprietary rights (Ext. 4). In the proceedings relating to the adjustment of rent in the year 1895 Binda Bakhsh Singh was described as an under-proprietor and the rent of the holding was fixed on that footing (Exts. 6 and 7). In the *khewat* prepared by Babu Judishtar Singh the nature of the tenure in suit was described as "heritable and non-transferable lease." (Ext. A 24). On the completion of the first regular settlement the name of Binda Bakhsh Singh was entered in the *khewat* as a "perpetual lessee." (Ext. A8). In the last settlement his name was entered in Register No. 5 and in the column of rent the assessment made in the year 1895 already referred to was shown (Ext. A22). The *khasra* prepared at the last-mentioned settlement left column No. 7 relating to under-proprietors blank and the name of Binda Bakhsh Singh was entered in column No. 8 as a tenant (Ext. II). The present defendant, Sitla Bakhsh Singh, stated in paragraph 3 of his plaint to contest the notice of ejectment issued by the *taluqdar* in the year 1908 that his ancestors were old *zamindars* of the village and as such they held possession over *sir*, *sayer*, *dih*, *jalkar*

and other unculturable land. In paragraph 4 he construed the decree of the 9th September 1868 as one for a "perpetual and non-transferable lease." In paragraph 6 he stated that the adjustment of rent in November 1895 was made with his ancestor in the capacity of a "perpetual lessee" (Ext. A 12). In the suit contesting the notice of ejectment the Court of first instance, the Assistant Collector of Partabgrah, set down amongst other issues the following issues :—

"1. Is the plaintiff a mere tenant of the land mentioned in the notice on behalf of the defendant or is he in possession thereof by virtue of any special agreement or decree of the Court"?

"2. Has any decision been arrived at in the present Settlement Court in respect of the land in suit, and, if so, what effect has it in this suit"?

In deciding the above two issues he opened his judgment by stating as a fact that the ancestors of the plaintiff were the old *zamindars* of the village. Then after stating the various stages of the litigation in the Settlement Court he referred to the proceedings of the year 1895 relating to the assessment of rent and observed that "the plaintiff is not only a simple tenant of the land in suit but he is a perpetual lessee having heritable but non-transferable rights and holds possession as such and his name stands recorded in Register No. 5, *khewat* accordingly." On the construction of the decree of Mr. Ferrar he expressed his opinion that the plaintiff's "status was that of a perpetual lessee for 30 years." Finally, he concluded his judgment thus: "Therefore as to issues 1 and 2 I hold that the plaintiff is not a mere tenant on behalf of the defendant, rather he is in possession as a perpetual lessee under a decree of the Court dated the 9th September 1868, and is, therefore, not liable to ejectment by notice under section 52 of the Oudh Rent Act." (Ext. 8). On these findings he decreed the suit and cancelled the notice of ejectment. On an appeal by the Court of Wards on behalf of the minor *taluqdar* the Commissioner of the Fyzabad division observed: "The lower Court has held that the decree of 9th September 1868 granted a perpetual lease. I am unable to concur in this view", and holding that the "respondent does not hold a perpetual lease and that he is liable to be ejected by notice" he allowed the appeal of the *taluqdar* (Ext. 9). On second appeal by the defendant the Board of Revenue referred to the judgment of Mr. Ferrar, the vernacular copy of the decree following that judgment, the *khewat* prepared at the first regular settlement, the proceedings before the *Tahsildar* and last of all to the settlement of rent in the year 1895, construed the word "*dawami*" to imply heritable rights and finally concluded its judgment in the following words :—

"The history of this case makes it manifest that at the first settlement and at the recent settlement the lease in the present case was understood to be heritable and respondent as a consequence obtained an enhancement of rent. I would allow the appeal and reverse the decision of the Commissioner and restore that of the Assistant Collector" (Ext. 10). Now, whatever might have been the steps of reasoning adopted by the Assistant Collector and the Board of Revenue in support of their final conclusions it is obvious that the decrees which were eventually passed in the suit contesting the notice of ejectment amounted to no more and no less than this that the defendant possessed the lands in question under a perpetual lease. As already observed, a perpetual lease may import a complete estate of inheritance. We are of opinion that the cumulative effect of the events as we have described them is to cast a cloud on the plaintiff's title as a complete proprietor of the lands in suit.

Our jurisdiction to grant a declaratory relief rests on the provisions of section 42 of the Specific Relief Act (I of 1877). That the plaintiff has a right to the property in suit is not disputed and having regard to the facts already stated we are of opinion that the defendant is a person interested to deny the title of the plaintiff to his right in the property in suit. To quote an American authority noticed in Doctor Banerji's Specific Relief, second edition, p. 492, "A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of the kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title and to stand in the

way of a full and free exercise of his ownership, is, in my judgment, cloud upon his title, which he may remove," *Whitney* v. *Port Huron* (1). We think it should be mentioned that in spite of the fact that the defendant has not in his pleadings in this suit claimed any under-proprietary right in the lands in suit he stubbornly resisted the relief which the plaintiff asked in the first part of the declaration and succeeded in that resistance in the Court below. His counsel here again addressed a lengthy argument to us persisting in the attitude which was taken in the Court below.

The next question is "Has the Civil Court jurisdiction to grant the second relief prayed for in the plaint?" We have given our anxious consideration to this part of the case and have felt borne down by the weight of precedents in this Court, in the absence of which we might have come to a different conclusion from what we are forced to arrive at. It is manifest that the determination of the question whether the plaintiff is entitled to the relief now under consideration involves the interpretion of the decree of the 9th September 1868. We should be very reluctant to hold that the Civil Courts have no jurisdiction to interpret a document bearing upon the rights of the parties to a litigation. The interpretation may have the effect of placing a party in a position which would be highly disadvantageous to him in the Rent Courts but the Civil Courts cannot be deprived of the jurisdiction to interpret a document because of the danger of such a consequence flowing from the exercise of that jurisdiction.

In the case of *Raghubar* v. *Raja Rampal Singh* (2) a Bench of this Court considered all the previous decisions and came to the following conclusions:—"It seems, therefore, to be settled law in Oudh, (1) that in a suit to contest the validity of a notice of ejectment, instituted under the Rent Act, if the plaintiff pleads that he is not a tenant, but has a right in the land which is inconsistent with his being a tenant, the question, whether he has such a right or not, is one which the Revenue Courts are not empowered to decide finally, but is one of which the Civil Courts can take cognizance; (2) that, if the plaintiff admits that he is a tenant, but denies that he is one not holding on special terms, the Revenue Courts have exclusive jurisdiction to determine whether he is or is not a tenant holding on special terms.....The Revenue Courts have, I think, exclusive jurisdiction to decide, where a tenancy is admitted, what the nature of the tenancy is, but where the existence of the relation of landlord and tenant is denied, I do not think that they have exclusive jurisdiction to decide as to the existence of such relation."

Another Bench of this Court decided the case of *Mohamad Ewaz Ali Khan* v. *Maheshur Parshad and others* (3). This case bears a strong resemblance to the case before us. The plaintiff *taluqdar's* case was that the defendants were entitled to hold for thirty years under the Settlement Court decree dated the 6th January 1869 and that after the expiration of the period of thirty years the plaintiff sought to eject the defendants by notice. In the proceedings following the issue of the notice the defendants denied that they held the village in suit as tenants and that after the expiration of the period of thirty years mentioned in the decree of the 6th January 1869 under which the defendants held the village as tenants, they ceased to be tenants under that decree. The plaintiff asked for a declaration that the defendants had no right to hold the village as under-proprietors or any other right in the village superior to that of an ordinary tenant. The case of the defendants was that they did not hold the village as tenants, but as under-proprietors independently of the decree mentioned above and that even if they held the village under the decree as tenants they were entitled to continue in occupation of the village. One of the issues settled in the Court of first instance was :—

"Does the thirty years' period, mentioned in the decree of the 6th January 1869, relate to the terms of the lease itself or merely to the amount of the rent fixed thereby to be paid by the defendant to the plaintiff ?" That Court refused to decide the issue on the ground that it had no jurisdiction to do so. On appeal this Court delivered its opinion in the following terms :—

" Where there is no dispute as to whether a person is a tenant holding under a decree

(1) (1891) 88 Mich. 269 ; 26 Am. St. R. 291.
(2) 3 O. C. 365.
(3) 5 O. C. 118.

and the landlord wishes to have him ejected on a ground alleged to justify his ejectment under the decree, perhaps the only Court competent to interpret the decree would be the Revenue Court, and the Civil Courts might properly refuse to interpret it, if the landlord asked them to do so with the object of seeking to have the tenant ejected by the Revenue Court." The case was remanded to the Court of first instance with directions to that Court to decide whether the relation of landlord and tenant existed beween the parties or whether the defendants were under-proprietors. The Court of first instance then granted the plaintiff *taluqdar* a decree that the defendants had no under-proprietary rights in the village or in any part of it but it refused to interpret the decree of the 6th January 1869. The defendants then appealed to this Court and the plaintiff filed objections on the ground that the lower Court should have interpreted the decree mentioned above. These objections were, however, withdrawn. The Court dismissed the appeal. One of the members of the Bench observed :—"I may add that this Court in its judgment remanding the case appears to have overlooked the main object of the plaintiff's suit which was to obtain a declaration that the defendants have no rights under the decree of the 6th January 1869 to remain in possession of the village. It directed the Subordinate Judge to decide whether the relation of landlord and tenant existed between the parties or whether the defendants were under-proprietors and no doubt he has in consequence refused to interpret the decree. The result seems to be that the plaintiff has obtained no declaration such as the Revenue Courts held that it was necessary for him to obtain, but as the objections of the respondent have been withdrawn, it is impossible for us to decide whether the defendants have a right to remain in possession after the expiry of the 30 years or not." The other member of the Bench did not take the view expressed in the quotation given above. He was of opinion that the order of remand by the former Bench was not erroneous. At the end he held that the defendants had no under-proprietary right of any kind left and added :—"The way is now clear for the Revenue Courts to determine whether the lease decreed by the Financial Commissioner was only a lease for 30 years which has expired rendering the appellants liable to ejectment by notice or whether the issue was one in perpetuity, the rent of which might be revised after 30 years :" *Maheshar Parshad* v. *Babu Muhammad Ewaz Ali Khan* (4).

Taking, therefore, the two decisions, *Muhammad Ewaz Ali Khan* v. *Maheshur Parshad* (3) and *Maheshar Parshad* v. *Babu Muhammad Ewaz Ali Khan* (5) together the view held by the majority of the Judges was that it was the function of the Revenue Courts and not of the Civil Courts to interpret the decree with the object of determining whether the tenancy has or has not come to an end on the expiration of 30 years.

After the dismissal of the appeal by the Court the *taluqdar* issued a fresh notice of ejectment under the provisions of the Oudh Rent Act (XXII of 1886). The defendants instituted a suit to contest that notice and their suit was decreed all through by the Revenue Courts in India and the notice of ejectment was cancelled. The last decision was given by the Board of Revenue on the 2nd January 1907. The matter was then carried in appeal by means of two appeals to His Majesty in Council. One was an appeal by the defendants from the decision of the Court of Judicial Commissioner dated the 13th December 1904 and the other under an order in Council against the order of the Board of Revenue already mentioned. Thus their Lordships of the Privy Council had two appeals from decisions of Courts of different jurisdictions before them. Amongst other matters they construed the decree of the 6th January 1869 and came to the conclusion that "the Shukuls are now in the position of tenants whose tenancy has expired." As regards the relief to which the *taluqdar* was entitled their Lordships observed :—"The *taluqdar* is, therefore, entitled to a declaration such as is asked for in the suit instituted by him on the 11th January 1900 in the Court of the Subordinate Judge of Sultanpur, namely, that the Shukuls are not entitled to the rights of under-proprietors, or to any rights other than those of tenants for a

(4) 7 O. C. 372.

(5) 8 Ind. Cas. 200 ; 31 A. 304 ; 10 C. L. J. 133 ; 11 Bom. L. R. 868 ; 13 C. W. N. 1093 ; 6 M. L. T. 168 ; 12 O. C. 293 ; 19 M. L. J. 442 ; 36 I. A. 114 (P. C.).

term of thirty years whose term has expired, but not to any further relief." Finally, they affirmed the decree of the Court of the Judicial Commissioner but allowed the *taluqdar's* appeal from the decisions of the Courts of Revenue and reversed the orders of the Board of Revenue, the Court of the Commissioner of Fyzabad and the Court of the Deputy Commissioner of Sultanpur and dismissed the suit contesting the notice of ejectment (*Maheshar Parshad* v. *Muhammad Ewaz Ali Khan*) (5). This decision of their Lordships of the Privy Council is strongly relied upon by the learned Advocate for the appellant in support of the proposition that the Civil Courts have jurisdiction to interpret the decree in this case and to grant him the further relief for which he has prayed in this suit.

In our opinion the decision is not an authority on the question of jurisdiction. Their Lordships had before them an appeal from the decision of the Courts of Revenue as well and no question of jurisdiction could or did arise in the decision of the appeals before their Lordships. Sitting as a final Court of Appeal from the decisions of the Courts of Revenue and also from the decisions of the Civil Courts they granted to the *taluqdar* all the reliefs to which he was entitled unfettered as they were by any bar of the absence of jurisdiction. No argument arose and no decision was given, as already observed, on the question of jurisdiction. It is true that in granting the declaration their Lordships referred to the suit instituted by the *taluqdar* in the Court of the Subordinate Judge of Sultanpur but that was merely for the purpose of indicating the nature of the relief which their Lordships were going to grant. We are unable to construe that reference as a determination of the question as to whether the Civil Courts have jurisdiction to grant such a declaration as is given by their Lordships of the Privy Council in the second part of the relief.

In the case of *Ram Pargash* v. *Raja Mahammad Abul Hasan Khan* (6) a Bench of this Court interpreted the decision of their Lordships of the Privy Council mentioned above in the same sense in which we have just now interpreted. We may add that the decision was reversed by the Privy Council but on a different ground (*Raja Mohammad Abul Hasan Khan* v. *Prag* (7).

In the case of *Nand Ram* v. *Amanat Fatima Begam* (8), decided by Mr. Scott and Mr. (now Sir Edward) Chamier this Court held that a person holding a village under a Settlement decree for "a perpetual hereditary farming lease" was a tenant holding under a decree of Court within the meaning of section 52 of the Oudh Rent Act (XXII of 1886). In the case of *Lal Jagdis Bahadur Singh* v. *Sheoraji* (9), a Bench of this Court held that a claim for a declaration that a perpetual lease of a village granted by a decree of a Settlement Court was cancelled for the breaches of the conditions stated in the decree and that the lessees and their representatives could be ejected by notice through the Rent Court was not entertainable because the Civil Courts had no jurisdiction to entertain such a suit.

In *Chhab Narain Singh* v. *Sri Krishna Din* (10) Mr. Chamier said :—" The last question is whether I can in this case decide whether the defendants are now entitled to hold the land under the *patta* of 1874 or are mere tenants at will. It is quite clear that I cannot declare that the defendants are mere tenants at will. This Court has repeatedly declined to make such a declaration. From this it seems to follow that I cannot declare that the defendants are or are not entitled to hold the land under the *patta* of 1874 as this would be equivalent to a declaration of the class of tenant to which the defendants belong—a declaration which this Court has repeatedly declined to make." He then proceeded to discuss a large number of cases decided in this Court and expressed the conclusion at which he arrived in the following words :—" On the authorities I hold that it is not open to me in this case to declare that the defendants are or are not entitled to hold under the *patta* of 1874. I can only declare that they have no under-proprietary rights in the land in suit."

(6) 4 O. and A. L. R. 413.

(7) 38 Ind. Cas. 814 ; 20 O. C. 8 ; 15 A. L. J. 113 ; 21 M. L. T. 102 ; 19 Bom. L. R. 202 ; (1917) M. W. N. 232 and 456 ; 32 M. L. J. 388 ; 21 C. W. N. 582 ; 26 C. L. J. 165 ; 5 O. L. J. 34 (P. C.).

(8) 6 O. C. 94.

(9) 6 O. C. 289.

(10) 2 Ind. Cas. 927 ; 12 O. C. 164.

RAJA BISHUNATH SARAN SINGH *v.* SITLA BAKHSH SINGH

In the case of *Hirde* v. *Raja Muhammad Abdul Hasan Khan* (11), a Bench of this Court held that the Civil Court was precluded from going into the question as to whether the defendants were perpetual *thekadars* in the village or not. The learned Judges were of opinion that the provisions of section 233, clause (i), of the U. P. Land Revenue Act (III of 1901) excluded the jurisdiction of the Civil Court from entering into that question.

In the case of *Debi Bakhsh* v. *Ram Dhani* (12) Mr. Lindsay, J.C. held in a suit instituted by a landlord in the Civil Court for a declaration that the *patta* set up by the defendant was null and void against the plaintiff and that the defendant could not acquire any right in the land under it, that it is competent for a Civil Court to adjudicate upon the validity of a document of title and that the jurisdiction to give a final adjudication upon the validity of a document of title rests with the Civil Court.

In a later decision in the case of *Jagannath Singh* v. *Drigbijay Singh* (13) Mr. Lindsay modified the proposition which he laid down in the case of *Debi Bakhsh* v. *Ram Dhani* (12). He said that the issue regarding the genuineness or otherwise of the *patta* relied upon by the defendant could only be decided with the object of determining a question which is exclusively reserved for the jurisdiction of the Revenue Courts, namely, whether the defendant is an ordinary tenant or a tenant with a right of occupancy. In the end he struck out the declaration granted by the lower Courts to the effect that the *patta* relied upon by the defendant was a genuine one.

In the case of *Badri* v. *Khurshed Ali Khan* (14) the plaintiff brought a suit for a declaration that a perpetual lease relied upon by the defendant and upheld by the Revenue Courts was invalid on the ground that it was a forgery or that it was executed by a person who had no authority to execute the same. Pandit Kanhaiya Lal, A. J. C. held that the Civil Court was not competent to grant such a declaration, the jurisdiction being barred by the provisions of section 233, clause (i), of the U. P. Land Revenue Act (III of 1901).

(11) 30 Ind. Cas 207 ; 2 O. L. J. 335.
(12) 35 Ind. Cas. 446 ; 19 O. C. 58.
(13) 48 Ind. Cas. 88 ; 21 O. C. 210 ; 5 O. L. J. 611.
(14) 41 Ind. Cas. 15 ; 20 O. C. 182.

It will be seen that the decisions of this Court prior to the passing of the U. P. Land Revenue Act (III of 1901) laying down the proposition that the Civil Courts have no jurisdiction to interpret a document when a party claims tenancy rights under that document are based on the provisions of section 52 of the Oudh Rent Act (XXII of 1886). That section is as follows:—"52. (1) A tenant having a right of occupancy in any land or holding any land under a special agreement or decree of Court, shall not be ejected from that land otherwise than in execution of a decree for ejectment; provided that the decree for ejectment shall not be made, unless, at the date of that decree a decree against the tenant for an arrear of rent in respect of the land has remained unsatisfied for fifteen days or upwards.

"(2) A decree for the ejectment of a tenant holding under a special agreement or decree of Court may be made on such grounds as would justify ejectment under the agreement or decree."

If the question were *res integra* and we were free to form our own opinion on it we would construe clause (2) of the section quoted above to mean that the grounds justifying ejectment meant such grounds as arise out of terms or conditions of the agreement or the decree, for example, clauses of forfeiture. A ground of ejectment to the effect that the agreement or the decree had become a "spent instrument, and had no longer any vitality as a grant of property," (per Lord Davey in *Beni Pershad Koeri* v. *Dudhnath Roy* (15) can hardly be accurately described as a ground justifying ejectment under the agreement or the decree. The law on the subject is now codified by the enactment of clause (i) of section 233 of the U. P. Land Revenue Act (III of 1901). That section is "No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters." Amongst the matters is mentioned: "(i) save as provided in section 44, the determination of the class of a tenant, or of the rent payable by him, or the period for which such rent is fixed under this Act." The present case does not fall within

(15) 27 C. 156 ; 26 I. A. 216 ; 4 C. W. N. 274 ; 7 Sar. P. C. J. 580 ; 14 Ind. Dec. (N. S.) 103.

section 44. If we interpret the decree of the 9th September 1868 we may come to either of the two conclusions :— (1) that the lease has come to an end immediately on the expiry of the 30 years from the date of the decree or (2) that it has not come to an end in spite of the expiry of the said 30 years. In the first place, neither of these conclusions is the determination of the class of a tenant or of the rent payable by him or the period for which such rent is fixed under Act III of 1901. In the second place, even if it is the determination of the class of a tenant it is only a sequel to the interpretation that we may place on the decree of the 9th September 1868 ; but that a logical inference deducible from such an interpretation divests the Civil Court of its undoubted jurisdiction to interpret a document is a view which we on our part are not prepared to readily endorse. Be that as it may, we must follow the uniform course of decisions in this Court till the Privy Council finally sets the matter at rest. On these grounds we uphold the finding of the learned Subordinate Judge on the second question involved in this appeal.

In view of the probability that this matter will be carried in appeal to His Majesty in Council we think it advisable to express our own view as to the construction of the decree of the 9th September 1868. If we had nothing else before us except the judgment of Mr. Ferrar we should have no difficulty in holding that the right of the defendant under that judgmest came to an end on the expiry of 30 years from its date. The issue is however much obscured by certain proceedings recorded in vernacular after the original judgment of Mr. Ferrar was delivered in English. To these proceedings we have already made reference. They are to be found in Exhibits A1, A2 and A4. In these proceedings an interpretation was placed on the judgment of Mr. Ferrar which in our opinion is not warranted either by the language of the judgment or the circumstances in which it was passed. The decision of the Board of Revenue, dated the 19th November 1909 (Ext. 10) in the suit to contest the notice of ejectment is mainly based on the vernacular proceedings above referred to. There the defendant's ancestor was described as *thekadar* or *pattadar dawami*, that is, a perpetual lessee, and the learned Members of the Board of Revenue interpreted those words as connoting a heritable interest possessed by the lessee in the lands in suit. These proceedings might have been of some help in the task of definitely determining the nature of the tenure if we had not the terms of the grant itself in evidence. We have those terms before us in the judgment of Mr. Ferrar and if our interpretation of those terms is that the defendant's ancestor, Binda Bakhsh Singh, got nothing more than the right of occupation of the lands in suit for a term of 30 years on payment of the rent fixed in the judgment or the altered rent that may be fixed afterwards, it is obvious that we cannot deviate from that interpretation because of the construction which the ministerial staff placed on the judgment of Mr. Ferrar.

In the case of *Secretary of State for India in Council* v. *Srinivasa Chariar* (16), Sir Lawrence Jenkins, in delivering the judgment of the Privy Council, observed :—'But then it is urged that subsequent events show that the *shrotriyadars* acquired in one way or another an interest in the land of the village that entitled them to work the quarries without any obligation to make any payment to the Government. In support of this argument their Lordships' attention has been drawn to many matters and in particular to the title-deeds of the 'A' series of exhibits, the extract from the *inam* register (Exhibit J), the regulations, acts and standing orders relating to *inams* and a land-acquisition proceeding. Had these materials stood alone they might well have been urged as suggesting an inference that the original grant was in terms that supported the plaintiffs' claim as to what passed under it. But in the clearer light afforded by Ext. 1 they lose their evidentiary value and leave the terms as shown by that exhibit in no degree obscured." We must therefore determine the intention of Mr. Ferrar's judgment primarily from the language used in that judgment and also by means of the surrounding circumstances. The surrounding circumstances were that the claim of Binda Bakhsh Singh for a sub-settlement was negatived by the Settlement Officer and the decree which he gave was entirely based upon a concession made by the *taluqdar's*

(16) 60 Ind. Cas. 230 ; 48 I. A. 56 ; 40 M. L. J. 262 ; (1921) M. W. N. 111 ; 29 M. L. T. 181 ; 19 A. L. J. 201 ; 33 C. L. J. 280 ; 13 L. W. 592 ; 44 M. 421 ; 25 C. W. N. 818 ; 3 U. P. L. R. (P. C.) 43 (P. C.).

agent. The statement of the agent if it was recorded anywhere outside the judgment is not before us. In the opening portion of the judgment however we find, "But defendant has expressed his willingness to give plaintiff a lease for 30 years at a fixed rate." Then again we find "Defendant said he would give a 30 years' lease on Rs. 301." These words are absolutely clear and mean nothing less than a right of occupation or enjoyment for a term of 30 years. In the decretal part of the judgment occurs the following passage :— "The Court accordingly decrees a lease for 30 years for 168 *bighas* 19 *biswas* 9 *dhurs* two *mahua* trees and a mango tree at Rs. 291 per annum. Rent to be adjusted when new *malguzari* is declared." (Exhibit I). When the matter went in appeal to the Commissioner of Rae Bareli that officer observed : "Appellant could not get under the existing law more than he has got. He is unwise to appeal and to give the respondent opportunity to draw back and plead that his offer of amicable adjustment bas been rejected." (Exhibit 3). The Financial Commissioner in his judgment of the 2nd March 1869 said "by the consent of the *taluqdar* the Court of first instance decreed him (the appellant) a lease for 30 years of the land in his possession at Rs. 291 per annum." (Exhibit 5).

It is urged on behalf of the defendant-respondent that the decree in effect grants him an estate of inheritance less the right of alienation. That why he should not have that right is not shown, to use the language of Lord Atkinson in the case of *Maheshar Parshad* v. *Muhammad Ewaz Ali Khan* (4). As we have pointed out above, the decree was a result of a concession on the part of the *taluqdar* and if we were to construe it as giving the defendant a heritable interest in the lands in suit such an interest will carry with it all the benefits which he would have had if he had succeeded in his claim for sub-settlement. The revenue settlement was to fall within the term of 30 years, that is, five years before the expiry of 30 years. The settlement as a matter of fact commenced in 1893. We find that the Government revenue at the time of Mr. Ferrar's judgment was Rs. 168-4-0 (Exhibit 1) but it rose to Rs. 177 on the revision of the settlement in 1892 (Exhibit 7). It was therefore natural to provide in the decree for a readjustment of the rent in proportion to the revenue at the next settlement and we have shown that such a readjustment did take place in November 1895. The defendant's contention is that the period of 30 years was fixed for the purpose of determining the rent to be paid by him to the plaintiff. We do not agree with this contention. We have seen that the amount of rent was altered in view of the enhancement of the revenue and that was done 5 to 3 years before the expiry of the 30 years.

The defendant's pleader pressed on us a recent decision of their Lordships of the Privy Council in the case of *Prithipal Singh* v. *Ganesh Din Singh* (17) and argued that as his client has been recognised for a long period of time as having a heritable and non-transferable interest in the lands in suit this Court should affirm such an interest. That decision was on an appeal from a decree of this Court. We have perused the judgment of this Court and find that the decision which was affirmed by their Lordships of the Privy Council proceeded on the ground that the defendant in that case had acquired the status of an under-proprietor by adverse possession. No such question arises in the case before us. We are, therefore, of opinion that the tenure decreed to Binda Bakhsh Singh, the ancestor of the defendant, by the decree of the 9th September 1868 was only a lease-hold for a term of 30 years from the date of the decree.

We allow the appeal, modify the decree of the lower Court and grant the plaintiff a declaration that the defendant is not the under-proprietor of the lands in suit. As regards the other part of the declaration, we affirm the decree of the lower Court. In respect of the costs, we are of opinion that in the circumstances of this case each party should bear its own costs in both the Courts.

N. H. *Appeal partly allowed.*

(17) 71 Ind. Cas. 641 ; 25 O. C. 396 ; 44 M. L. J. 29 ; (1922) A. I. R. (P. C.) 383 ; 37 C. L. J. 219 ; 9 O. L. J. 619 ; 32 M. L. T. 109 ; 9 O. and A. L. R. (P. C.) 511 ; 18 L. W. 41 (P. C.).

SOMAR SINGH *v.* PREMDEI

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 68 AND 74 OF 1923.

January 4, 1924.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Kulwant Sahay.

M. A. No. 68.

SOMAR SINGH AND OTHERS—PETITIONERS—APPELLANTS

versus

Musammat PREMDEI AND OTHERS—OPPOSITE-PARTY—RESPONDENTS.

M. A. No. 74.

PEAREY SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Musammat PREMDEI KUER AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 182 (2)—*Civil Procedure Code* (Act *V of* 1908), *O. XLI, r.* 33—*Decree against several sets of defendants—Appeal by one set—Dismissal of entire suit—Appeal to His Majesty-in-Council—Restoration of decree of Trial Court—Execution—Decree, whether barred against defendants who did not appeal.*

Rule 33 of O. XLI of the Civil Procedure Code enables an Appellate Court to deal with the entire decree, although the appeal may be as to a part of the decree, and also to give directions in favour of parties who have actually not filed any appeal or objection. In this way, in an appeal from a part of the decree by some of the parties the entire decree becomes the subject matter of the appeal.

Clause 2 of Article 182 of Schedule I to the Limitation Act, applies where there has been an appeal from a part or whole of the decree, or when some only of the parties to the suit have brought the appeal.

Plaintiffs obtained a decree for contribution against three sets of defendants, which proceeded upon a common foundation, but specified the liability of each set of defendants. Defendant No. 1 appealed against the decree and plaintiffs filed cross-objections. Defendants Nos. 2 and 3 were impleaded as respondents. The High Court dismissed the plaintiffs' suit *in toto*. Plaintiffs appealed to His Majesty in Council, and the latter restored the decree of the Trial Court. When plaintiffs sought to execute the Order-in-Council, Defendants Nos. 2 and 3 objected that as against them the decree of the Trial Court had become barred by time, inasmuch as they had never appealed against it, and as the Order-in-Council merely restored the decree of the Trial Court, it could not be executed against them;

Held, (1) that the Courts in India were bound to carry out the directions contained in the Order-in-Council and could not go behind it ;

(2) that on the appeal of defendant No. 1 the entire decree was before the High Court and it had jurisdiction under O XLI, r. 33 of the Civil Procedure Code to dismiss the entire suit of the plaintiffs ;

(3) that before the Order-in-Council was passed there was nothing which the plaintiffs could execute and their application was not, therefore, barred.

Case-Law discussed.

Appeals from an order of the Subordinate Judge, Second Court, Patna, dated the 10th March 1923.

Messrs. *Hasan Imam, K. Roy*, and Mr. *S. Dayal*, for the Appellants.

Messrs. *K. P. Jayaswal* and *B. C. Sinha*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—Miscellaneous Appeal No. 68 is by defendants Nos. 2 and 5 to 8 ; and Miscellaneous Appeal No. 74 is by defendants Nos. 4, 9 to 11. The defendants Nos. 1 and 3 are not parties to these appeals.

The respondents obtained a decree against the aforesaid 11 defendants in a suit for contribution. The decree was passed on the 6th May 1910 for Rs. 10,672-2-0 on account of principal and Rs. 1,104-12-0 on account of interest, making a total of Rs. 11,776-14-0. The liabilities of the defendants were split up and incorporated in the decree, by an order amending the decree, dated the 30th July 1910. The defendants Nos. 1 and 3 were made liable for Rs. 3,925-10-4 ; defendants Nos. 2 and 5 to 8 for Rs. 3,925-10-4 and defendants Nos. 4 and 9 to 11 for Rs. 3,925-10-4.

Against this decree the defendants Nos. 1 and 3 appealed to the High Court of Calcutta on the 19th December 1910. The plaintiffs and the remaining defendants, who are appellants before us, were impleaded as respondents in that appeal. The plaintiffs preferred a cross-objection against the part of the decree whereby their claim was reduced. They had claimed Rs. 15,960-6-9 on account of principal and interest ; their claim was reduced by about Rs. 5,000, more or less. The High Court of

SOMAR SINGH *v.* PREMDEI

Calcutta by its judgment, dated the 19th January 1915, dismissed the entire claim of the plaintiffs, their cross-appeal also failed.

The parties to the litigation both the plaintiffs and the defendants were members of a joint *Mitakshara* family, and the claim of the plaintiffs was more or less based upon an *Ekrarnamah*, dated the 13th August 1907, whereby the rights of the plaintiffs and the defendants, or their respective predecessors as between themselves were settled. The High Court held that the claim of the plaintiffs to contribution was hopelessly barred and that the plaintiffs failed to show that the monies borrowed from Ganga Prasad, which were the subject-matter of the litigation, were used to pay off the joint debts. The plaintiffs appealed to His Majesty-in-Council, and the decision of the High Court was set aside by the order of His Majesty-in-Council, dated the 21st December 1920. The operative portion of that order runs as follows :—

"(1) that this appeal ought to be allowed, the decree of the High Court of Judicature at Fort William in Bengal, dated the 19th day of January 1915 set aside without costs and the decree of the Court of the Subordinate Judge of Patna, dated the 6th day of May 1910 restored and (2) that there ought to be no costs of this appeal."

On the 27th April 1921, the High Court directed the aforesaid decree of His Majesty-in-Council to be sent down to the lower Court for execution. Thereupon the decree-holder on the 3rd August 1922 presented an application in the Court of the Subordinate Judge of Patna for executing the said decree of His Majesty in-Council against all the defendants.

There were three sets of objections filed against the execution of the decree by the aforesaid three sets of judgment-debtors respectively. These objections were overruled by the Subordinate Judge by his order, dated the 10th March 1923. The defendants Nos. 1 and 3 have not challenged the order of the Subordinate Judge. The other sets of defendants have come to this Court in appeal. Their petition in the Court below raised various objections ; but in the present case we are concerned only with one objection of theirs, namely, that the execution of the decree in question is barred by limitation. This objection is common to both the appeals, and consequently one judgment will be sufficient to dispose of both of them.

The objection is a short one. It is said that the decree of the Subordinate Judge was passed on the 6th May 1910, declaring separate liabilities of these appellants in the two cases, *viz.*, Rs. 3,925-10-4 to be paid to the plaintiff by each set of defendants ; that these sets of defendants had not preferred any appeal to the High Court and the separate decrees against them embodied in one decree of the Court below became final ; that the execution of the portions of the decree against these sets of defendants should have been levied within three years of the 6th of May 1910, the date of the decree ; and that no execution was levied nor was any step taken to advance execution of the decree against these appellants. Hence it is urged that the decree against them became barred by lapse of time long before the 19th July 1915 when the High Court dismissed the plaintiff's claim and that the order of His Majesty-in-Council simply restores the decree of the Subordinate Judge and the execution is virtually in respect of the decree passed by the Subordinate Judge and the effect of the order of His Majesty-in-Council is to revive the decree which, as stated above, was long before barred. Now it has not been disputed in this Court that the respondents are executing only the order of His Majesty in-Council and that that order fastens the liability of the claim of the plaintiff on all the defendants including the appellants before us ; but it is said that it could not have been contemplated nor could it be the result of the order of His Majesty-in-Council to revive the decree of the Subordinate Judge which was barred as against these defendants, the appellants before us. It appears to me that we are not competent, nor was the Subordinate Judge competent who was executing the decree in question, to go behind the order passed by His Majesty-in-Council. That order may be right or wrong ; but we have to take it as it is, and the only duty of the Courts in India is to give effect to the order in question and, as stated in the concluding portion of the order, to punctually observe, obey and carry the same into execution. The grievance of the appellants, if any, could be rectified by His Majesty-in-Council alone, and the remedy as recommended in the

case of *Premlall Mullick* v. *Sumbhoonath Roy* (1), was to approach His Majesty-in-Council and to get the mistake, if any, rectified. This course has not been so far adopted, and the order of His Majesty-in-Council remains unimpeachable. The appellants were impleaded as respondents in the appeal before His Majesty-in-Council and it was their duty to urge before His Majesty-in-Council to absolve them from the liability of the decree of the Subordinate Judge upon the ground that it was barred by limitation. That decree was challenged in appeal by defendants Nos. 1 and 3 : in that appeal the present appellants were also impleaded as parties and were made respondents. The plaintiffs preferred cross-objection to the decree and prayed that the entire claim should have been decreed against all the defendants and that the Subordinate Judge was wrong in modifying the claim and reducing the same. In this way the whole suit of the plaintiffs was involved in the appeal. The plaintiffs did not accept the decree of the Subordinate Judge as a final decree and, therefore, were not bound to enforce it. They wanted their whole claim and until that was determined in the appeal in the High Court of Calcutta they were not at all required to execute the decree in question.

I have already briefly set out the scope of the suit and the point involved in the appeal in the High Court. The entire suit was based upon an *Ekrarnamah* or certain dealings which the plaintiffs alleged were binding upon all the defendants as members of a joint *Mitakshara* family. The foundation of the liability of the defendants was common, though the extent of their liability might have been different, and in the appeal the foundation of the plaintiff's claim was involved. That was the scope of the appeal, and the result confirms the view, for upon the hearing of the appeal their Lordships of the Calcutta High Court did not confine themselves to the decree passed against defendants Nos. 1 and 3, but dismissed the entire claim of the plaintiffs. This, to my mind, arose upon the particular facts of the case and upon the appeal and the cross appeal before the High Court and upon the fact that all the contending parties were before the Court either as appellants or as respondents. Therefore, as a matter of fact, the whole decree was before the Court and the finality of it was not determined until the appeal was disposed of. Apart from this, the High Court had full seizin of the appeal, and under O. XLI, r. 33 of the Civil Procedure Code it had full power to pass such decree, in favour of all or any of the respondents or parties whether they were actually before the Court or not, as the justice of the case required. This provision in the Code is new, but it has given effect to the principles from time to time enunciated by learned Judges in dealing with cases that came before them where they found that it was their incumbent duty as a Court of Appeal to do full justice to the case and to the parties involved in the case whether all of them were before the Court or not. Therefore the plaintiffs were not required to execute the decree before it became final : in other words, before the appeal in the High Court was determined. After the High Court of Calcutta dismissed the appeal, the plaintiffs had no decree in their favour to execute until His Majesty in-Council upheld their claim.

The learned Counsel on behalf of the appellants has cited a number of authorities in support of the provision that the Subordinate Judge's decree against the present appellants could be executed in as much as their liabilities under the decree were specified : *Ganga Kuar* v. *Kesar Kuar* (2), *Mashiat-un-nissa* v. *Rani* (3), *Raghunath Pershad* v. *Abdul Hye* (4), *Christiana Benshawn* v. *Benarasi Proshad* (5), and *Dhirendra Nath Sarkar* v. *Nischintapur Company* (6).

The earliest case of Allahabad was *Mashiatn-un-nissa* v. *Rani*, (3) in which two learned Judges (Brodhurst and Mahmood, JJ.) took a different view. The other case reported in (*Ganga Kuar* v. *Kesar Kuar*) (2) was decision by Knox, J., who, while he felt that there was a sharp difference of opinion upon

(1) 22 C. 960 at pp. 971, 972 ; 11 Ind. Dec. (N. S.). 687.

(2) 1 A. L. J. 409.

(3) 13 A. 1 ; A. W. N. (1890) 207 ; 7 Ind. Dec. (N. S) 1 (F. B.).

(4) 14 C. 26 ; 7 Ind. Dec. (N. S.) 13.

(5) 22 Ind. Cas. 685 ; 19 C. W. N. 287.

(6) 36 Ind. Cas. 898 ; 22 C. W. N. 192 ; 26 C. L. J. 118.

the question thought that he was bound by the decision in *Mashiat-un nissa* v. *Rani* (3). He does not give any reason of his own to support his view. On the other hand, a Division Bench of the same Court in *Badi-un-Nissa* v. *Shamsuddin* (7), distinguished those cases upon the ground that all the parties were not impleaded in the appeal in those cases. Sir John Edge, C. J., referring to those cases says " but in these cases all the parties to the suit were not parties to the " various appeals from the decree in the suit." In the case decided by Edge, C. J., the decree passed in Sir John favour of the plaintiff in respect of the pre-emption with respect to two of the villages were no longer involved in the subsequent appeals up to the High Court by the plaintiff with respect to two other villages, yet it was held that the execution to enforce the decree with respect to the first two villages was not barred, inasmuch as the decree did not become final until the appellate decree of the High Court was passed. This case is indistinguishable from the present one and the learned Counsel for the appellants concedes that. The case of *Raghunath Pershad* v. *Abdul Hye* (4), was distinguished, if not over-ruled, in the Full Bench case of *Gopal Chunder Manna* v. *Gosain Das Kalay* (8). The case of *Christiana Benshawn* v. *Benarasi Proshad* (5), was similarly distinguished in *Satish Chandra Chaudhuri* v. *Girish Chandra Chakravarty* (9).

The case of *Kristnama Chariar* v. *Mangammal* (10), dealt with all the cases and upon a review of them and of the law on the subject distinctly came to the conclusion that a decree is not barred even with respect to the portion against which no appeal had been preferred until the appeal against the other portion of the decree is finally determined.

The Full Bench cases of *Gopal Chundar Manna* v. *Gosain Das Kalay* (8), and *Kristnama Chariar* v. *Mangammal* (10), were based under Article 179 of the old Limitation Act but shortly before the present Limitation Act was passed in 1908, and most of the reasonings advanced there would seem to anticipate the law as at present stands embodied in the new Code of Civil Procedure and the Limitation Act both of which were passed in the year 1908. Rule 33 of O. XLI of the new Code, as observed above, enables the Appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give direction in favour of parties who have actually not filed any appeal or objection. In this way under the present Code of Civil Procedure in an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. Article 182, clause (2) "the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal " would seem to apply where there has been an appeal from a part or whole of the decree, or only when some of the parties to the suit have brought the appeal. It does not in any way qualify or restrict the final decree or order as is sought for by the appellants. The case of *Ranjit Prasad Tewari* v. *Ramjatan Pandey* (11) will to some extent also support the view.

It would thus appear that the plaintiff's right to execute the decree is not at all barred.

The view taken by the learned Subordinate Judge is therefore correct, and we dismiss the appeals with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeals dismissed.*

(7) 17 A. 103 ; A. W. N. (1895) 20; 8 Ind. Dec. (N. S) 391.

(8) 25 C. 594 ; 2 C. W. N. 556 ; 13 Ind. Dec. (N S.) 392.

(9) 60 Ind. Cas. 915 ; 47 C. 813.

(10) 26 M. 91.

(11) 37 Ind. Cas. 833 ; 1 P. L. W. 197 ; (1917) Pat. 118.

MADRAS HIGH COURT.

REFERRED CASE NO. 4 OF 1923.

September 26, 1923.

Present:—Sir Walter Salis Schwabe, K.C., Chief Justice, and Mr. Justice Waller.

D. N. STRATHIE, ESQ., M.A., I.C.S., COMMISSIONER OF INCOME-TAX, MADRAS—REFERRING OFFICER

versus

M. S. S. CHIDAMBARAM CHETTIAR AND ANOTHER—ASSESSEE.

Income-Tax Act of 1922), *s.* 68, *proviso* 2 *as amended by Income-Tax Act*, 1923—*Assessment to Super-tax for* 1921-22 *whether can be made in* 1922-23—*Real income liable to Super-tax—Income-Tax Act* (*VII of* 1918) *s.* 19, *scope of*—

Under the Second Proviso to section 68 of the Income-Tax Act, 1922 as amended by section 3 of the Income-Tax Amendment Act 1923; assessments to super-tax for 1921-22 on the income of 1921-22 can be made in 1922-23 under the heading of adjustment in cases in which, during provisional assessment proceedings, it was found that the assessee's income was below the taxable amount for purposes of super-tax, but the real income is ultimately found in proceedings under section 68 of Income Tax Act of 1922 as amended by section 3 of the Act of 1923 to be large enough to be assessed to super-tax.

Under section 19 of Act VII of 1918, if the total income actually received has been ascertained by the Collector, the Collector is to compute the income-tax and super-tax which would have been payable if income-tax and super-tax had been levied in the previous year with reference to the true amount of the income so ascertained; and then the difference between the sums so computed and the aggregate of the sums already paid by the assessee for the previous year ought to be paid by or refunded to the assessees as the case may be. The sum that should have been paid for super-tax in the preceding year, if the right figure had been before the Collector, is computed and from that is deducted any sum that has already been paid for super-tax. If no sum has been paid for super-tax, then there is no deduction to be made.

Case stated whether under the 2nd Proviso to section 68 of the Income-Tax Act, 1922 as amended by section 3 of the Income-Tax Amendment Act, 1923, assessments to super-tax for 1921-1922 on the income of 1921-1922 can be made in 1922-1923 under the heading of adjustment in cases in which, during provisional assessment proceedings, it was found that the assessee's income was below the taxable amount for purpose of super-tax, but the real income is ultimately found in proceedings under section 68 of Income-Tax Act of 1922 as amended by section 3 of the Act of 1923 to be large enough to be assessed to super tax.

The Government Pleader, for the Referring Officer.

Mr. *M. Subbaroya Aiyar*, for the Assessee.

JUDGMENT.

Schwabe, C.J.—In this case the assessee made a return for income tax and super-tax purposes in the beginning of the year 1921-1922. At first, he was assessed both to income-tax and super-tax, but he satisfied the authorities that the figure that they had taken was too large, and they reduced the assessment down to an amount which would involve the payment of income-tax only, that is to say, below the minimum super-tax amount. Under the scheme of Income-tax and super-tax then in force. to be found in Act VII of 1918, the Amending Acts and the Super-tax Act of 19_0, for both income-tax and super-tax there was an adjustment at the end of the year; so that, if the anticipated income which was based on the preceding year's income and was the basis of the preliminary original assessment was found by the result of the year's trading to be wrong—either 'too large or too small—the matter was adjusted by returning any amount overpaid or demanding any amount underpaid. By the Income-Tax Act of 1922, this system was abolished for the future; it adopted the system of making an assessment on the preceding year's actual income and treating that as the hypothetical income for the year of assessment—one which could not, as a general rule, be altered. The result of that was that, for the year 1921-1922, there would still have to be the adjustment at the end of the year so as to arrive at the proper income-tax for that year and that the final figure arrived at as the final income for that year would also afford a basis for the hypothetical income of the next year. As this principle of adjusting referred to above was to be abolished, the old Acts were repealed; but provision was made for the transition year 1921-1922 by preserving certain

sections of the Old Act for that purpose and that purpose only. The provision is found in section 68 of the 1922 Act as amended by Act XV of 1923 the amendment being made so that it might be clear that it was intended that the provisos to section 68, keeping alive certain sections of the old Act for the purposes of assessment for the year ending the 31st March 1922, should apply to super-tax as well as income-tax.

It is argued that notwithstanding all these precautions, what has happened is this that anyone, who having made a return was assessed for a sum less than the minimum on which super-tax is payable and, therefore, was neither asked for nor paid super-tax, although in fact, it was subsequently discovered that the income for that year had been such as to go over the minimum, can escape super-tax altogether. Looking at section, 19 of the Act VII of 1918, so far from that being the case, in my judgment, it is quite plain that the contrary was intended. The section has a perfectly clear meaning and it is that, if the total income actually received has been ascertained by the Collector, the Collector is to compute the income-tax and super-tax which would have been payable if income-tax and super-tax had been levied in the previous year with reference to the true amount of the income so ascertained; and then the difference between the sum so computed and the aggregate of the sums already paid by the assessee for the previous year ought to be paid by or refunded to the assessees as the case may be. That seems to give an easy sum to be worked out. The sum that should have been paid for super-tax in the preceding year, if the right figure had been before the Collector, is computed, and from that is deducted any sum that has already been paid for super-tax. If no sum has been paid for super-tax then there is no deduction to be made. That is the perfectly plain meaning of the section and I see no reason whatever for the suggestion that we have to strain the meaning of that section and read it as though there were a proviso to it, *viz.*, "provided always that, if no super-tax or income-tax had been demanded or paid for the previous year on the provisional assessment then nothing shall be payable for the year of assessment" It was argued that before the coming into operation of the Act of 1922, by reason of the suggested interpretation of section 19, the Crown had to have recourse, in cases where there had been no provision for super-tax, to section 25 under which the assessee could be made to pay. But it is said that section 25 having been repealed by the Income-tax Act of 1922, that remedy for the Crown is gone. In my judgment, that contention also is gone because section 25 of the Act of 1918 has now been re-enacted by section 34 of the Act of 1922, and section 34 in words applies not only to the present and future but to the past. It says if for any reason the income chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate the Income-tax Officer can at any time within the year take the necessary steps. It follows, in my judgment, that even if the assessee could escape under section 19, he would not escape under section 34.

The answer to the question referred to us is in the affirmative. The assessee will pay the costs of this reference.

Waller, J.—I agree and have nothing to add.

V. N. V.
K. S. D.

Reference answered in the affirmative.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL No. 39 of 1923.

January 10, 1924.

Present:—Mr. Daniels, J. C.

Mt. JAMWANTI KUNWAR—JUDGMENT-DEBTOR—APPELLANT
versus
Mt. MOHAN DEI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Certification of payment, after decree has become barred, whether revives limitation.

No time is provided within which an application for certification of a payment must be made under O. XXI, r. 2 of the Civil Procedure Code, but

such an application cannot be made after the period of limitation for execution has expired.

Bhajan Lal v. *Chheda Lal*, 24 Ind. Cas. 215 ; 12 A. L. J. 825, relied on.

The provision contained in O. XXI, r. 2 of the Civil Procedure Code is not intended to enable a decree-holder to revive a decree which has already become time-barred.

An uncertified payment cannot be recognised for the purpose of saving limitation.

Ram Sarup v. *Jagan Nath Prasad*, 15 Ind. Cas. 523 ; 15 O. C. 234, followed.

Appeal against the order of the District Judge, Sitapur, dated the 4th May 1923, upholding the order of the Munsif, Sitapur, dated the 18th October 1922.

Messrs. *Bisheshar Nath* and *Bishambhar Nath*, for the Appellant.

Mr. *H. K. Ghose*, for the Respondent.

JUDGMENT.—The question for decision in this appeal is whether it is open to a decree-holder to certify payment after the period of limitation for execution of the decree has expired. In the present case the decree was passed on 10th April 1918. On 17th August 1921, more than three years afterwards, the decree-holder presented an application for execution alleging two intermediate payments which would bring the case within limitation. On the same date he also presented a separate application asking that these payments might be certified. Both the Courts below have decided in favour of the decree-holder and the judgment-debtor appeals. It is quite true that no time is provided within which an application for certification must be made, but I agree with the view taken by the Allahabad High Court in *Bhajan Lal* v. *Chheda Lal* (1), that such an application cannot be made after the period of limitation for execution has expired. It is settled law that an uncertified payment cannot be recognised for the purpose of saving limitation. *Ram Sarup* v. *Jagan Nath Prasad* (2). If, therefore, the period of limitation is allowed to expire without any application for execution being made the decree becomes dead and no further execution proceedings can be taken. It was never the intention of O. XXI, r. 2 that a decree-holder should be able by a subsequent application to revive a decree which has already becomes time barred. I agree with the view taken in the Allahabad case above referred to and I accordingly allow the appeal and setting aside the decrees of the Courts below dismiss the execution proceeding as time-barred. As it appears from the proceeding of the Court below, that the payments had in fact been made, though they had not been certified, the parties will bear their own costs in all Courts.

Z. K. *Appeal allowed.*

(1) 24 Ind. Cas. 215 ; 12 A. L. J. 825.
(2) 15 Ind. Cas. 523 ; 15 O. C. 234.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER
No. 75 OF 1922.

November 20, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Waller.

PONNUSWAMY IYER AND OTHERS—PLAINTIFFS—APPELLANTS
versus
DAMODAR HUNSRAJ—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Sale of goods—Payment by hundis*—Overpayment, suit to recover—Place of suing—Cause of action, where arises—Negotiation of* hundi, *meaning of.*

Plaintiffs, a firm of merchants at Madras, carried on business with the defendant firm at Calcutta. The Calcutta firm under the orders of the Madras firm, sent goods to various places in the Madras Presidency. The arrangement as regards payment was that the money was to be paid either in cash in Calcutta or by *hundies* drawn by defendants in Calcutta on the plaintiffs' firm in Madras. The payments were made only on the delivery of the Railway Receipts which were to be attached to the *Hundies* and presented to plaintiffs firm along with the *Hundies*. In a suit by the plaintiffs' firm against the defendant firm instituted in the City Civil Court, Madras, for refund of certain overpayments made to the defendant firm, the defendant firm pleaded that the Court at Madras had no jurisdiction to entertain the suit :

Held, that a part of the cause of action must be held to have arisen in Madras both as regards the

PONNUSWAMY IYER *v.* DAMODAR HUNSRAJ

payment on the *hundis* and the presentation of Railway Receipts, which was a necessary condition to be performed before demand for money could be made of the Madras firm, and the City Civil Court had, therefore, jurisdiction to entertain the suit under section 20 (*c*) of the Civil Procedure Code.

When a firm outside Madras draws *hundis* on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the *hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*.

Negotiation of the *hundi* is only a provisional method of realising money from persons who are willing to accept the *hundi* for a small profit and to take the trouble of presenting the *hundi* to the drawee and recovering the money from him. If the *hundi* is dishonoured the endorsee will of course, have recourse to the drawer of the *hundi* who had endorsed it over to him, so that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the buyer actually makes payment on the *hundi*.

Mylappa Chettiar v. *Aga Mirza Mohamed Shirazee* 51 Ind. Cas. 550 ; 37 M. L. J. 712 ; 26 M. L. T. 504 ; *Motilal Pratabchand* v. *Surajmal Joharmal*, 30 Bom. 167 ; 6 Bom. L. R. 1038, distinguished.

Appeal against the order of the City Civil Court, Madras, dated the 14th December 1921 in O. S. No. 530 of 1920.

Mr. *M. A. Thirunarayanachari*, for the Appellants.

Mr. *N. Chandrasekara Iyer*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the learned City Civil Judge returning the plaint in O. S. No. 530 of 1920 on his file to be presented to the proper Court. The learned Judge held that no part of the cause of action arose within his jurisdiction and, therefore, passed that order. The suit was brought by the receivers on behalf of a firm in Madras called Kuppuswami Naidu and Company against the defendants, a firm carrying on business in Calcutta, for a certain sum of money which they claimed, had been overpaid to the defendants' firm. Among the pleas raised by the defendants' firm one was that the Court in Madras had no jurisdiction to try the suit and that the suit was properly triable only by the Court in Calcutta, where they carried on business and where, according to them, the whole cause of action arose.

It is not denied that the defendants do not reside, or carry on business, or work for gain in Madras but the plaintiffs rely entirely for their contention that the suit lies here on the ground that part of the cause of action arose within the jurisdiction of the Madras Court. Under section 20 (*c*) of the Code of Civil Procedure a suit can be brought where the cause of action arises at least in part, and the question we have to decide is whether the cause of action in this suit has arisen at least in part in Madras.

Kuppuswami Naidu and Co., had dealings with the Calcutta firm and the way in which the dealings were carried on was that, on the orders of Kuppuswami Naidu and Co., the Calcutta firm was to send goods by rail to several places all over the presidency named by the Madras Firm (plaintiffs). The contract was made in Calcutta ; but the arrangement as regards payment as stated by the defendants' firm itself in their written statement was that the money was to be paid either in cash in Calcutta or by *hundis* drawn by defendants in Calcutta on the plaintiffs' firm in Madras. The learned City Civil Judge held that this arrangement about payment was an arrangement which was tantamount to payment in Calcutta itself ; but we are unable to agree with the learned Judge on the point. When a firm outside Madras draws *hundis* on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the *hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*. Negotiation of the *hundi* is only a provisional method of realising money from persons who are willing to accept the *hundi* for a small profit and to take the trouble of presenting the *hundi* to the drawee and recovering the money from him. If the *hundi* is dishonoured, the endorsee will, of course, have recourse to the drawer of the *hundi* who had endorsed it over to him so that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the buyer, in this case the Madras firm, actually makes payment on that *hundi*, and such payment is clearly a payment made

in Madras. It is true that, in the first three instances, the money was actually paid by the Madras firm through an agent of theirs in Calcutta to the defendant; but that arrangement does not seem to have been persisted in and subsequent payments were all made by the system of the Calcutta firm drawing *hundis* in their own favour and endorsing them to some *hundi* broker and obtaining money from him, that broker taking the trouble of presenting the *hundis* to the Madras firm and receiving payment. It may also be mentioned that one other arrangement about the payment was that payment was to be made only on the delivery of the railway receipts. These railway receipts were to be attached to the *hundis* and presented to Kuppuswami Naidu and Co., in Madras along with the *hundis* when payments of the *hundis* were demanded from them; so that the presentation of the railway receipt in Madras was also a part of the performance of the contract, and was a necessary condition to be performed before money could be demanded from the Madras firm.

In these circumstances, it seems to us clear that a part of the cause of action must be held to have arisen in Madras both as regards the presentation of the railway receipts and as regards the payment on *hundis*; and it would follow that the City Civil Court had jurisdiction to try the suit, under section 20 (*c*) of the Civil Procedure Code.

The learned City Civil Judge has relied upon a case reported in *Mylappa Chettiar* v. *Aga Mirza Mohammad Shirazee* (1) which he thinks is a case on all fours with the present one, but there is a fundamental difference between that case and the present one which the learned Judge has overlooked. There, although payment was by *hundis*, the arrangement was that the *hundi* was to be drawn and presented to the National Bank of Mandalay along with the bill of lading taken in the name of the consignor himself; it was to be endorsed over to the branch of the National Bank at Mandalay and handed over along with the *hundi* to them, they were to make payment of the amount claimed on the consignor at Mandalay. The learned Judges find as a fact in that case that the National Bank was merely acting as the agent of the Madras Bank who were themselves only the agents of the consignee at Negapatam and, when the bill of lading was endorsed over to the National Bank and received by that Bank and money was paid to meet the *hundi* drawn on the Bank, the transaction was complete so far as the consignor was concerned as the National Bank was found to have been acting merely as agents of the Negapatam merchant. It was on that ground that the learned Judges in that case held that the payment should be taken to be one made in Mandalay and not in Negapatam and that, so far as payment was concerned, the cause of action did not arise in Negapatam, but in Mandalay. Here, as we have already stated, all that the Calcutta firm did was to draw the *hundi* on the Madras firm and discount it in the manner usual among merchants with some exchange bank or firm which took *hundis* on discount, without being freed from the liability of having to repay the money paid in case the *hundi* is dishonoured. The Calcutta firm was entitled to discount the *hundi* with whomsoever it pleased. There is no evidence that Nantaramdas Atmaramdas, the firm which actually negotiated these *hundis* for the Calcutta firm were acting as agents of the Madras merchants at all. This case is therefore, very clearly distinguishable from the case in *Mylappa Chettiar* v. *Aga Mirza Mohammad Shirazee* (1).

The Bombay case referred to by the learned Judge, *Motilal Pratab Chand* v. *Surajmal Joharmal* (2) is a case where the principles are no doubt stated by Tyabji, J., but according to those principles if the payment has to be made at a particular place, part of the cause of action will arise there.

It will be further noticed that the main claim in this suit is really for the amount that had been overpaid by Kuppuswamy Naidu and Co., to the defendant company. That payment was actually made in Madras. The *hundi* having been drawn for a larger sum than the Calcutta firm was entitled to draw it for was presented in Madras and to save it from being dishonoured the Madras firm paid the excess amount here in Madras, and it is mainly for that amount that the present suit is brought.

(1) 54 Ind. Cas. 550; 37 M.L.J. 712; 26 M.L.T. 504.

(2) 30 B. 167; 6 Bom. L. R. 1088.

It is, therefore, clear to us that the cause of action did arise in Madras and that the plaint should not have been returned for being presented to another Court but that the learned Judge should have tried the suit himself. We, therefore, set aside the order of the learned Judge and direct him to take the plaint on to his file and dispose of the case according to law.

As regards costs the respondent will pay the appellants' costs in this Court. All costs in the lower Court will be disposed of by the City Civil Judge in his final judgment.

V. N. V. *Appeal allowed.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 266 OF 1922.

December 14, 1923.

Present :—Mr. Justice Walsh and
Mr. Justice Ryves.

RAM PRASAD—PLAINTIFF—APPELLANT
versus
MAHABIR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata between Co-Defendants—Decision of question necessary to give relief to plaintiff.

An adjudication which is necessary to give the proper relief to the plaintiff, is *res judicata* as between the co-defendants as well, provided there is a conflict of interest between the latter.

Defendant brought a suit against the appellant for the determination of his title t o a house under a will, and in that suit it was finally decided by the High Court that the parties were entitled to share equally in the house. A third party then brought a suit to have his rights under the will determined, and the defendant and the plaintiff were both impleaded as defendants to the suit. The construction of the will was again put in issue and it was decided by the High Court that the house belonged to the third party and to the plaintiff and that the defendant had no share in it. The plaintiff then brought the present suit for a declaration that the decree of the High Court in the second suit was binding on the defendant and that he had no share in the house in dispute ;

Held, (1) that the question of the construction of the will was directly and substantially in issue in the second suit, and as the decision of that question was necessary in that suit in order to give the proper relief to the plaintiff, the decision was *res judicata* between the parties to the present suit who were co-defendants in the second suit;

(2) that, therefore, the plaintiff's suit was entitled to succeed.

Appeal from the decree of the Subordinate Judge, Mirzapur, dated the 30th November 1921.

Dr. *K. N. Katju*, for the Appellant.

Messrs. *Jang Bahadur Lal*, *Shiva Prasad Sinha* and *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is a matter which is perfectly simple and straightforward, but which by a combination of circumstances has got into a slight tangle. The whole question turns upon the interpretation of a will, about which unfortunately there has been a difference of opinion. But that question was finally and conclusively determined against the parties to this suit by a judgment of the Chief Justice and Mr. Justice Banerji on the 5th of December 1919. In order to simplify this judgment we propose to call the parties merely appellant and respondents. The appellant and respondents to this appeal were entitled by a will of an ancestor dated the 10th of April 1882 to a half share of a business. A controversy has arisen over the meaning of the will as to the house. The respondent brought a suit against the appellant to determine that question. It reached the High Court in second appeal and every Court was against the appellant, and it was decided by a single Judge of this Court in May 1916 that the house belonged to the parties in equal shares, half and half. That decision was final and binding upon the parties for the time being. But when the respondent, who had been successful in that suit, started to enforce his rights in the execution court, the usual *tertium quid* appeared upon the scene in the character of a separated member of the joint family to which the appellant had belonged, and he claimed unsuccessfully in the execution Court his half share in this property which had been joint and had been partitioned to him. That was a sort of *jus tertii* independently of any decision in the previous litigation,

If he was right, the decree in the previous litigation could only operate upon the balance which was left after his rights had been separated and given to him. Thereupon he brought a suit claiming his share of which he had been deprived in the execution court, and he made both the appellant and the respondent parties to that suit. In that suit the interpretation of the will undoubtedly came substantially into question. The suit could not be decided without interpreting the will, and as you cannot interpret half a document, it necessarily followed that the interpretation adopted in that suit would not only affect the rights of Sheo Prasad but also the rights *inter se* of the appellant and respondent who were then co-defendants. So that as regards the interpretation of the will, the following principle of law, which nobody is concerned to dispute, came into play. As regards co-defendants, adjudication which is necessary to give the proper relief to the plaintiff, is *res judicata* as between the co-defendants as well, provided there is a conflict of interest. In the end that suit also reached the High Court and Mr. Justice Ryves before whom the appeal in second appeal came, was of opinion that the interpretation of the will in the previous suit on appeal was erroneous. He referred it to two Judges. It ultimately came before the Chief Justice and Mr Justice Banerji who in the decree we have already referred to dated the 5th December 1919, held that the previous interpretation of the will was erroneous and that the house had been bequeathed to the appellant solely, the result of which was that the plaintiff in that suit was entitled to his share and the appellant to what was left. It was not necessary on that occasion to go into the consequences of the decree which was passed. It was a matter which might be left, if the Court thought fit, to be dealt by arrangement between the parties themselves, or by any other Court which might have to interpert the effect of that decree. The High Court might on that occasion have given a declaration as between the two co-defendants as to their rights. It had in fact expressed those rights in so many words. It was not asked to do more. The parties were left to their existing rights. Those rights are not difficult to state. From the 5th December the appellant had his half share. Sheo Parshad had his half share. The respondent was out in the cold. But inasmuch as the decree of the High Court of 1916 was not affected by the decree of the High Court of 1919, it remained *pro tanto* good and anything done under it was *pro tanto* valid. Something had been done under it. The respondent had not slept upon his rights. He had done his best to enforce them as the result of his triumphant but temporary success in 1916, and he brought one suit for rent in 1917, which ended in a compromise, and even after December 1919 he applied to the execution court, namely in March 1921, to execute his decree, which, although he never ought to have obtained in the light of what the High Court had subsequently held, he still enjoyed as the result of the 1916 decision. The Subordinate Judge who dealt with that execution proceeding took a perfectly right course. It was pointed out to him by the appellant before us that there was a subsequent decision which showed that the respondant ought not to have recovered that decree. He declined to fall into the trap which was laid for him. His business was to execute the decree and to decide any legal grounds which might be raised in objection to its execution, and although in giving his reasons he indulged in certain *dicta*, which is the way of Judges who are unfortunately expected, even if not compelled, to give reasons for what they do, *dicta* which we are bound to say we should probably have expressed ourselves as one of our reasons for the order, with reference to the state of things created by the decision of the High Court, in substance he expressed that the prior decision of the High Court was *res judicata* and binding upon the parties, and Mr. Jang Bahadur Lal on behalf of the present respondents, relies upon these *dicta* as amounting in themselves to *res judicata* binding upon the appellant before us. He might have appealed from the order of the execution court. He did not. Therefore, says Mr. Jang Bahadur Lal, everything which the Judge said in his judgment is binding upon the appellant for ever. But of course that is not so. The question of whether the previous proceedings were *res judicata* between the parties was not either directly or substantially in issue in the execution court. The later decision of the High Court differing from the prior decision, as we have already pointed out, left the existing decrees untouched. The

execution court had to execute such decrees in accordance with the law without regard to what any Judge might have said or done in some other suit which was not before it. But in the light of this somewhat incongruous state of things, namely, that a party who had been declared by the High Court to have no interest whatever in the property was still successfully executing decrees which gave him the profits thereof, it is not surprising that the appellant looked round to see how he could right the wrong, which it undoubtedly was, and he brought the present suit. For the moment we will pass by the criticisms which the respondents' Counsel, Mr. Jang Bahadur Lal has based upon the form of the relief claimed. The substance of the matter is a suit to declare in his favour as against the respondents, with reference to this much debated point, the rights which had been established in his favour by the subsequent decision of the High Court, and he started upon that suit undoubtedly with the object of enforcing in his favour that decision and of doing so by means of the principle of *res judicata* which in his view under section 11 of the Code made the decision of the 5th of December 1919 binding upon the respondents. In the decision of that question, which was really the only question in suit, the lower Courts have gone off the line. The question substantially and directly in issue in the prior litigation which ended in the decree of December 1919, was, what were the rights of the parties in respect of the house under the will? The absence of Sheo Prasad from the first suit, and the fact that the second suit only related to half the house, are both irrelevant. The greater includes the less, and a decision as to the whole house, of course, includes a decision as to the half, and it was impossible to decide the issue in Sheo Prasad's suit which ended in the decree of December 1919, without deciding the rights over the whole house. We come without hesitation to the conclusion that the decision with regard to the interpretation of the will, and, therefore, the devolution of the whole house, was substantially and directly in issue between the appellant and respondents as co-defendants in Sheo Prasad's suit within the meaning of section 11, and that, therefore, both the lower Courts have come to a wrong decision and that the plaintiff is entitled to succeed in this appeal and substantially in the suit. We now come to the question as to the form of the relief. Mr. Jang Bahadur Lal with regard to this has taken a good point. The plaintiff claims that the decree in No. 455 of 1914 which has been wrongly passed may be cancelled: Putting this into plain English, it is asking the Munsif to cancel a decree of a single Judge of the High Court which, as we have already said, is dangerously near to contempt of court, and it is clear that the Munsif was not disposed to do it. Mr. Jang Bahadur Lal for the respondents now contends that he has not decided the issue at all. But in asking for this relief the plaintiff either by good luck or judgment happens to have put in the necessary words which entitle us to do justice in the case. He says that under the will, dated the 10th of April 1882 the defendants have got no right in the house known as *Arhatwala*. That is really what he was trying to do, namely, to establish that the decree of the 5th of December 1919 was binding upon the respondents, that the respondents had no right to the house, and that, therefore, he, the plaintiff, was entitled to a declaration that he was, and the fact that he put in an ancillary claim which it was impossible for the Court to grant, does not in our view disentitle him to what is obviously just and right in the circumstances as they now exist. Though it may be useless, we think it right to indicate to the parties our view of how matters should for good and all rest between them. The respondents are clearly entitled in our opinion to the fruits of what they have been able to recover as the result of the decision in their favour in 1916 without qualification. That is to say as regards any decision in execution proceedings taken even after the 5th of December 1919, the *status quo* is to continue. On the other hand as the result of this decision the plaintiff is not entitled in law to restitution of anything which he may have paid in the meantime. But as from to-day the decree of 1916 and any proceedings in the lower or execution courts based thereon must be regarded as at an end. Mr. Jang Bahadur Lal has very naturally pressed upon us on behalf of his clients that we ought to remit the case for the determination of other issues. Technically he possesses this right, but we have gone into the matter very thoroughly and we are convinced that no further issue remains

to be determined. Furthermore there was an agreement between the gentlemen conducting the case on either side in the Munsif's Court that no oral evidence should be produced. This creates an estoppel. The appeal must be allowed and the plaintiff's suit decreed in the terms of this judgment with costs here and below including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 22 OF 1922.

August 28, 1923.

Present :—Mr. Justice Spencer and Mr. Justice Devadoss.

K. C. MANAVIKARAMAN *alias* ANJUN RAJA AVERGAL—PLAINTIFF—APPELLANT

versus

N. C. ANANTHANARAYANA AYYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908) *ss.* 21, 37, 38, 39—*Execution of decree—Transfer of jurisdiction—Court competent to execute decree—Objection to jurisdiction taken in appeal, whether can be entertained.*

No Court can execute a decree, in which the subject-matter of the suit, or of the application for execution, is property situate entirely outside the local limits of its jurisdiction.

Begg Dunlop & Co., v. *Jagannath Marwari*, 11 Ind. Cas. 417; 14 C. L. J. 228 at p. 231; 39 C. 104; 16 C. W. N. 402, relied on.

In all cases, where between the passing of the decree and the executing of it, the jurisdiction over the subject-matter of the decree has passed to another Court, the Court passing the decree must send it for execution to the Court which has territorial jurisdiction over the subject-matter of the decree. Where, however, the judgment-debtor fails to take objection to the jurisdiction of the Court which passed the decree to execute the decree, and the objection is taken for the first time in the Appellate Court it should not be entertained.

Semble:—The provisions of section 21 of the Civil Procedure Code are applicable to execution proceedings.

Appeal against the order of the District Court, South Malabar, dated the 21st November 1921, in A. S. No. 480 of 1921, preferred against the order of the Court of the Subordinate Judge, Ottapalam, dated the 11th April 1921, in E. P. No. 136 of 1920, in O. S. No. 6 of 1919.

Mr. *K. P. M. Menon*, for the Appellant.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Narayanaswami Aiyar*, for the Respondents.

JUDGMENT.—In O. S. No. 6 of 1919, a decree for redemption of a kanom demise was passed by the Subordinate Judge of Ottapalam, on March 5th, 1920. An execution petition was filed on August 6th, 1920, for having a revaluation made of the improvements and for delivery of the property. On the 1st October, 1920, the place where the mortgaged property was situated, was transferred from the jurisdiction of the Ottapalam Subordinate Judge's Court, to that of the Palghat Subordinate Judge's Court. The Subordinate Judge of Ottapalam disposed of the execution petition, and in the course of so doing, he ordered on the 16th December, 1920, that there should be a re-valuation of the property, and on the 11th April, 1921, he ordered that a warrant for delivery of the property should be issued, returnable on the 21st June 1921, and he adjourned the further hearing of the petition for disposal of other matters referred to therein.

On appeal to the District Judge, an objection was taken for the first time to the jurisdiction of the Subordinate Judge of Ottapalam to pass an order for delivery of the property, after the executing Court had lost jurisdiction over the locality, where the property was situated. This objection was upheld by the District Judge and the lower Court's order was set aside.

It is clear from the above dates that both at the time of passing the decree and at the time when the execution petition was presented, the Ottapalam Sub-Court had territorial jurisdiction over the subject-matter of the suit. It follows, therefore, that the Ottapalam

MANAVIKARAMAN *v.* ANANTHANARAYANA AYYAN

Court was "the Court which passed the decree," within the definition, in section 37 (*d*), Civil Procedure Code. Section 38 provides that :

"a decree may be executed, either by the Court which passed it, or by the Court to which it is sent for execution."

Section 39 (*c*) provides that the Court, which passed the decree, may, on the decree-holder's application, send it for execution to another Court :

"if the decree directs the sale or delivery of immoveable property, situate outside the local limits of the jurisdiction of the Court which passed it."

As Mukerjee, J , has observed in *Begg Dunlop and Co.* v. *Jagannath Marwari* (1) these provisions read together plainly indicate the general principle that no Court can execute a decree, in which the subject-matterof the suit, or of the application for execution, is property situate entirely outside the local limits of its jurisdiction, and he quotes the Full Bench decision of the Calcutta High Court in *Prem Chand Dey* v. *Mokhoda Debi* (2) in support of this elementary principle. We are not inclined to accept the suggestion that section 38 makes it optional to a Court to execute its own decree, or to transmit it to the Court, which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. Although the words in section 39 are "the Court may send it for execution," we think that in all cases the Court should send its decree to the Court which has territorial jurisdiction, if between the passing of the decree and the executing of it, the jurisdiction has passed to another Court. In this view of the case, it is unnecessary to canvass the correctness of the decision of the Full Bench of the Calcutta High Court, in *Prem Chand Dey* v. *Mokhoda Debi* (2), to the effect that a Court has no jurisdiction, in execution of a decree, to sell property, over which it has no territorial jurisdiction, at the time when it passes the order of sale.

In the present case, the objection to jurisdiction was not taken in the executing court, but was taken for the first time in the grounds of appeal to the lower Appellate Court. The question, therefore, arises whether the submission by the defendant to the jurisdiction of the Ottapalam Subordinate Judge's Court cures its want of jurisdiction. There can be no doubt that under section 21 of the Civil Procedure Code, such an objection will not be admissible, if it is not raised, to the trial of a suit by a Court, which has no jurisdiction over the place of suing. This section makes it imperative that such objection should be taken in the Court of first instance at the earliest possible opportunity, in any case, before issues are settled; and there must further be a consequent failure of justice for sustaining the objection.

The respondents' pleador has conceded that he submitted to the jurisdiction of the Ottapalam Court, so far as it issued directions for re-valuing the improvements, that being a matter, which the executing Court has jurisdiction to dispose of, under section 6 of the Malabar Compensation for Tenants' Improvements Act. There is nothing in the statement put in by the first counter-petitioner at the time of execution or in the B diary, to show that he took this objection, even at the stage when delivery was ordered.

The question whether section 21 of the Civil Procedure Code is applicable to execution proceedings was referred to a Full Bench, in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (3), but was not directly decided. From the order of reference by Seshagiri Aiyar, J., and from the opinion of Sir John Wallis, C. J., it appears that both those learned Judges were inclined to extend the same principle to execution proceedings ; but they decided the case upon other considerations, which were that in execution no party had a right to question the correctness of the decree, which was being executed, or the jurisdiction of the Court which passed it. Following this Full Bench decision, in C. R. P. No. 372 of 1921, one of us applied the same principleto an objection to jurisdiction, which was taken only in the executing court.

We are of opinion that the objection in the present case is one of form only and not of substance. The District Judge's order will

(1) 11 Ind. Cas. 417 ; 14 C. L. J. 228 at p. 231 ; 39 C. 104 ; 16 C. W. N. 402.
(2) 17 C. 699 at p. 703 ; 8 Ind. Dec. (N. S) 1003.
(3) 58 Ind. Cas. 871 ; 43 M. 675 ; 12 L. W. 217; (1920) M. W. N. 460 ; 28 M. L. T. 75 ; 39 M. L. J. 203 (F. B.).

only have the effect that the property will have to be re delivered to the defendant, and then it will be open to the plaintiff to apply to the Palghat Subordinate Court, for a fresh order for delivery, and all the formalities of issuing a commission and handing over property by means of an *amin* will have to be repeated, without any advantage to any one.

In the circumstances of the case, as the defendant took no objection at the time but submitted to the jurisdiction of the executing Court and only raised this objection, after the order had been passed, we think that the District Judge would have been well advised to have refused to allow such an objection to be taken in appeal and that he should have declined to interfere with the executing Court's order, upon an objection which was utterly devoid of merits.

In this view, we set aside the District Judge's order and restore the order of the Subordinate Judge with costs here and in the District Court.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2170 OF 1921.

November 13, 1922.

Present :—Mr. Justice Martineau.

RALLA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARNAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Judgment based solely on result of local investigation by Trial Court, legality of.

A judgment should not be based solely on the result of a personal local inspection made by the judge.

Syed Ahmed Saheb Shulari v. *The Magnesite Syndicate Limited*, 29 Ind. Cas. 60; 2 L. W. 460 ; 17 M. L. T. 387; 28 M. L. J. 598; 39 M. 501, relied on.

The judgment of a lower Appellate Court based entirely on a local investigation conducted by the Judge of the Court of first instance cannot be sustained in second appeal.

Appeal from the decision of the District Judge, Hoshiarpur, dated the 13th June 1921.

Mr. *Fakir Chand*, for the Appellants.

Mr. *Badri Das*, for the Respondents.

JUDGMENT.—My order of the 8th April last, remanding the case for an inquiry as to when the house was built will be read as part of this judgment. The finding of the learned District Judge is that the *Kothas* were built only 2 or 3 years before the suit.

It is contended for the respondents that this finding is not based on evidence. The contention is correct. There is no doubt oral evidence produced by the plaintiffs to show that the house was built within six years of the suit, just as there is oral evidence on the other side as to its having been bulit more than six years ago, but the Courts below have not relied on that evidence, which, as the learned District Judge observes, is mostly interested. The finding of the learned Judge is based solely on the opinion expressed by the Munsif from an inspection of the spot. In *Dwarka Prasad* v. *Makhu Lal* (1) it was held that the judgment of a lower Appellate Court based entirely on a local investigation conducted by the Judge of the Court of first instance cannot be sustained in second appeal. It was also ruled in *Syed Ahmed Saheb Shulari* v. *The Magnesite Syndicate Limited* (2) that a judgment should not be based solely on the result of a personal local inspection made by the Judge. I must hold, therefore, that the finding of the lower Appellate Court cannot be supported as it is not based on legal evidence. The result is that the suit must fail, the plaintiffs not having discharged the onus which lay upon them.

The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 52 Ind. Cas. 241.
(2) 29 Ind. Cas. 60; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598.

ABURUBAMMAL *v.* THE OFFICIAL ASSIGNEE OF MADRAS

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 111 OF 1922

August 27, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Krishnan.

ABURUBAMMAL—APPELLANT
versus
THE OFFICIAL ASSIGNEE OF MADRAS—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 52, applicability of—Legal and equitable interests—Reputed ownership of equitable interest—Withdrawal of consent—Letter posted to correct address—Presumption.

Under the terms of an agreement an insolvent gave the garnishee his motor car as security for an advance of Rs. 3,000. The insolvent was to have the right to use the car and keep it in good order and deliver it up on demand. The loan was also secured by a pro-note of the insolvent and another person. Some months later the garnishee sent a letter to the insolvent through her vakil demanding under threat of criminal proceedings that the car should be returned to her. Three months thereafter the insolvency proceedings commenced, and the Official Assignee claimed the car free from any charge, under section 52 of the Presidency Towns Insolvency Act.

Held (1) that the insolvent was the legal owner of the car and the garnishee the true owner of the equitable interest therein ; (2) that the insolvent who had the power to use the car was the reputed owner of the equitable interest within the meaning of section 52 of the Presidency Towns Insolvency Act, but that the letter of the garnishee's vakil demanding the return of the car was a sufficient determination of the consent of the true owner of the equitable interetst ; (3) that the insolvent had thus ceased to be the reputed owner of the equitable interest with the consent of the true owner at the time of the commencement of the insolvency and section 52 of the Presidency Towns Insolvency Act was, therefore, inapplicable to this case.

The words "true owner" in section 52 of the Presidency Towns Insolvency Act include the owner of an equitable interest and there can also be a reputed owner of that interest. But it is essential for section 52 to apply that the insolvent should at the commencement of the insolvency be the reputed owner with the consent of the true owner and the question whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner is a question of fact.

The Mercantile Bank of India Ltd., Madras v. *The Official Assignee of Madras*, 35 Ind. Cas. 942; 39 M. 250; *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar*, 25 M. 406 ; 12 M. L. J. 282 ; *Colonial Bank* v. *Whinney*, (1887) 11 A. C. 426 ; 56 L. J. Ch. 43 ; 55 L. T. 362 ; 34 W. R. 705 ; 3 Marrell 207, followed.

Where a letter is proved to be posted to the right address, a presumption arises that the letter was in fact received by the addressee.

Per Schwabe, C. J.—Even if the letter of the garnishee's vakil was not received by the insolvent the consent of the garnishee to the insolvent's possession of the car was proved to have been determined by her instructions to the vakil to send the letter and the sending of that letter and this was enough to take the case out of section 52 of the Presidency Towns Insolvency Act.

Appeal from the order, dated the 11th September 1922, of Mr. Justice Coutts Trotter in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in Insolvency Petition No. 100 of 1922 in the matter of C. Cunniappa Mudaly, an insolvent.

Mr. *K. Sanjiva Kamath*, for the Appellant.

The *Official Assignee of Madras*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—By an agreement in writing dated the 2nd August 1921, the insolvent purported to give to the garnishee his motor car as security for an advance by her to him of Rs. 3,000. It was a term of the agreement that the insolvent should have the right to use the car and should keep it in good order, and deliver it up on demand. He also agreed that, if he exercised any acts of ownership over the car, he should be criminally liable, a stipulation which can have no effect in law.

The other relevant facts are that the loan was also secured by a joint promissory note of the insolvent and another renewed on November 9, 1921 to the end of January 1922, and that by a letter, dated February 10, 1922 from her vakil, she demanded from the insolvent under threat of criminal proceedings that the car should be returned to her. The commencement of the insolvency was in May 1922.

On these facts it is contended by the Official Assignee that he is entitled to the car free from any charge in favour of the garnishee as, being at the commencement of the insolvency with the consent of the true owner in the pos-

session, order and disposition of the insolvent in his trade or business, and therefore under section 52 of the Presidency Towns Insolvency Act, the property of the insolvent, divisible amongst his creditors; and it has been so held by Coutts Trotter, J.

Now the legal owner of the property throughout was the insolvent, but the garnishee was the owner of an equitable interest in the property. It has been held on the true interpretation of section 52 and of the same words in the English Bankruptcy Acts, that the words 'true owner' include the owner of an equitable interest and that there can also be a reputed owner of that interest and that reputed owner can be the insolvent himself, that is, the legal owner of the property see *The Mercantile Bank of India Ltd., Madras* v. *The Official Assignee of Madras* (1), following the judgment of Bhashyam Iyengar J. in *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar* (2), and see the English cases set out in Williams on Bankruptcy, 12th Edition at p. 217. In *Colonial Bank* v. *Whinney* (3) it was held that where there was an equitable mortgage of shares by the deposit of the shares certificate and a blank transfer, the registered shareholder remaining the legal owner, the depositee got an equitable interest and that another person could be the reputed owner of the equitable interest.

The result is that in this case the garnishee must be taken to be the true owner of the equitable interest in this case conferred by the agreement of August 2, referred to above; but the car being left in the possession of the insolvent with power to use it to all appearance as though it were his own, he had become the reputed owner. But it is essential for the section to apply that he should at the commencement of the insolvency be the reputed owner with the consent of the true owner. Now the question is whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner and that is a question of fact. In this case the letter of February 10, 1922 is in very plain language : " Under instructions from Mrs. Appuruppammal I call upon you to forthwith return the car which has been given as security for the amount you have borrowed from her and which you have taken promising to return when demanded. You have not returned the car when demanded by her. Please take notice that, if the car is not sent at once, criminal proceedings will at once be instituted against you. " I should infer from the terms of the letter that there had been a previous demand made verbally by the garnishee herself. But, however that may be, there is in this letter a very definite demand for the return of the car. The evidence is that that letter was posted, and it is quite clear that it was so posted because a certificate from the post office to that effect is produced before the Court. It is suggested by the learned Judge that it is possible that the letter was not delivered to the insolvent and that it is possible that, although not delivered, it did not come back to the Dead Letter Office through, what the learned Judge speaks of as the vagaries of the Madras Post ; but the insolvent was called as a witness and he did not deny the receipt of that letter, though it is true he was not asked whether he had received it or not ; and I fail to see how the learned Judge was justified in coming to the conclusion on that evidence that it has not been received because the presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the recipient. Speaking entirely for myself I have always looked upon, and I shall always look upon with the gravest suspicion the evidence of a man who comes to Court and says that he has not received the really important letters in the case, because although it is possible, I should require something more before I should be ready to find that the ordinary course of events has been departed from in so convenient a way. I must, therefore, find that that letter was in fact received.

If it was received, there can be no doubt in my mind that there was a determination of the consent of the true owner at that date. I should add that in my view even if that letter was not received, I should incline to the view that the consent was proved to have been determined by the instructions to the Vakil to send that letter and the sending of that letter by him. It is possible that after that date

(1) 35 Ind. 942 ; 39 M. 250.
(2) 25 M. 406; 12 M. L. J. 282.
(3) (1887) 11 A. C. 426; 56 L. J. Ch. 43 ; 55 L. T. 362 ; 34 W. R. 705 ; 3 Marrell 207.

the consent was in some way renewed and I confess that I should like to have a very much more clear explanation than I have got why nothing was done in the matter between February 10, and May. The *garnishee* gives evidence, and a considerable body of evidence, that she took most active steps thereafter to take possession of the motor car and to deal with it as her own, but that evidence is not believed and we are not in a position to do anything else than to accept the learned Judge's view, that it was not acceptable evidence. But he does not hold that after February 10, there was any act by her showing consent to further possession by the insolvent, nor do I think we ought so to find. If the insolvent had come into Court and stated, "I got that letter but after that date the lady came to see me and she said "very well, go on using the car while I find a purchaser" or something of that kind, that would be sufficient to say that this letter was not a final and conclusive withdrawal of consent. But I can find nothing at all in the evidence to amount to anything of that kind. That being so, I think we must take that letter demanding the return of the car under threat of criminal proceedings if not complied with, as a sufficient determination of the *garnishee's* consent.

In these circumstances this appeal must be allowed. In the ordinary course an order would be made directing the return of the car by the Official Assignee to the *garnishee*, he of course, if so advised, being entitled to redeem it as representing the insolvent on payment of Rs. 3,000 and interest thereon at the promissory note rate and costs. We are, however, informed that the Official Assignee has spent money on the car during the time in which it has been in possession on repairs or improvements and that it is still worth less than Rs. 3,000. He is, therefore, entitled to a first charge for what he has spent on the car. Probably the best course to adopt would be that he sells the car and deducts from the sale price the amount spent by him on repairs and hands over the balance to the *garnishee* who will be entitled to prove as an unsecured creditor for any balance due to her. If the *garnishee* desires the car it is open to her to pay the amount spent by the Official Assignee on repairs and improvements of the car and have the car. She must have her costs here and below. She must elect which course she will adopt within 14 days of the Official Assignee informing her of the amount of his expenditure. There will be liberty to apply.

Krishnan, J.—It is clear from the authorities that have been noticed in the judgment of the learned Chief Justice that in section, 52 (2) (*c*) the words 'true owner' include the owner of an equitable charge like the one which the *garnishee* has over the motor car in this case. It is also clear that the person who is really the owner of the car can be a reputed owner of the equitable charge, and that section 52 (2) (*c*) will apply to such a case as that. But there is another term in the section which has to be considered before we can apply it to the facts of this case, and that is that the car should have been in the possession of the reputed owner, in this case the insolvent, with the consent and permission of the true owner, viz., the *garnishee*, at the date of the insolvency. By the letter of February 10, 1922, that has been referred to by the learned Chief Justice, it was clearly intended to put an end to the consent which the *garnishee* had originally given to the insolvent keeping possession of his car and that that letter was posted to the right address there can be no doubt because there is the certificate of posting produced, and the presumption in law is that the letter reached the hands of the addressee, who is the insolvent in this case. The insolvent, when called as a witness did not deny the receipt of the letter, neither side having put the point to him, thus the presumption remains, and we must take it, that the letter reached the hands of the insolvent, before the date of the insolvency. That of course determines the original consent that had been given by the *garnishee*, the true owner. I do not propose to express any opinion on the question whether, when such a withdrawal of consent is not communicated to the person from whom the consent is withdrawn, such withdrawal will be effective or not, for that is a more difficult question to decide and it does not require decision in this case. I am in agreement with the learned Chief Justice, that the letter was actually received by the insolvent, and that being so, the one essential condition of the section that the reputed owner must at the commence-

ment of the insolvency have had possession or disposition of the article in question with the consent and permission of the true owner fails. If section 52 (2) (*c*) does not apply, then it is quite clear that there is no other ground on which the Official Assignee can be allowed to take this car free from the charge created by the insolvent. I, therefore, agree to the order proposed by the learned Chief Justice in this case.

V. N. V. *Appeal allowed.*
Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2589 OF 1921.

November 16, 1922.

Present :—Mr. Justice Broadway.

Mt. NAZKS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mt. GOPAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act, (IX of 1908) *s* 5—*Appeal, delay in filing—Extension of time—Diligence, absence of.*

An appellant who does not show any sort of diligence in the matter of obtaining the necessary copies for the purposes of his appeal is not entitled to any indulgence by way of extension of time under section 5 of the Limitation Act.

Appeal from the decision of the District Judge, Hoshiarpore, dated the 20th June 1921, affirming that of the Honorary Munsif, Second Class, Bijapur, Palampur, dated the 13th November 1920.

Mr. *G. L. Gulati*, for the Appellants.

Mr. *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT :—A preliminary objection has been taken by Mr. Mehr Chand Mahajan to the effect that the appeal is barred by time. The decision appealed against is dated the 20th of June 1921. An application for copies of the decree and the lower Appellate Court's order was filed on the 27th of June 1921 and these copies appear to have been received by the appellant on the 9th of July, 1921. The appeal itself was filed on the 4th of October 1921 and was returned on the same date on the ground that it was not accompanied by a copy of the judgment of the Trial Court. The appellant appears to have done nothing further in the matter until the 26th October 1921, when he applied for a copy of the necessary judgment which was ready on the 31st of that month and actually delivered to the appellant on the 7th of November 1921. The appeal was then refiled on the 22nd of November, 1921. Mr. Mehr Chand Mahajan's contention is, therefore, correct and the appeal is barred by time. See *Malu Mal* v. *Sri Ram* (1) and *Bhairon Ghulan* v. *Ram Autar Singh* (2).

Mr. Gulati for the appellant has urged that his clients are *jats* and that some latitude should be shown to them. I take it that the learned Counsel asks me to apply section 5 of the Limitation Act to the case. I would have been quite prepared to extend the period if the appellant had shown any sort of diligence in the matter. Rule 2 of O. XLIII, Civil Procedure Code has been in force since 1909 and it is idle to plead ignorance of its existence. The appeal was returned on the 4th October, 1921 and yet no application for the necessary copy was filed till the 26th of October. Even allowing for the fact that Kangra is at some distance from Lahore this delay appears to me to be unwarranted. Again although the necessary copy was delivered to the appellant on the 7th of November, 1921, the appeal was not refiled till the 22nd November, 1921. In all these circumstances I am unable to see any reason for showing the appellant any consideration and the appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 63 Ind. Cas. 38 ; 2 L. 227; 3 U. P. L. R. (L.) 99
(2) 63 Ind. Cas. 338 ; 43 A. 660 ; 19 A. L. J. 598 ; 3 U. P. L. R. (A) 165.

SADDIK AHMED *v.* M. K. M. FIRM

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL
No. 213 OF 1921.

December 5, 1922.

Present :—Sir Sidney Robinson, Kt., Chief Justice, and Mr. Justice Macgregor.

SADDIK AHMED—APPELLANT
versus
M.K.M. FIRM AND ANOTHER—RESPONDENT.

Provincial Insolvency Act (*V of* 1920), *s.* 54—*Surety paying off debt, whether creditor—Transfer in favour of surety—Fraudulent preference.*

Appellant stood surety for the price of certain goods purchased by *A*. When the sellers pressed for payment *A* agreed to execute a conveyance of certain immoveable property in favour of appellant in order to enable him to pay off the debts for which he had become surety and also to pay himself the balance of a debt due from *A*. Appellant paid off the price of the goods and obtained the conveyance. A few days afterwards *A* became insolvent:

Held, that on payment of the price of the goods, appellant had become a creditor of *A*, and the conveyance in his favour, in the absence of any pressure put by him on *A*, amounted to a fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act and was void.

Mr. *Das*, for the Appellant.

Mr. *Sen*, for the Respondent.

JUDGMENT.

Robinson, C. J.—On the 19th January 1921, one Abdul Ganny applied to be adjudicated insolvent. A short time before he was adjudicated, he sold the properties involved in this appeal to the appellant. After the adjudication some of the creditors challenged the sales as having been made within three months of the adjudication and prayed that they might be declared void. They have been so declared, and this is an appeal against that order.

The facts are as follows.—The Insolvent, in January 1920, bought certain goods on credit, and the appellant verbally stood surety for him. The vendors pressed for payment and called upon the appellant to fulfil his guarantee. He demanded security from the Insolvent before he did so, and on the 3rd of June 1920 an agreement, Exhibit "D," was executed, by which the Insolvent agreed to sell to the appellant a piece of land and a house for Rs. 1,600. The agreement provides that the appellant was, out of the purchase money to pay off a mortgage that existed on the properties and to pay the two persons, from whom the Insolvent had bought goods on credit, the amounts due to them with interest. The Insolvent agreed to give possession as soon as the debts to be paid were liquidated. The sale was to be completed, and the conveyance was to be executed within the following January. In addition to this debt, the Insolvent owed the appellant Rs. 1,000 which remained due on a promissory note for Rs. 2,000 executed by him and Ma Gyi on the 12th of February 1920. The appellant is shown in the schedule of creditors, a creditor for this Rs. 1,000. As a surety, the appellant was clearly a creditor of the Insolvent. See *Rodriguez* v. *Ramaswami Chettiar* (1). He was clearly a creditor as soon as he paid this money on his behalf. It is argued, however, that there was, in June 1920 an enforceable agreement to sell the properties; that, although the conveyance was only executed shortly before the adjudication, he ceased to be a creditor as soon as he obtained the agreement to sell; and that, therefore, section 54 of the Provincial Insolvency Act would not apply to the case. I am unable to accept this argument. The money was paid only in December, 1920. No liability to sell accrued under the agreement until these moneys had been paid. But over and above this, there is the fact that the Insolvent was unable to pay his debts in full as they became due from his own money, and that the person in whose favour the transfer was made was a creditor. Apart from the position arising under the agreement, the effect of the agreement is to pay the appellant the major portion of the debt due to him by this transfer, so that the properties do not go into the general fund to be divided rateably amongst all his creditors.

(1) 38 Ind. Cas. 783; 40 M. 783; 32 M. L. J. 253; (1917) M. W. N. 238; 21 M. L. T. 225; 5 L. W. 830; (F. B.).

ABDUL GHANI *v.* ISHAR SINGH

Under these circumstances I think that there can be no doubt that this transfer was void as a fraudulent preference. The order of the Court below will be confirmed, and the appeal dismissed with costs, advocate's fees three gold mohurs.

Macgregor, J.—There was certainly no pressure put upon the Insolvent by Siddick Ahmed. There is no documentary evidence that the latter stood surety for him. He did not sign the pro-notes as surety nor is he shown as such in the creditors' accounts. He says that the proposal to sell the property to him came from the Insolvent, and beyond sending his man afterwards to ask him to convey it, he did not use any pressure. Insolvent is still living in the house, and Siddick Ahmed's accounts do not show receipt of the alleged nominal rent. They are entirely on friendly terms and it is clear that the transfer was with the view of giving Siddick Ahmed undue preference. The contract to sell could not put Siddick Ahmed in a better position than any other creditor. I agree in the proposed order of the learned Chief Justice.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 837 OF 1922.

December 1, 1922.

Present :—Mr. Justice Broadway.

ABDUL GHANI—PLAINTIFF—APPELLANT

versus

ISHAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Inference from facts.

When more inferences than one are legally open from the evidence, the High Court cannot, in second appeal, refuse to be bound by the inference drawn by the lower Appellate Court.

Madho Rao Bhan Jamindar v. *Govindbhat Brahman*, 46 Ind. Cas. 794 : *Rajaram* v *Ganesh*, 21 B. 91 at p. 94 ; 11 Ind. Dec. (N. S.) 63, relied on.

Appeal from the decree of the District Judge, Gurdaspur, dated the 22nd December 1921, affirming that of the Munsif, First Class, Batala, dated the 22nd December 1920.

Mr. *Sayad Mohsin Shah*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiff in this case instituted a suit on behalf of the Muhammadans of Chandu Nangal, Jaorian Khurd and Dera Nanak in respect of a plot of land record ed as *Shamilat* of Chandu Nangal. It was sought to obtain a declaration against the defendants that land comprised in *Khasra* No. 11 was a graveyard in possession of the Muhammadans of the three villages and that the defendants were not entitled to interfere in any way with such possession. The Courts below have concurred in the conclusion that the plaintiffs had not made out their cases and they have, therefore, come up to this Court in second appeal through Mr. Mohsin Shah, while I have heard Mr. Shamair Chand for the respondents.

Mr. Shamair Chand has urged that the learned District Judge has come to conclusions which are purely conclusions of fact after a consideration of all the evidence on the record, and that, therefore, no second appeal was competent. He referred to *Durga Chowdhrani* v. *Jewahi Singh Chowdhury* (1) Mr. Mohsin Shah was unable to explain what the question of law was that he sought to advance in this Court and was constrained to urge that the learned District Judge had drawn wrong inferences from the facts found. Here, again, he was unable to state what was the wrong inferrence so drawn and then fell back on the allegation that the evidence had not been properly appreciated by the lower Appellate Court. Mr. Shamair Chand referred to *Madho Rao Ban Jamindar* v. *Govindbhat Brahman* (2), and urged that were more than one inference is legally open, this Court cannot in second appeal refuse to be bound by that inference drawn in the Court below. In

(1) 18 C. 23 ; 17 I. A. 122 ; 5 Sar. P. C. J. 560 ; 9 Ind. Dec. (N. S.) 16 (P. C.)
(2) 46 Ind. Cas. 794.

this respect reference may also be made to *Rajaram* v. *Ganesh* (3).

I have carefully examined the judgment of the learned District Judge and find that he has considered all the oral evidence which he has described as unreliable, and that he also has examined all the documentary evidence on the record. I am not prepared to say that the inferences drawn by him are erroneous.

I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(3) 21 B. 91 at p 94 ; 11 Ind. Dec. (N. S.) 63.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 3 OF 1923.

February 12, 1923.

Present :—Mr. Justice Heald.

MAUNG PO KIN AND ANOTHER—APPELLANTS

versus

MAUNG KYAUK YE—RESPONDENT.

Transfer of Property Act (IV of 1882) s. 68—Mortgage with possession—Mortgagee ousted by person claiming adversely to mortgagor—Duty of mortgagor—Mortgagee, whether entitled to sue for mortgage money.

Where a mortgagee in possession is ousted from possession of the mortgaged property by a person claiming title adversely to the mortgagor, it is the duty of the latter to defend his title and to restore the mortgagee to possession, and if he fails to do so, the mortgagee is entitled, under section 68 of the Transfer of Property Act, to sue for the mortgage money.

Appeal against the decree of the District Court, Maubin, in Civil Appeal No. 74 of 1922.

Mr. *Po Han*, for the Appellant.

JUDGMENT.—Appellants mortgaged certain lands to respondent with possession by way of usufructuary mortgage.

Respondent was ousted from the lands by the mortgagee of a person who claimed title adversely to appellants.

Appellant's defence to respondent's suit was that the person who ousted respondent had no lawful title, that it was respondent's duty to defend his own possession, and that they were not responsible for his loss of his security.

The trial Court held that appellants were not bound to defend, that it was their mortgagee's duty to defend his own possession against a third party, and dismissed respondent's suit.

Respondent appealed, and the District Court held that, having lost his security, he was entitled to get back his mortgage money.

Appellants now come to this Court in second appeal on the grounds that respondent failed to prove that his loss of possession was due to any defect in their title, and that they were not bound to secure respondent quiet enjoyment against a mere trespasser.

There is clearly no substance in these grounds. According to the principles embodied in section 68 of the Transfer of Property Act, a mortgagee in possession has a right to sue for the mortgage money where the mortgagor fails to secure the possession of the property to him without disturbance by the mortgagor or any other person. In this case the mortgagor's title was clearly impugned and it was their duty to defend it and with it respondent's possession. They do not allege that they made any attempt to do so, and they were, therefore, undoubtedly bound to repay the mortgage money.

The appeal is dismissed under the provisions of O. XLI, r. 11 read with O. XLII, r. 1.

Z. K. *Appeal dismissed.*

MAHABIR *v.* MANOHAR SINGH

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 18 OF 1923.

December 4, 1923.

Present :—Mr. Justice Kaniyalal.

MAHABIR—APPLICANT
versus
MANOHAR SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) Sch. II, para. 1—Reference to arbitration—Agreement not in writing—Statement made to Court recorded in writing—Award, validity of.

A record taken down of an oral statement made by the parties or their pleaders agreeing to refer the matter in dispute to arbitration is as much an agreement in writing, for the purposes of para. 1 of schedute II to the Civil Procedure Code, as a written application made by the parties or their pleaders. The personality of the writer makes no difference.

Where both the parties to a pending suit consent to a reference to arbitration, and an order of reference is then and there made by the Court in the presence of the parties, though not upon a written application, the reference is perfectly valid.

Shama Sundram Iyer v. *Abdul Latif*, 27 C. 61 ; 4 C. W. N. 92 ; 14 Ind. Dec. (N. S.) 41; *Abdul Hamid* v. *Riaz-ud-din*, 30 A 32; A. W. N. (1907) 273; 4 A. L J. 691; *Umed Singh* v. *Seth Sobhag Mal Dhadha*, 32 Ind. Cas. 161; 43 C. 290; 20 C W. N. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 108; 23 C. L. J. 130; (1916) 1 M. W. N. 67; 18 Bom. L. R. 308; 43 I. A. 1 (P. C.), relied on.

An award is not invalid merely beoause an application for an order of reference is not made in writing.

Revision against on order of the Bench Munsifs, Allahabad, dated the 25th April 1923.

Mr. *B. N. Vyas*, for the Applicant.

JUDGMENT.—This an application in revision against an award, which has been accepted by the Court below in a suit pending before it. On the date of the hearing of that suit the pleaders for the parties stated that they had agreed to arbitration and wanted to refer the matter in dispute to a certain pleader named by them for decision. Their statements were recorded by the Court and a reference was made in accordance with their agreement. The arbitrator made an award, to which certain objections were taken by the defendants ; but they did not there state that the reference was invalid because it was not in writing, or that they had not authorised their pleaders to make it. In fact the *vakalatnama* filed by the applicant in the Court below expressly authorised the pleader concerned to enter into an agreement of arbitration. An objection is now taken that under paragraph 1 of the second schedule attached to the Code of Civil Procedure the agreement ought to have been in writing, but a record taken down of an oral statement made by the parties or their pleaders is as much an agreement in writing as a written application made by the parties or their pleaders themselves. The personality of the writer makes no difference. In *Shama Sundram Iyer* v. *Abdul Latif* (1), and *Abdul Hamid* v. *Riazuddin* (2) it was accordingly held that where both the parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application, it was not open to the Court to supersede that reference. An award is not invalid merely because an application for an order of reference is not made in writing. In *Umed Singh* v. *Seth Sobhag Mal Dhadha* (3) their Lordships of the Privy Council held that where a guardian *ad litem* of a minor party was in Court and had assented to the application for reference to arbitration the omission of the guardian to sign the application was immaterial. The application, therefore, fails and is rejected.

Z. K. *Revision rejected.*

(1) 27 C. 61; 4 C.W.N. 92 ; 14 Ind. Dec. (N S.) 41
(2) 30 A. 32 ; A.W.N. (1907) 273 ; 4 A. L. J. 691.
(3) 32 Ind. Cas. 161; 43 C. 290 ; 20 C.W.N. 137 ; 3 M.L.J. 67 ; 14 A. L. J. 97 ; 3 L. W. 145 ; 19 M. L. T. 108; 23 C. L. J. 130; (1916) 1 M. W .N. 67; 18 Bom. L. R. 308; 43 I. A. 1 (P. C.).

MAUNG PEIN *v.* MAUNG PO MAUNG

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL
No. 236 OF 1922.

January 22, 1923.

Present:—Mr. Justice Lentaigne.

MAUNG PEIN—DEFENDANT—APPELLANT
versus
MAUNG PO MAUNG—PLAINTIFF—RESPONDENT.

Squatter's land—Abandonment, absence of—Refusal to assess land in name of occupier—Fresh occupier, position of—Possession, suit to recover.

Plaintiff worked the land in suit for two years and paid revenue in respect thereof. The land was not worked in the third year and the Revenue Surveyor, without any reference to the plaintiff, struck out the latter's name and omitted to assess the land to revenue. Plaintiff tried to approach the Revenue Surveyor but without result. In the fourth year the Revenue Surveyor permitted defendant to enter upon the land and assessed it to revenue. Plaintiff sued defendant to recover possession of the land;

Held, that as plaintiff had not abandoned and had no intention of abandoning the land, the Revenue Surveyor was not justified in refusing to assess the land in his name, and his suit must, therefore, succeed, as the defendant was a mere trespasser.

Appeal against the decree of the District Court, Henzada, in Civil Appeal No. 28 of 1922.

Mr. *Ba Si*, for the Appellant.

JUDGMENT.—Plaintiff-respondent worked the land in suit either by himself or his tenant for 2 years, 1918-19 and 1919-20, and admittedly paid revenue for these two years. Plaintiff alleges that he leased the land to defendant's brother for the third year, but this is disputed and admittedly the land was not cultivated or worked in this third year. The Revenue Surveyor then of his own motion and without reference to plaintiff struck out plaintiff's name and omitted to assess the land to revenue. When plaintiff discovered this, he sent a man to the Revenue Surveyor, which fact is admitted by the Revenue Surveyor, and plaintiff says that the only reply was that the plaintiff should come himself. As plaintiff had not abandoned the land, and the Revenue Surveyor had not even questioned plaintiff or paid any attention to the message sent to him, this was obviously wrong. In the fourth year the defendant-appellant asked the permission of the Revenue Surveyor to enter on the land and did so and was assessed to revenue. Plaintiff then complained to the Sub-Divisional Officer and prosecuted the appellant as a trespasser. Plaintiff also filed the present suit for recovery of possession, which was dismissed by the Township Court, but on appeal, the District Court of Henzada reversed the decree of the Township Court and gave plaintiff a decree holding that plaintiff had acquired a right to continue in possession, and that defendant was a trespasser.

The present second appeal is filed against that appellate decree and I can see no substance in this second appeal.

Reliance is placed on two paragraphs of the Land Records Manual No. 447 A and 430, but they do not justify the refusal of the Surveyor to assess the land as a holding for the third or fourth years in plaintiff's name as plaintiff had not abandoned the land and had no intention of abandoning the land. The lower Appellate Court has criticised this action of the Revenue Surveyor. I agree with the decision of the lower Appellate Court, and as no sufficient reason has been advanced why it should be set aside, I dismiss this appeal.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 843 AND 844 OF 1922.

February 26, 1924.

Present :—Mr. Justice Venkatasubba Rao.

IN C. R. P. No. 843 OF 1922.

RAMAPPA CHETTIAR AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

EKAMBARA PADAYACHI—DEFENDANT—RESPONDENT.

IN C. R. P. No. 844 OF 1922.

RAMAPPA CHETTIAR—PLAINTIFF—PETITIONER

versus

MARUTHAMUTHU PADAYACHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code, (V of 1908), O. XXI, rr. 58, 63—Claim petition, dismissal of, for default—Application to restore petition, whether maintainable.

Where a claim petition under O. XXI, r. 58 of the Civil Procedure Code is dismissed for non-appearance of the claimant, an application to restore the petition is maintainable.

The provision in O. XXI, r. 63 of the Civil Procedure Code that an order there under shall be conclusive does not take away the right of the party to have the order of dismissal for default set aside.

Petitions under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of Small Causes, Kumbakonam, in I. A. Nos. 1245 and 1246 of 1922 in S. C. Suit No. 3060 of 1922.

Mr. *K. S. Jayarama Aiyar*, for the Petitioners.

Mr. *K. S. Desikan*, for the Respondents.

JUDGMENT.—A claim was preferred under O. XXI, r. 58, Civil Procedure Code and it was dismissed on account of the non-appearance of the claimant. On his application, the Subordinate Judge restored the petition. The present petitions have been filed challenging the correctness of this order.

Order XXI, r. 63, provides that the party against whom an order is made may institute a suit; but subject to the result of such suit the order shall be conclusive. It is said that

the words *the order shall be conclusive* have the effect of precluding an application of this kind being entertained. No authority bearing directly on the point has been cited and I am not prepared to accede to this contention. If the Legislature had intended to lay down such a rule, I should have expected to find very clear language employed to indicate that intention. The words in my opinion do not take away the right of the party to have the order of dismissal for default set aside. Full effect can be given to the words "the order shall be conclusive" by holding that an adjudication finally made after the setting aside of the dismissal, is conclusive subject to the result of the suit mentioned in the rule.

The Revision Petitions are accordingly dismissed with costs, half of the Vakil's fee in the first and half in the second is allowed.

V. N. V. *Revisions dismissed.*

———

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 17 OF 1923.

January 31, 1923.

Present :—Mr. Justice Heald.

MAUNG SAN YA—APPELLANT

versus

MAUNG NGWE HLA—RESPONDENT.

Civil Procedure Code (Act V of 1908) ss. 2, (17) (c), 80—Village Headman, whether public officer—Suit against Village Headman—Notice, whether necessary—Report to Deputy Commissioner, whether notice.

A Village Headman holds an office by virtue of which he is empowered to place or keep persons in confinement and has various other powers and duties which constitute him a "public officer" within the meaning of sections 2 and 80 of the Code of Civil Procedure.

Section 80 of the Civil Procedure Code is, therefore, applicable to a suit against a Village Headman to recover damages for an act purporting to have been done by him in his official capacity.

A mere report to the Deputy Commissioner does not amount to a notice within the meaning of section 80 of the Civil Procedure Code.

PIR MAKHDUM *v.* MALIK BOOLA KHAN

Appeal against the decree of the Divisional Court, Prome, in Civil Appeal No. 34 of 1922.

Mr. *Jordon*, for the Appellant.

JUDGMENT.—Appellant instituted a suit against respondent, who is a Village Headman, to recover Rs. 1,000 as damages for false imprisonment. His case was that respondent imprisoned him for 24 hours on a false charge of having failed to report the arrival of strangers at his house, a Headman having power to imprison for 24 hours for failure to make such a report.

The Divisional Court held that the provisons of section 80 of the Code of Civil Procedure applied to the case, and as the requirements of that section had not been fulfilled, ordered the plaint to be rejected.

Appellant in his appeal suggests that section 80 of the Code did not apply to the case, and that if it did apply his action in reporting the occurrence to the Sub-divisional Officer or Deputy Commissioner amounted to a fulfilment of the requirements of the section.

There can be no doubt that section 80 of the Code applied to the case, since a Village Headman holds an office by virtue of which he is empowered to place or keep persons in confinement and has various other powers and duties which constitute him a "public officer" within the meaning of sections 2 and 80 of the Code and the act in respect of which damages were claimed, purported to be done by him in his official capacity.

As for the second suggestion, how any advocate of this Court has the hardihood to argue that a mere report to the Deputy Commissioner or Sub-divisional Officer complies with the requirements of section 80 of the Code passes my comprehension.

The appeal is dismissed under the provisions of O. XLI, r. 11 read with O. XLII, r. 1.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 393 OF 1916.

March 12, 1918.

Present :—Mr. Fawcett, A. J. C.

PIR MAKHDUM AND OTHERS—PLAINTIFFS

versus

MALIK BOOLA KHAN—DEFENDANT.

*Jagir land—Grant of revenue—Proprietary rights—*Zemindar, *position of—Unerpur* Jagir*—Right to cut trees—Custom.*

The right to cut trees and sell them in the *Jagir* of Unerpur in Sindh is, as between the *Jagirdar* and the *Zemindars*, vested in the *Zemindars*, who have more proprietary interest in the soil than the *Jagirdar*.

The general rule is that trees upon land are part of the land and the right to cut and sell them is incident to the proprietorship of the land.

Ruttonjee Eduljee Shet v. *Collector of Tanna*, 10 W. R. 13 (P. C.); 11 M. I. A. 295; 2 Sar. P.C. J. 292; 20 E. R. 113, followed.

In the case of a *Jagir* the grant ordinarily is of the royal share of the revenue and not of the soil.

In Sindh the ordinary tenure is that of the *Zemindar* or landholder who exercises wholly or in part the privileges of the landholder. The extent of such privileges varies according to custom from that of an absolute proprietorship of the land, subject to the payment to Government of whatever may be the customary Government share of the produce, down to that of an ill-defined and often disputed claim to levy a lapo or rent on all cultivated land.

Though a *Zemindar* may be the proprietor of the soil, yet by custom he may not have the right to cut trees without the permission of the *Jagirdar*.

Mr. *Kimatrai Bhojraj*, for the Plaintiffs.

Mr. *Tahilram Maniram*, for the Defendant.

JUDGMENT.—This suit relates to the right to cut trees on certain Survey Nos. in the *Jagir* of Unerpur. The plaint asserts that plaintiffs Nos. 1 to 3 are hereditary *Zemindars* of these Survey Nos. and are, as such *Zemindars*, the owners of the jungle and trees in the

PIR MAKHDUM *v.* MALIK BOOLA KHAN

Survey Nos. ; that they have always been in possession of the said jungle and trees ; that they have leased their rights to cut them to the plaintiffs Nos. 4 to 7 who have actually cut some of it ; and that the defendant, who is the *Jagirdar* has been wrongfully obstructing the said rights of the plaintiffs and had moved the Revenue Authorities, who had referred the plaintiffs to the Civil Court. Plaintiffs accordingly pray for (*a*) a declaration of their rights as *Zemindars* to cut and appropriate to their own use the jungle and timber in the said lands, (*b*) for an injunction restraining the defendant from in any way interfering with or obstructing their said rights or (*c*) in the alternative for possession of the timber cut and lying in the said Survey numbers or its value Rs. 7,700 and for possession of the jungle, if the Court holds that the plaintiffs are not in possession thereof. In his written statement, the defendant denies that plaintiffs Nos. 1 to 3 are hereditary *Zemindars* in the *Jagir* and that they have any right to cut the jungle. This right, he contends, belongs to the *Jagirdar* and not to the *Zemindar*. He also disputes the value of the timber that had been cut and raises other pleas.

On this the following issues as amended have been raised.

1. Are plaintiffs Nos. 1 to 3 hereditary *Zemindars* of the Survey numbers mentioned in paragraph 1 of the plaint? Is this question *res judicata* by virtue of decisions in Suit No. 24 of 1889 and Appeal No. 2 of 1890 and Suit No. 406 of 1903 of the Sub. Civil Court, Kotri, and appeal No. 55 of 1907 of the Court of the Judicial Commissioner of Sind (H. C. J.)?

2. Did the plaintiffs as *Zemindars* not cultivate any of the numbers except numbers 34 and 35 and a small portion of *Kacha* land No. 1 ?

3. Have the plaintiffs Nos. 1 to 3 ever cut the jungle and timber on the Survey numbers mentioned in the plaint ?

4. Who has the right to cut the timber in the *Jagir*—the *Jagirdar* or the *Zemindar* ?

5. Is the suit time-barred under Article 14 of the Limitation Act (paragraph 6 of the Written Statement) ?

6. Can the suit lie as framed (paragraph 7 of the Written Statement) ?

7. What is the value of the timber lying cut in the *Jagir* ?

8. General.

On the first issue, the decision of the Subordinate Judge in Suit No. 24 of 1889 was, for the reasons given in the judgment in Suit No. 406 of 1903 (Ex. 11) not *res judicata*. As there pointed out, the fact that there was no dispute on this point in Appeal No. 2 of 1890 amounts to an admission which can be relied on by plaintiffs, but does not operate as an estoppel. The issue, as amended, however, raises the question of the effect of the subsequent decisions in Suit No. 406 of 1903 and 2nd Appeal No. 55 of 1907. It is clear that by those decisions plaintiffs Nos. 1 to 3 were held entitled to hereditary *Zemindari* rights in *Kacha* land to which the suit related. That land must have been Survey No. 1 ; the only *Kacha* land in the plaintiffs' *Zemindari*. I think, therefore, that the decision in that litigation does operate as *res judicata* at any rate in regard to the Survey No. 1. But it cannot be extended to cover the question of the plaintiffs' *Zemindari* rights in other lands. This, however, is a matter of little moment, for the evidence conclusively establishes the claim of plaintiffs Nos. 1 to 3 to be hereditary *Zemindars* of the Survey Nos. mentioned in paragraph 1 of the plaint.

* * * * It is too late in the day now for the defendant to object to the *Zemindari* rights of plaintiffs Nos. 1 to 3 which have been recognized both by the Revenue Authorities and the Civil Courts. I therefore hold on the 1st part of issue No. 1 in the affirmative.

Issue No. 2 seems to me to have been raised under a misapprehension. It is apparently based on paragraph 1 of defendant's Written Statement where he says all the numbers except Nos. 34 and 35 and a small portion of *Kacha* land, Survey No. 1, have always remained uncultivated. This issue should have really been "did the plaintiffs as *Zemindars* not cultivate any of the numbers except Nos. 34 and 35 and a small portion of *Kacha* land No. 1 ?" The question, however, in any case is really immaterial in this suit. It is quite clear that, as stated in the Commissioner's Special Circular No. 9, the Fallow rules do not apply to *Jagirs*, and the question of the cultivation of these Survey Nos. has no relevancy to the question of the right to

cut trees and jungle growing therein. However, as evidence has been given on this matter, it may be stated that the defendants' assertion that none of the *Pacca* lands have been cultivated except Nos. 34 and 35 is untrue, for admittedly Nos. 36 and 37 have been at any rate partly cultivated. Allahdad Shah also states that most probably a portion of No. 45 had been cultivated, and according to the notice, Ex. 10, there was also admitted cultivation in Nos. 13, 48, 50 and 51. I need not waste further time on this issue.

Issue No. 3 should have contained an addition as to "predecessors-in-title" after the words "plaintiffs Nos. 1 to 3," and would, I think, have been more in consonance with the pleadings, if the issue had been, "have plaintiffs Nos. 1 to 3, and their predecessors-in-title always been in possession of the jungle and the timber on the Survey Nos. mentioned in the plaint?" which was the point emphatically denied in paragraph 2 of defendant's Written Statement. For it is quite clear the defendant himself, although he makes a statement of that kind, cannot really deny that plaintiffs Nos. 1 to 3 and their predecessors-in-title have had trees cut on at any rate some of the lands in suit. * * * * There can, therefore, be no answer to the issue other than one in the affirmative.

I come now to the important issue in the case, *viz.*, "who has the right to cut the timber in the *jagir* on the *Zemindari* lands of plaintiffs Nos. 1 to 3, the *Jagirdar*, or the *Zemindar*?" On this point, the general rule as laid down by the Privy Council in *Ruttonjee* v. *Collector of Tanna* (1) is that the trees upon the land are part of the land, and the right to cut down and sell those trees is incident to the proprietorship of the land. The first question, therefore, that arises is whether the *Jagirdar* is the owner of the *jagir* lands or not. Mr. Kimatrai for the plaintiffs naturally relies strongly on the numerous rulings, the last of which is that of *Gururao Shrinivas Hebbikar* v. *Secretary of State for India* (2) that in the case of Saranjam or *Jagir* (the terms being convertible) the grant is ordinarily of the royal share of the revenue and not of the soil, and that the burden of proving that in any particular case it is a grant of the soil lies upon the party alleging it. In the case of *Mir Jam Khan* v. *Lekhraj* (3) Mr. Whitworth says that he sees no warrant for the presumption of the general resemblance of *Jagirs* in Sind to *Jagirs* in the Presidency, and has pointed out certain circumstances which he thinks distinguish the two cases. On the other hand there are passages in the History of Alienations in Sind, Volume 1, which can be cited to the contrary. Thus at page 143, Sir Bartle Frere says that the general principles of classification applied to Deccan Saranjams could well be adopted for Sind *Jagirs* and points out resemblances between the two kinds of grants. At page 225, Mr. Ellis approves of a mode of permanent settlement "on not dissimilar principles to those which guided the Hon'ble Mountstuart Elphinston in providing for the claims of the Saranjamdars of the Peshwa."

But in the present case I think it is not necessary to depend on any presumptions. The first thing to consider is the sanad which was granted to defendant's ancestor Boola Khan. It is in the same form as that which is given at page 439 of the History of Alienations, Volume 1. The question now in dispute has not come before the Courts for the first time, and a sanad of a similar kind, although the *Jagirdar* in that case was not quite on the same footing as the present *Jagirdar*, was considered by Mr. Birdwood in *Seth Trikamdas* v. *Seth Thawerdas* (4). In that case at pages 101 to 108 he gives his reasons for coming to the conclusion that, though the sanad describes the grant as one of a tract of land, the words do not necessarily imply that Government intended to grant any proprietary interest in the soil, and that the primary intention of the Government seems to have been to grant the actual revenue of the cultivated lands, and with it the requisite power for its collection by the grantee, on his own account, and all the advantages which such power involved. Therefore he held that, though the grant conferred on the *Jagirdar* some advantages coming within the higher "dominium" of the Sovereign,

(1) 10 W. R. 13 P. C.; 11 M. I. A. 295 ; 2 Sar. P. C. J. 292 ; 20 E. R. 113.
(2) 39 Ind. Cas. 65 ; 41 B. 103 at p. 121 ; 19 Bom. L. R. 117.
(3) (1859) 2 S. D. 41 at p. 52.
(4) (1882) 1 S. D. 89.

yet under the sanad he was not the owner of the soil but only a grantee of the revenue of the land. Again in the case of *Mir Jam Khan* v. *Lekhraj* (3) Mr. Knight at pages 44 and 45 considered the same question in the case of the sanad of a *Mir Jagirdar* and says, "The nature of the tenure is not described; but in the concluding paragraph, which exhorts the grantee to continued loyalty and good behaviour, the following significant passage occurs:—'It is natural to infer that those who hold certain revenue and benefits alienated to them or continued to them in alienation, by the State, should be foremost', etc., etc. This is the only explicit reference to the nature of the grant that the document contains and the implied specification of 'certain revenues and benefits' as its subject-matter is strongly corroborative of the *a priori* probability that no rights in the soil itself were added to the grantee." I agree and think it is quite clear that, if Government intended to grant the owership of the soil to the *Jagirdar*, it would not have used that particluar phrase, but have used some expression more appropriate to the real nature of the grant. Another point to be borne in mind is that under the sanad the 5 per cent. assessment is calculated not on the capital value of the land but on the net annual produce.

But it is not necessary to rest the case there, for in my opinion the correspondence regarding the settlement of the First Class *Jagirs*, of which his *Jagir* was one, shows beyond all possible doubt that what was then granted was not the ownership of the soil but the assessment of other revenue which would otherwise have come to Government. Mr. Ellis submitted the proposals for the settlement in 2 letters, (1) No. 27 of 14th October 1858 mentioned at page 224 *et seq.* of the History of Alienations in Sind, Volume 1, and (2) No. 30 of 10th November 1858 at page 231 *et seq.* The latter letter explicitly refers in paragraph 8 to this particular *Jagir*, which is described in the margin as the case of Malik Jiand Khan. In paragraph 5 of the same letter, Mr. Ellis mentions that the extent of the land which it is proposed to confirm to the First Class *Jagirdars* was four lakhs and seventy five thousand bigahs; but pointed out that the whole amount "of the *assessment* thus proposed to be alienated, is only Rs. 33,000, the fact being that much of the land included in these estates is unculturable barren desert." I think it is clear from this that under the settlement proposals the alienation was of the assessment and not of the land. The proposals of Mr. Ellis were submitted by the Bombay Government to the Government of India in their letter given at page 238 *et seq.* and in paragraph 12 of this letter the value of the alienated lands referred to in the letter No. 27 is stated to be estimated at Rs. 40,000. The Government of India sanctioned the settlement of the First Class *Jagirs* in their letter of 5th April 1859, given at page 242 *et seq.* In paragraph 5 of the letter it is stated that the *Jagirs* embraced an area of 475, 123 bigahs and involved a revenue of Rs. 39,145. This is evidently based on paragraph 5 of Mr. Ellis' letter No. 30 and paragraph 12 of the Bombay Government letter; and there is no doubt whatever that it was an alienation of the revenue of the lands that was sanctioned in this letter. Then we have the Secretary of States' despatch formally approving of the *Jagir* settlement, which is given at page 250 *et seq.* He there says "I have received and considered in Council two letters from the Government of India; forwarding the correspondence relative to the mode in which it is proposed to deal *with the alienated revenues of the Province of Sind.*" It is to be noted that he does not say "alienated lands." but "alienated revenues." In paragraph 5 he also, like the Government of India, mentions that, though the extent of the First Class *Jagirs* was an area of 475,123 bigahs, the revenue involved amounted only to Rs. 39,145. I think, therefore, that this alienation clearly was one of revenues and not of any ownership of the soil.

It is irrelevant to consider any previous grants to the *Jagirdar*, *cf. Secretary of State for India* v. *Bai Rajbai* (5). It is no doubt the case as stated in History of Sind Alienations, Volume 2, page 5 that Numria Chiefs had almost sovereign powers and may have had proprietary rights in lands. But, however that may be, it is quite clear that the continu-

(5) 30 Ind. Cas. 303; 39 B. 625 at p. 646; 19 C. W. N. 1087; 18 A. L. J. 953; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 730; 23 C. L. J. 1; 42 I. A. 229 P. C.

ance of the estates by the British Government went only to the extent above mentioned. It may also be noted that the Commissioner refused to recognise the claim of the Numria Chief Ahmed Khan, to the right to sell land at Kotri for building sites though it had been exercised for some time (pages 5 and 13). Another fact to be borne in mind is the statement at page 18 that Boola Khan made his salam rather late, and, therefore, the restoration of the *Jagir* was of course in the nature of a concession.

Next we have to consider the claim of the *zemindars*, plaintiffs No. 1 to 3, to have a proprietary interest in the soil. In this connection sections 217 and 218 of the Land Revenue Code were referred to by the pleaders in arguing the case. I do not, however, think that these sections have much bearing on the rights now under discussion. As pointed out in *Vasudeo* v. *Govind* (6), the application of section 217 depends on the question whether the person who claims under it is a holder of land, as defined by section 3 (11) of the Land Revenue Code, *i. e.*, whether he is the person in whom the right to hold the land is vested. In that particular case the fact that a certain person had been entered as registered occupant in the Survey was held not to be conclusive on the question of the right to the land. Section 217 also clearly refers mainly to the right of the occupant or holder to cultivate land included in his holding: and even if it could be said to cover the case of the right of an occupant to cut trees under section 40 of the Land Revenue Code, yet this only deals with the rights of occupants *as against Government*. It clearly could not affect the rights of third parties. I, therefore, go on to the question whether the *Zemindar* has a proprietary interest in the soil. On this point the leading case is that of *Muradali* v. *Arab Jiwan* (7). In that case the whole question was exhaustively discussed by Mr. Candy, and he concludes that, though there may have been originally nothing proprietary in the character of some *Zemindars*, yet the position was one which readily developed into a proprietary form. In the case of the *Secretary of State* v. *Kotumal* (8) Mr. Beaman (at page 341) states that he was not prepared to adopt all Mr. Candy's conclusions; but his remarks on the point are *obiter dicta*; and in *Secretary of State for India* v. *Mushtaksing* (9) *Muradali's* case (7) has been followed in regard to *zemindari* rights generally including proprietary rights in the soil. Also, so far as there is anything in the History of Sind Alienations on the subject, the opinions certainly go in favour of the plaintiffs rather than the defendant. I refer more particularly to the discussion in paragraph 82 *et seq.* at pages 50—53, and Sir Charles Napier's decision in paragraph 105 at pages 61 to 63, where at pages 52 and 62 he speaks of the *zemindar* as being more the proprietor of the land than the *Jagirdar*. Sir Bartle Frere was of the same opinion, as will be seen from paragraphs 27 to 29 of his Memorandum of "Revenue Settlement in Sind" at pages 128 and 129 of Selections from the Records of the Bombay Government, No. XVIII, New series. In paragraph 28 he says "a *Jagirdar* is merely one who holds an assignment of the Government revenue of certain lands," and in paragraph 29 he says "the landowner in Sind is called the *zemindar*." Again in the passage quoted in *Muradali's* case (7) Sir Bartle Frere states that "the ordinary tenure in Sind is that of a *zemindar* or landholder who exercises wholly or in part the privileges of the landholder," and that "the extent of such privileges varies according to custom from that of an absolute proprietorship of the land, subject to the payment to Government of whatever may be the customary Government share of the produce, down to that of an ill-defined and often disputed claim to levy a *lapo* or rent on all cultivated land." In this particular case the plaintiffs' *zemindari* rights have been recognized both by the Revenue Authorities and the Civil Courts as including a right to a share in the produce; and the opinions that have been quoted certainly support the view that plaintiffs as *Zemindars* have at any rate more proprietary interest in the soil than the *Jagirdar*. This claim is also strengthened by their being entered as registered occupants of the lands at the Survey of the *Jagir*.

(6) 36 B. 315.
(7) (1883) 1 S. D. 223 at p. 266.
(8) (1901) 2 S. D. p. 320 at p. 353.
(9) 24 Ind. Cas. 813; 7 S. L. R. 169.

PIR MAKHDUM *v.* MALIK BOOLA KHAN

The evidence that has been given in the case in regard to the *factum* of possession cannot be said to help the Court very much in determining this issue. It is clear that there has been no undisputed possession by either side; but on the contrary, at any rate from 1882 onwards, that there have been disputes between the *Pirs* on one side and the *Jagirdar* on the other, as to the right to cut and sell the trees and jungle.* * * * * *

The above evidence, in my opinion, certainly goes in favour of the plaintiffs Nos. 1 to 3, because the lessees Allahdad Shah and Seth Vishindas attorned to their predecessors-in-title, and all along the *Jagirdar's* right to cut jungle from the lands of *Pirs' zemindari* has been effectively disputed. I do not think it necessary for me to discuss in detail the other oral evidence as to acts of ownership in connection with the trees on either side. It is, I think, in accordance with probabilities in view of the dispute that both sides have asserted their claims and sold jungle produce in order to support them. But, though I gave the defendant every latitude to adduce evidence which might show possession or custom supporting his case, he has entirely failed to prove this.* * * * * The evidence as to possession does not, therefore, in my opinion, affect the main conclusion which has been given above, and I hold that the right to cut and sell timber in the *zemindari* lands of the plaintiffs is (at any rate as between the *Jagirdar* and the *zemindar*) vested in the *zemindar*.

At the same time, though the *zemindar* is proprietor of the soil, yet by custom he might not have the right to cut trees without the *Jagirdar's* permission. This, in fact, has been alleged by some of the witnesses, for instance Allahdad Shah; and in the case of *Secretary of State* v. *Koturmal* (8), already referred to, it is stated that it was admitted that the *Zemindars* used to ask permission of Government before cutting down the trees. In so far as the *dominium* of Government has been conferred on the *Jagirdar*, it might, therefore, have been the custom for the *zemindar* to get the *Jagirdar's* permission, but no such plea has been raised by the defendant, and in any case there is no sufficient evidence to justify a finding that his permission was required before the trees could be cut by the *Zemindars*. It is also I, think, conceivable that, although the *Zemindars* have a proprietary right to the trees, yet the Jagirdar might be entitled to a share of the profits of the trees, just as he has a right to a share of the produce of cultivation. Government, for instance, make a profit out of the trees on land, see Commissioner's Special Circulars, paragraph 9 at page 154 and paragraph 2, page 79. Also the *sanad* of a First Class *Jagirdar* is not confined to the produce from cultivation but covers all produce of the *Jagir*. Some judgments of the Hyderabad District Court have been put in which go against such a claim. I am inclined to think that a stronger case could be made out for the Jagirdar than is there allowed, but it is not necessary for me to discuss the point, because the defendant has not raised any such contention, and it is not for this Court to make out a case for him which he has not himself set up.

I have considered, however, whether in view of the above possibilities the declaration and injunction sought should be limited, so as not to prejudice any right which defendant might have of that kind; but I have come to the conclusion that any future claim he might make of this sort would almost certainly be held to be debarred under section 11, Explanation IV, of the Civil Procedure Code. It is also undesirable to encourage further litigation between the parties. If the defendant has any justification for setting up such a claim, he should have done so in the present suit.

As regards issue No. 5, it is clear that the decision of the Collector in Ex. 41 was not one which it was necessary for the plaintiffs to set aside, within the meaning of Article 14 of the Limitation Act. It related to a question of title and not to any matter in respect of which the Collector could pass a final order under the Land Revenue Code or otherwise. Accordingly the suit is not time-barred.

Issue No. 6 was not pressed and in any case must be answered in the affirmative.

On issue No. 7 no evidence has been adduced as to the value of the timber; but this has already been agreed to as Rs. 5,250 the amount deposited in Court by plaintiffs.

For the above reasons I pass a decree granting plaintiffs the declaration and injunction sought. The defendant must pay plaintiffs' costs, including costs of the hearing, which defendant was ordered to deposit on 1st December 1916.

N. H. *Suit decreed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

October 26, 1923.

Present :— Lord Buckmaster, Lord Sumner, Sir John Edge, Mr. Ameer Ali, and Lord Salvesen.

KUMAR SATYA NARAIN SINGH—APPELLANT

versus

RAJA SATYA NIRANJAN CHAKRAVARTI AND OTHERS—RESPONDENTS.

Ghatwali *tenures, incidents of—Hundwa estate, whether under-tenure of Kharakpur—Alienability—Custom, local, incidents and proof of.*

Where a grant is forthcoming to a man and his heirs as *Ghatwal* or is to be presumed to have been made though it may have since been lost, personal performance of the *ghatwali* services is not essential so long as the grantee is responsible for them and procures them to be rendered.

Inalienability is one of the incidents of *ghatwali* lands. But evidence may be given to show that in a certain District they are by local custom subject to special incidents in this regard.

To terminate the *Ghatwali* character of lands it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and re grant of the lands on new terms, or, at any rate, of a release of the right to appoint the *ghatwal* and call for the performance of the services.

Where a tenure is created, as distinct from a mere personal employment, the tenure-holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land; it constitutes a personal right in so far as the land held on that condition is concerned, and a personal obligation in so far as concerns the grantor, which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage, nor, being in the nature of a title to the lands, can be relegated to desuetude for the mere disadvantage of the *ghatwal*. The truth is that, where rights can once be shown to have been established and continue to be vested in living persons, obsolescence and desuetude are popular expressions rather than solid legal grounds for refusing a continuing recognition to the right as originally established.

The Hundwa estate is not an under-tenure of Kharakpur. It is a *Ghatwali* tenure and is inalienable.

Incidents *of Ghatwali* tenures discussed. A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent.

It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area.

Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant.

Case-Law discussed.

Appeal from the judgment of the Patna High Court, dated the 9th July 1918, confirming the judgment of the Sub-judge, Bhagalpore, dated the 14th Septemper 1914.

Messrs. *De. Gruther*, *K. C.* and *Dube* for the Appellant.

Messrs. *Lowndes K. C.* and *Raikes*, for the Respondents.

JUDGMENT.—This was a suit to enforce by sale certain mortgages of lands; which may be shortly called the Hundwa estates, created by the late Udit Narayan Singh of Lagma, in Pergana Hundwa, a jungleterry taluq in the Santal Perganas District. The suit was defended on behalf of Kumar Satya Narayan Singh, whom the widow of Udit Singh adopted under his testamentary authority as his son, and the ground of defence was that the Hundwa estates were and are inalienable and passed unencumbered to this defendant as successor on the death of Udit Singh, the mortgages notwithstanding. Two main questions arose: the first, whether the estates were ever inalienable at all; and the second, even if so, whether before the dates of the mortgages they had not become alienable in full. Both Courts rejected the defence: the Subordinate Judge mainly on the first point; the High Court of

Patna, while accepting the original inalienability of the estates, definitely upon the second. This defendant now appeals.

The title and tenure asserted by the appellant rest on an alleged grant and subsequent confirmation of a permanent *ghatwali* tenure made to his ancestor Subha Singh by Captain Brown and Mr. Dickinson, officers of the ruling power, in 1776 and 1794 respectively. The respondents' case is that nothing more took place than an ordinary revenue settlement of these estates, then belonging to Subha Singh, confirmed at the permanent settlement, and subject to no tenure or condition of inalienability.

In a very elaborate judgment the learned Subordinate Judge examined the whole history of Hundwa for over a century and a half, and his conclusions may be thus summarised. Hundwa was originally acquired in absolute ownership in or before the sixteenth century by a Khetauri family driven from its earlier home by Rajput pressure from the west. Subsequently, at a date unknown, it became annexed to the Kharakpur Raj and was tributary to it, but, for their own purposes and not under obligation to any overlord, the Rajas of Hundwa continued to appoint their own *ghatwals* in Hundwa and to maintain an armed force of *jagirdars*. Hundwa was at this stage of its history, when the East India Company obtained the Dewani in 1763 and, in assessing revenue on the mahal of Hundwa, included it as part of the Kharakpur estate for fiscal purposes. When the Santal Perganas came under martial law the landed proprietors *ex majori cautela* obtained *pottas* and *sanads* from the military officers in charge confirmatory of the rights which they had enjoyed in quieter times. They were, as was the whole population, liable to military service if called upon, and no doubt they accepted in their *pottas* mention of a service which arose out of the state of the country. When about the end of the century peace had been fully re-established in the district, no further service of the kind was requisite, and, in spite of the language of the pottas, none was ever required. Such was the case of Hundwa, as of many other estates. Nothing more had been done by its proprietors than the ordinary rural police work, which fell on all landed proprietors of consideration, and, although in a country where names die hard the old tradition of the existence of *ghatwals* in Hundwa, and with it the name, continued to survive, there was in fact no correspondence between the old and the recent state of things. The Raja of Hundwa himself never was a *ghatwal*, either appointed by the Mogul power at Delhi or by the East India Company. He was, when he chose, a grantor of *ghatwali* holdings of his own creation, but, subject only to his payment to the *zemindars* of Kharakpur, he was an independent proprietor and not the holder of any service tenure.

The learned Judge thus made light of the title deeds, on which the defendant relied, regarding them as mere recognitions, not very accurately expressed, of pre-existing rights, for which view he thought that he found conclusive record and authority in the reports of various officers of the company, which have been published from time to time. From similar sources, and to the like effect, was derived a whole series of other incidents and of official acts, which he considered to be of capital importance.

At the beginning of the last century the Collector of Bhagulpore prepared a list of the *ghatwals* in Kharakpur, and this list does not mention the defendant's ancestor, who was then in possession of the Hundwa estate and must have held it, according to the defendant, as a *ghatwali* tenure. A few years later Mr. J. P. Ward reported, in 1833, that Hundwa was held by the defendant's ancestor as a *ghatwali* tenure, but as a *ghatwali* tenure under the Raja of Kharakpur, though he added that this dependency had been successfully disputed. Mr. Ward records this without making any suggestion that it was really held from the Government direct, except that Captain Brown and Mr. Dickinson are spoken of as having respectively made and continued a "grant." In 1838 Government took proceedings under Reg. XI of 1819 to resume Hundwa, on the ground that it was lying unassessed to revenue, though it had been included in the permanent settlement of *Mahalat* Kharakpur in 1796, when Kadir Ali was the Kharakpur Raja. The claim failed, and the Government acquiesced in the decision, although an entry in the Settlement Register of *Mokurrari Istamrari Jumma* of Bhagulpore for 1801—1802 recorded in regard to Hundwa

that after the Dewani a *mokurrari potta* had been granted subject to *ghatwali*, and mentioned as the foundation for this record Captain Brown's *potta* for the whole *pergana* Hundwa, dated 1776, and Mr. Dickinson's *sanad* of 1794. In 1863, after the adverse decision of their Lordships' Board, reported in 6 Moore's Indian Appeals, the Government agreed with the Raja of Kharakpur of that day, in consideration of an annual payment of Rs. 10,000, to surrender its right to the advantage of having *ghatwals* regularly appointed for the performance of public policy services, whose *jaghirs* the *raja* would have to provide himself. For this purpose a list had been prepared of the *ghatwals*, to whose services the Government might lawfully lay claim, but Hundwa is not in the list. It is, of course, matter for argument whether the reason for the omission is that Hundwa, as a *ghatwali* tenure, was not included in the *zemindary* of Kharakpur, not being the subject of a public service as to which the Raja of Kharakpur had any responsibility, or whether, as the learned Judge thought, the true reason is that the Raja of Hundwa held his lands as an independent proprietor and not by any manner of *ghatwali* service at all. It certainly is of some importance that such a list should have been made for such a purpose without any mention of Hundwa and without any explanation of the reason why it was not mentioned. In subsequent years various less important proceedings took place, as to which the observation is that the official ignorance of the fact, if fact it was, that Hundwa was held direct from the Government on a *ghatwali* tenure is singular in any case and doubly so in view of the existence of Captain Brown's and Mr. Dickinson's grants, which could hardly have been entirely lost sight of. Thus in 1867 part of the lands of Hundwa were acquired for a public road and paid for without any indication that Hundwa differed from any other of the lands under Kharakpur. A similar incident, of no great importance in itself, was given in evidence when more land was required for the road in 1872. In 1875 the Commissioner for the Division called on the Collector of the district for information as to all *ghatwali* tenures, from which police services were then demandable, and again Hundwa was omitted from the replies, as though all trace had been lost of the Government right to call for *ghatwali* service. From his comments on these events the learned Judge appears to have thought that, if a Government could be conceived to be capable of losing sight of rights of great antiquity and small value, legal consequences would follow in the lapse of years, disabling the Government, to the advantage of the proprietor, from enforcing its claims. He recites, however, in his judgment, extracts from official correspondence from 1869 onwards, which show that the writers themselves were alive to the fact, that there might be still existing *ghatwali* tenures in the districts in question as to which, for various reasons, the demand of services had in fact ceased, and contrasts them with other passages, from which he infers, not without reason, that the writers had not lost sight, at any rate, of Hundwa, but were clearly, if erroneously, of opinion that it was not a Government *ghatwali*, but probably was a *shikmi* tenure under the estate of Kharakpur.

The Subordinate Judge finally attached very great importance to the entries in the Record of Rights relating to Hundwa, in which at the settlements made in 1874—79 and 1898—1907 the *taluqas* in question were entered as the *Istemrari Mokurrari* property of the Raja of Hundwa without any qualifying addition, such as might have been made and in the case of other *ghatwali* properties was made, and he regarded the Record of Rights as being "the clearest possible positive evidence of the fact that Hundwa is not a *ghatwali* at all, whether under the control of the Government or of the *Zemindar*."

Undoubtedly, this long series of administrative acts, records and reports, which either affirmatively declare Hundwa to have been a *shikmi ghatwali* of Kharakpur or negatively treat it as, at any rate, wholly free from any *ghatwali* services to the Government, is, as the learned Subordinate Judge found it, a very impressive circumstance. If the problem had been to infer the true original grant, which, in the absence of the text of it, could only be collected from the evidence of what was done and left undone in connection with Hundwa by the ruling power, it would, no doubt, have been difficult to infer, as the explanation which best fitted all the

facts, that the right originally granted consisted of a *ghatwali* tenure, held from the East India Company direct. The production of the authentic texts of the original grants completely alters the question, and it becomes in the first instance one of construction. The reports of the Government officers are not even *contemporanea expositio*, for the earliest one must have been based on hearsay accounts, already one or two generations old, and presumably not on any inspection of the original grants, since they are not mentioned.

In the High Court the learned Judges differed from the conclusion of the learned Subordinate Judge, holding that Hundwa was originally a Mogul *ghatwali*, hereditary in the family of the defendant's ancestors, which Captain Brown and Mr. Dickinson confirmed but did not originate, by the *potta* and *sanad* in question. They arrived at this conclusion on the construction of the two documents, read in the light of contemporaneous conduct and of prior history, which they conceived to have been sufficiently established or to be common knowledge. Roe, J., thus states their conclusions:—

> "The Hundwa tenure was, prior to the Dewanee, a Mogul *ghatwali*. The effect of assumption of jurisdiction over the jungle Terai *Mahlas* by the East India Company was at most to convert the allegiance of the *ghatwal* from an allegiance to the Mogul Empire to an allegiance to the East India Company. The Permanent Settlement did not destroy the Company's right to enforce nor relieve Purander Singh from liability to render that allegiance. Nothing that has since been done has altered the position. . . . The descendants of Purander Singh have never specifically refused to render services as *ghatwals*. . . . The entry of the *ghatwali* service attached to the *Mahal* in Exhibit F still stands. . . . It may be that the power to enforce these services has lapsed by limitation. That question was not argued at the bar and could not be raised in this suit. I am satisfied that the right has not been destroyed by any definite act."

As the construction, which was put upon these documents in the High Court, was strenuously contested at their Lordships' bar by the respondents, who prayed that the judgment of the Subordinate Judge on this point should be restored, the first question for decision will be whether or not the lands of Hundwa were at any material time a *ghatwali* tenure at all or not. Without proceeding upon the same line of reasoning as that adopted in the High Court, their Lordships are of opinion that they were. Formidable as the series of official acts and reports above mentioned appears to be, their Lordships think that, as soon as the texts of original instruments, such as the *potta* and *sanad* in question, dating from a time anterior to all these matters, are produced and put in evidence, the nature of the estate of Hundwa rests upon their true contruction and import and not upon the notions entertained about them in later generations.

The instrument of 1776 is one of a considerable number of similar instruments executed by Captain James Brown, of the East India Company's service, who gave a full account of the district, which was published in India Tracts, 1787. He was one of the officers employed in introducing order into the five jungle *Terai mahals*, including Birbhum and Kharakpur. Though the originals of the two documents in question are not now forthcoming and probably have been lost, they had been so often produced and accepted in numerous suits for the last eighty years and more, that the translations used in the present case have been accepted without question as truly representing authentic originals. The document of 1776 is headed "*Patta* in terms of *Kabuliyat* granted," etc. (which *Kabuliyat*, however, is also not forthcoming), and is entitled in the commencement thus: "This *Istamrari Mokurrari Patta* is granted to you . . . at a varying consolidated *jumma*, Rs. 2,701, in respect of *Pergana* Hundwa." The document itself sets out no parcels for *Pergana* Hundwa, though there is an express exception of Brahmottar and other lands, "*jagirs* granted to archers and Barkandases, perquisites of *Imlah* lands and other *zemindari* expenses." Then follow certain clauses which may not go beyond duties then ordinarily discharged by *zemindars*, though among them occur the words "you should go round your village, escorted by archers and Barkandases holding *jagir* grants, as per details given below, and protect the

villages ;" but further on occurs this most significant clause: "When called by the Hazur you should be escorted by a body of archers and Barkandases 307 in number, of whom the Sardars will be 7 and archers and Barkandases will be 30), and should appear before the Hazur, and you ought to be careful about the boundaries and limits of your village."

There follows a sort of summary or schedule headed "Annual jama of the *Istamrari Mokurrari* settlement . . . Barkandases and archers," with details showing how Rs. 2,701 are made up, which throw no light on the present question. It is clear that the whole sum payable to the revenue is payable by Raja Subhao Singh. There is, further, a contemporaneous Dowl, which, it is common ground, supplies the parcels intended to be included in this settlement. It is admitted that the lands in mortgage are lands to which the instrument of 1776 applied, but it has to be observed that, when Hundwa is mentioned in the interval, since then, it cannot always be concluded that the whole of the lands so referred to were either lands covered by this instrument or lands belonging to the family of Subhao Singh and Udit Singh. Their content seems to have changed from time to time. These facts add to the obscurity of the past history of Hundwa, but as no issue turned on these discrepancies in the Courts below, their Lordships are of opinion that they do not affect the present question one way or the other.

Importance has further been attached to the persons named in the instrument of 1776 and to the manner in which they are referred to. It is expressed to be granted to "Raja Subhao Singh, Babu Udit Singh, Babu Gopal Singh, Babu Lal Singh and others, ghatwals of Pergana Hundwa appertaining to Kharakpur." No doubt the senior of the kinsmen is called Raja out of respect. The term does not mean that Subhao Singh was an independent proprietor, while the other kinsmen were not but were *ghatwals* only; the whole class are *ghatwals* of Hundwa, though varying in social importance. In the operative part it is mandatory, though always in general terms—"You should always obey the Government," and so forth. The Dowl mentions Subhao, Gopal, Lal and Udwant, (who may really be Udit), in connection respectively with the Taluqas Khandwa, Phuljheri, Kesri and Sarji, and it names six or seven other persons whom the instrument itself does not name at all. These discrepancies, for the same reason as that above stated seem to their Lordships not to require further discussion.

In 1794 this instrument was perused and considered by Mr. Dickinson, the Government officer then in charge of this district, and he issued a perwana, which is also relied on by the appellant as part of his title and, in view of the fact that it purports to be a substantive confirmatory grant, has throughout been accepted on both sides as being one with the instrument of 1776 for purposes of construction of the title. It is in the name of the East India Company. It is addressed to the *Mutsaddis*, present and future, of Pergana Hundwa, and ultimately directs them to "treat the said Pergana as a *mokurrari* tenure," to "receive the fixed Jama of the said Pergana by regular instalments each year from Raja Purundar Singh, zemindar, and others;" and it adds, "You shall not demand anything in excess, nor shall you demand production of fresh sanads every year."

The rests of this perwana consists of recitals of details and parcels and of words of grant. It records that, since Captain Brown granted Hundwa, "old zemindari of Raja Subhao Singh," "as permanent *Mokurrari*" to him, Udit Singh, Gopal Singh, Lal Singh, Bishun Singh, Fateh Singh, and other *ghatwals* of the said Pergunna," all these persons except Gopal Singh have died, and Subhao Singh's nephew, Purandar Singh, has been in possession of the shares of his uncle and also of Udit Singh and of Gopal Singh, paying the Government Revenue; while in the case of the others, sons in each case have succeeded to fathers' shares. The perwana concludes: "Therefore, taking into consideration their right of inheritance, so much of the said Pergana as formed the share of Raja Subhao Singh *Zemindar*, and of Udwant Singh and Gopa, Singh, *ghatwals*, is granted as before to Raja Purandar Singh, *Zemindar*, and so much of it as belongs to Lal Singh has been granted to Budhan Singh, the share of Bishun Singh to Manik Singh, the share of Fateh Singh to Rohan Singh and other *ghatwals*, and to their

descendants as permanent *Mokurrari* tenure." The rent, " excepting the *Jagir* lands of Barkandases and archers, " is Rs. 2,701. The obligations of the document of 1776, as to looking after the villages and appearing before the *Huzur* with a force 307 strong, are referred to, but whether for the purpose of reciting that these obligations have hitherto been performed, or of directing the *Mutsaddis* to see that they are performed in the future, is not, as a matter of drafting, quite clear. What is clear is that there is nothing to take away from the earlier document in this respect and that, reading the two instruments together, effect must be given to these provisions as part of their terms. What, then, must that effect be ?

The respondents' contention, briefly, is that these provisions are nothing more than the expression of duties then currently required of *Zemindars*, and, whether required or not, discharged by them in their own interest and in the interests of their ryots ; that the mention of *ghatwals* does not include Subhao Singh or Purandar Singh themselves ; and that the " other " *ghatwals* mentioned do not include them in one class but are *ghatwals* subordinate to them, whose duties are of earlier origin than either of these instruments and are not based upon them. The language employed is relied upon in support of the view that Hundwa was, before 1776, an independent *Zemindari* in the family of Subhao Singh, held subject only to payment of Government revenue ; that such *ghatwals* as then existed were his *shikmi ghatwals*, and that all that Captain Brown and Mr. Dickinson did was to settle what eventually became the permanent revenue payment due in respect of the whole estate and to signify this in an ordinary settlement potta, confirmed by the later perwana. These contentions their Lordships think unsound.

It may be advisable to consider generally the law relating to *ghatwali* tenures, partly for the purpose of determining whether the construction adopted by their Lordships is in any way inconsistent with that law, and partly for the purpose of deciding the incidents which the law attaches to the form of tenure resulting from the construction. In the Santal Perganas there are for practical purposesthree classes of *ghatwali* tenures, (*a*) Government *ghatwalis*, created by the ruling power ; (*b*) Government *ghatwalis*, which since their creation and generally at the time of the Permanent Settlement have been included in a Zemindari estate and formed into a unit in its assessment; and (*c*) Zemindari *ghatwalis*, created by the *Zemindar* or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. The matter may, however, be looked at broadly. In itself "ghatwal" is a term meaning an office held by a particular person from time to time, who is bound to the performance of its duties, with a consideration to be enjoyed in turn by the incumbent of the office. Within this meaning the utmost variety of conditions may exist. There may be a mere personal contract of employment for wages, which take the form of the use of land or an actual estate in land, heritable and perpetual, upon services certain or services to be demanded. The office may be public or private, important or the reverse. The *ghatwal*, the guard of the pass, may be the bulwark of a whole country-side against invaders ; he may be merely a sentry against petty marauders ; he may be no more than a kind of gamekeeper, protecting the crops from the ravages of wild animals . *Ghatwali* duties may be divided into police duties and quasi-military duties, though both classes have lost much of their importance, and the latter in any strict form are but rarely rendered. Again, the duties of the office may be such as demand personal discharge by the *ghatwal* and personal competence for that discharge ; they may, on the other hand, be such as can be discharged vicariously, by the creation of *shikmi* tenures and by the apointment and maintenance of a subordinate force, or they may be such as in their nature only require to be provided for in bulk. It is plain that where a grant is forthcoming to a man and his heirs as *ghatwal* or is to be presumed to have been made though it may have since been lost, personal performance of the *ghatwali* services is not essential so long as the grantee is responsible for them and procures them to be rendered. *Shib Lall* v. *Moorad Khan* (1). So much for the *ghatwal*. The superior, who appoints him, may also in the varying circumstances of the organisation of Hindostan be the ruling power over the

(1) 9 W. R. 126.

country at large, the landholder responsible by custom for the maintenance of security and order within his estates, or simply the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office. It would not be easy to draw with precision the distinction in the duties performable by him between a person who might properly be called a *ghatwal*, and a person, who is only to be styled a chowkidar, though the legal incidents of the respective positions are clearly different. At the other end of the scale the term "*ghatwal*" may be the honourable badge of a great proprietor, who in his day was a veritable Warden of the Marches. In the minor senses of the word, "*ghatwal*" can hardly be said to connote a tenure at all. A jaghir, assigned for the support and remuneration of a *ghatwal*, may be no more than wages in kind, arising from the use of a plot of land customarily in the occupation of the *ghatwal* for the time being, and in such a case personal service by the employee and personal selection and appointment by the employer may well be in every case essential incidents of the relationship. Incompetence and misconduct on the part of the employee may be causes for removal of the *ghatwal* and resumption of his holding *Rajah Neelanund Singh* v. *Surwan Singh* (2); actual appointment may be the necessary initiation and seal of his office; personal selection may be the whole basis of his service and mere family claims valueless in the matter. On the other hand, there are great estates, whose proprietors are found holding them or parts of them upon the terms of providing that *ghatwali* services shall be forthcoming, either regularly or when required: services, which it is impossible for the proprietor himself to render in his own person, and which become possible to him and to those to whom he renders them simply by virtue of his possession of the lands thus granted. In such cases the *ghatwali* tenure, even if not originally granted as heritable, easily becomes so, and is commonly found on the death of an incumbent of the office to descend to some member of his family, if not necessarily to the senior member. Thus in Kharakpur *ghatwals* have a perpetual hereditary tenure at a fixed *jumma* (*Munrunjun Singh* v. *Rajah Lelanund Singh* (3). A recognised right to be appointed *ghatwal*, then takes the place of a formal appointment; a recognised right in the superior to dismiss the *ghatwal*, if he is no longer able and willing to render the service required by his tenure, and to appoint another person to the office and the tenure of the lands, then readily suffices to maintain in perpetuity the incidents of the tenure. Women of rank have thus in some instances come to be the recognised holders of *ghatwali* lands *Tekat Doorga Pershad Singh* v. *Tekat Doorga Koveree* (4). The case of Rani Surbessuri occurred in 1783 in Kharakpur, and there are said to have been many such cases in Birbhum. A further incident of such a tenure is the inalienability of the *ghatwali* lands, for it is obvious that, if the whole lands were alienated together at the choice of the *ghatwal*, he would be in a position either to make his own alienee, possibly a person non-resident or unfit, the *ghatwal* in succession to himself without the consent of his superior, or to deprive himself of the whole of the means provided to enable the services to be rendered, while himself retaining the office, whose obligations he could in consequence no longer fulfil. The office cannot, except by special custom, grant or other arrangement, either run with lands or be severed from them. If the lands are alienated piecemeal —and this must be involved in a right to alienate them at all -the same difficulty arises in another form, for here, the office being indivisible the question is to which of a number of several purchasers of the lands is it to pass? *Hurlal Singh* v. *Jorawun Singh* (5), *Rajah Lilanund Singh Bahadoor* v. *The Government of Bengal* (6), *Rajah Nilmoni Singh Deo* v. *Bakranath Singh* (7), *Raja Lilanand Singh Bahadur* v. *Thakur Munorunjun Singh* (8). It is true that, so far as the superior is concerned, the inconveniences which would arise from allowing to the *ghatwali* a free right

(2) 5 W. R. 202.

(3) 3 W. R. 84.
(4) 20 W. R. 151.
(5) 6 S. D. A. Rep. 169 at p. 170.
(6) 6 M. I. A. 101; 4 W. R. P. C. 77; Sar. P. C. J. 505; 1 Suth. P. C. J. 213; 19 E. R. 38.
(7) 9 I. A. 104; 9 C. 187; 5 Shome. L. R. 66; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.)
(8) I. A. Sup. Vol. 173 at pp. 181, 185; 13 B. L. R. 124

of alienation may be met by reserving to the superior the right of withholding consent to the alienation and thus defeating it, and this, coupled with the right to appoint a successor to the office when it falls vacant, may in practice be sometimes all the protection that the superior requires, but in two points affecting others it is insufficient. First of all, when the *ghatwal's* office has become hereditary in his family, alienation by him becomes impossible without infringing the right of his heirs; and secondly, when the office is of a public character and held for the general good, it is not enough to safeguard the superior's personal right of appointment, but it is also necessary to ensure that the lands and the services shall remain substantially connected so that actual performance and not mere subordination may be assured, and this involves that the lands must remain impartible and inalienable. These considerations peculiarly apply where the superior, by whom *ghatwals* are appointed and of whom *ghatwali* lands are held, is the ruling power itself. In Mogul times such grants were common; nor did their existence by any means come to an end with the assumption of the Dewanny. Government *ghatwali* tenures have to some extent lost, or appeared to lose, their identity by being included for revenue purposes in the assessment of *zemindary* lands held by another and an independent proprietor, but the question whether or not a given *ghatwali* tenure is a Government *ghatwali* tenure must depend on the original grant, and unless the inclusion of the tenure in the assessment of *zemindary* lands can be shown to have amounted to a release by the Government of the *ghatwali* services or to a grant to a third part of the right to receive them and of the right to appoint the *ghatwal*, the tenure must remain, as it originally was, a Government *ghatwali* tenure.

In view of these considerations, their Lordships think that there is nothing in the general law to limit the interpretation of these documents according to their natural sense, and they are unable to accept the argument, which the respondents base on the special words employed in them. Even now the words "raja," "*Zemindari*," "*potta*" and "*istemrari mokurrari*" are not so strictly used as always to bear a precise meaning or to refer invariably to cases, in which nothing is due but an annual Government jumma for an absolute estate in lands. There is even less ground for so holding when the documents under construction are nearly 150 years old. No authority is forthcoming to show that a holding on the terms of both yielding a jumma and rendering a *quasi*-military service may not be consistent with the use of these words. Whether the service tenure is made a term or not, the holder might be a "*Zemindar*" or landholder and his holding be "perpetual" and "on fixed terms," and the position of Subhao Singh depends not on his being styled "raja" and *Zemindar*, which are general expressions of consideration, but upon the conditions upon which he held the land. Their Lordships are further unable to refer the obligation to furnish a force of 307 men to any ordinary police administration of a Bengal *Zemindari*. The force is precise and it is large; it is military rather than civil; it does not vary according to the needs of the moment, but is fixed at a standing number at all times, and attendance on the Huzur with the whole force on demand is clearly beyond the scope of mere constabulary duties. Effect must be given to these very special and express words, and although no forfeiture is stated in case of non-compliance with them, it is only possible to do so by regarding them as descriptive of an obligatory service tenure, whether of the ordinary *ghatwal* type or not, and as the condition on which the *ghatwal* holds the lands.

It is, however, objected that the authority of Captain Brown and Mr. Dickinson to make a grant on combined terms of revenue rental and *quasi*-military service is an essential matter and that, as servants of the East India Company, then only exercising the Dewanny of Bengal, Orissa and Behar, these officers would naturally be concerned only with military action and with revenue revisions, and not with making new grants of old estates. It may be conceded that there is no evidence to show that the holder of this estate prior to 1776, who appears to have been Subho Singh himself, had conducted himself in any way that would have justified a forfeiture of it nor is it shown that, if it were so, Captain Brown had any authority to forfeit the lands into the Company's hands. He was acting under martial law, it is true, in a time of acute disturbance in this region, but that of itself would not make him a person to

exercise such a power. The answer to these objections appears to their Lordships to be this. It must be presumed that for anything done by Captain Brown in the purported discharge of his functions some valid authority existed until the contrary is proved, especially in a matter which was repeatedly brought before Government officials and Courts of law within but a short time of the event without once, so far as their Lordships know, having any doubt cast upon its validity. It is very probable, though not absolutely proved that before 1776 some *ghatwali* tenure of these lands had existed in this family for many years and that Captain Brown's policy was to confirm what he found already existing. The grant to Subhao Singh of land previously held by that proprietor would be explicable and regular, if Subhao Singh either surrendered this estate, already held on a *ghatwali* tenure, in consideration of a regrant from the new ruling power on satisfactory terms as to *jumma* and service, or if, being already holder on joint rent and service terms, subject to revision at the will of the old ruling power, which is known historically to have been common in Mogul times he now received and accepted from the new ruling power a grant, which fixed his rent and his service favourably and for a term, which was expected to be, and soon actually became, a term in perpetuity. It is probable enough that Subhao Singh would turn from the setting to the rising sun and make new terms if he could. It is certain, from the map in Mr. Macpherson's report and from the history of the district, that, if Hundwa was not a *ghatwali* tenure, whatever be the time of its first creation, a singular and perilous gap was left for no discoverable reason in the line of defences consisting of *ghatwali* tenures, which was devised to protect the lands, known as the Damand-i-Koh. In up-holding old titles, of which the authentic records are still forthcoming, their Lordships are justified in making all reasonable presumptions to explain them and give them validity. Certainly in making either of these assumptions they are not trespassing beyond the bounds either of actual probability or of legal precedent, and as the alternative would be either to disregard express words and to leave them no force at all, or else to assume that what has been treated as a good title for over a century is really an instance in which an official, unsuspecting and unsuspected has outstepped the limits of his unknown power, their Lordships have no hesitation in saying that the grants of Captain Brown and Mr. Dickinson created a valid permanent service tenure of the estate of Hundwa.

It must be conceded that from the time of Purandar Singh to the present day no *Zemindar* of the Hundwa estate has ever been personally appointed *ghatwali* either by Government *sanad* or otherwise. The fact is common ground. It may be observed that, if the fact be material in this case, the consequences would not be those contended for by the respondents, for if a person enteres into possession of a *ghatwali jaghir*, not having obtained the appointment which is required to make him the lawful holder of it, his possession is without title at all, and until by prescription or otherwise he acquires a right which he is capable of alienating—a question which does not arise here—the lack of a *sanad* of appointment is really the proof of the defect of his title, not of the completeness of it. In this case, however, the grant of 1794 expressly makes the tenure hereditary without any renewal of the appointment. It is a grant to the named persons and their descendants, and the direction to the Mutsaddis is, "Nor shall you demand production of fresh *sanads* every year." Nor is this inconsistent as the respondents contend, with the grant being a service grant at all. Their Lordships are unable, however, to accept the argument that in this case the lands are merely subjected to a pecuniary charge, so that the personality or the appointment of the holder would be of no importance. The tenure-holder has to raise and maintain the force, not merely to pay for it. Whatever may be the other incidents it is clear that these grants impose on him the duty of providing a specific armed force and of attending with it upon the competent Government officers whenever this service is required of him. What can this be but a service-tenure?

Again, it is objected that true heritability is inconsistent with a *ghatwali* tenure when the office is of a personal character. A *jaghir* may, it is true, be held by a *ghatwal* on the terms of personal employment and service of the strictest kind and in the most complete subordination. In such a case selection and

appointment are the natural commencement of the service, and its determination in fact involves the determination of this highly personal tenure. Where everything depends on personal qualifications and exertions a heritable tenure is out of place. On the other hand, services may be due in bulk and the obligation of the *ghatwal* may consist, not in personal guardianship of a particular post, but in providing the service of others who are competent to discharge the services in person. The obligation to embody and keep up an armed force of 300 men with an appropriate staff of officers is pre-eminently an obligation of this kind. It is personal in that the grantee under this tenure is himself bound to the provision of this force from time to time and is not merely chargeable in respect of the expense, or bound to make a contribution to the expense of forces embodied and kept on foot by others. It is personal in that the lands are granted upon this tenure in order that out of their produce the obligation in question may be discharged by the grantee. It is, however, impersonal in that the very nature of the service is rather one of purveyance than of arms. For this purpose the *ghatwal* must be a person of property, and for that reason he is the grantee of lands as *ghatwali* lands; but he need not be himself a soldier or watchman, and for that reason also the lands, though *ghatwali* lands may descend to heirs without personal selection and appointment, as is the case here. Since the tenure is a service tenure, the lands are liable to forfeiture if the obligation of service is expressly repudiated, while the rights of the ruling power are similarly sufficiently safeguarded by holding that the succession of an heir incapable of rendering even the vicarious service involved in the provision of this armed force, might be treated as being in itself a ground of forfeiture in the person of that successor, if not in the persons of the entire family for it is what might be called an anticipatory repudiation. It is enough to indicate this principle as an answer to the argument that the absence of actual appointments and the presence in the *perwana* of 1794 of an actual dispensation from periodic *sanads* are both fatal to the existence of any true *ghatwali* tenure. It is not necessary to decide whether and to what extent an appearance of personal unfitness in a particular heir would operate to disable him from succession as *ghatwal*.

In view of the considerations above set out, their Lordships have arrived at the following conclusions with regard to the construction and effect of the *potta* of 1776 and the *sanad* of 1794 :—

(1) The instruments contain words of grant and purport to make grants on behalf of land in the name of the East India Company. They must be so interpreted nor can this construction be defeated merely because there may be ground for thinking that the grantees were already holders of these lands under earlier grants or on customary service terms. The tenure is, therefore, a Government tenure. A similar construction was adopted by the High Court of Calcutta in *Raja Lilanand Singh Bahadur* v. *Thakur Munorunjan Singh* (8).

(2) As the grants are expressed to be *istemrari mokurrari* grants, and as in fact the lands have for generations descended in the family of the defendant from ancestor to heir, they are a perpetual and hereditary tenure. A similar conclusion was arrived at in *Munorunjun Singh* v. *Rajah Lelanund Singh* (3) when a *sanad* of 1777, granted by Captain Brown in similar terms, was under construction.

(3) The express obligation imposed on the grantees, as an integral part of the grant, to support a specified number of barkandases, and with them to attend the *Huzur* when required, shows that the tenure is a service tenure and is *ghatwali* in its nature.

(4) A tenure so granted is inalienable and indivisible (*Hurlal Singh* v. *Jorawun Singh* (5) and cannot be sold in execution of a decree against the person of the incumbent of the office of *ghatwal* for the time being (see *Nilmoni Singh Deo* v. *Bakranath Singh* (7), and *Joykishen Mookerjee* v. *The Collector of East Burdwan* (9).

(5) Neither by the terms of the grant nor by the general law applying to such *ghat-*

(9) 10 M. I. A. 16 ; 1. W. R P. C. 26 ; 1 Suth. P. C. J. 512 ; 2 Sar. P. C. J. 54 ; 19 E. R. 879 (P. C.).

wali tenures is an actual appointment of the next heir to be *ghatwali* in the room of his predecessor requisite, nor is actual performance of the stipulated *ghatwali* services from time to time necessary. Readiness and willingness to perform them when required may be inferred where there is no proof of any refusal to perform and where performance within a reasonable time, if required, is not shown to have become impossible.

At the last stage of this argument the respondents' Counsel raised the further contention that Hundwa is in any case locally in Kharakpur, and that, by a well-established local custom, now always recognised, Kharakpur *ghatwali* lands are alienable. They disclaimed any contention that a family custom existed, and put the point solely as one of local custom. Their Lordships might well have refused to entertain this contention, for it involves important considerations of fact as well as of law and it had not been determined or even discussed in the Courts in India. It was, however, said to rest on a series of decisions of long standing, and their Lordships, loth to appear to cast any doubt upon such authorities by refusing to take account of them on the ground of a rule of procedure, have determined, under the circumstances, to deal shortly with this contention.

The proposition that Hundwa is in Kharakpur must, in consequence of the litigation of 1812 to 1819, to be mentioned hereafter, be now regarded as a purely topographical statement. What the area or the site known as Kharakpur may be is a matter for evidence, and no evidence was given about it. It is further a matter as to which the Courts in Bengal have original means of knowledge which their Lordships do not possess, and for this reason the fact that the contention was never submitted to those Courts becomes doubly significant. If it is well founded, the whole of the discussions and proofs, which led to two long hearings and two elaborate judgments, would have been obviated *in limine*, for the whole point of the defence disappeared, if Hundwa was by binding custom and by decision recognising that custom an alienable tenure. If such a crucial point was never made, it was probably because the local knowledge of the Courts themselves would have compelled them to overrule the point as soon as stated.

A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent and so forth (*Rajkishen Singh* v. *Ram joy Surma Mozoomdar* (10). It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area (*Marquis of Anglesey* v. *Lord Hatherton* (11), *Maharanee Heeranath Koer* v. *Baboo Buru Narayan Singh* (12). Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant and such rules in cases relating to Birbhum or Pachete are not in point.

It has been long held that certain *ghatwali* tenures in this district are alienable with the consent of the *Zemindar*. This was decided after an elaborate examination of the evidence in *Kali Pershad* v. *Anand Roy* (13) by their Lordships' Board. This authority has repeatedly been followed and applied in India, and, so far as the reports show, without proof of the custom being required over again. What, however, does this amount to? Their Lordships' Board pointed out that *ghatwali* tenures are generally inalienable but that evidence may be given to show that in a certain district they are by local custom subject to special incidents in this regard. Such evidence was forthcoming and was to the effect that many transfers had taken place in Kharakpur without being questioned or questionable, provided that the *Zemindar* of Kharakpur expressly assented to and accepted the transferee as his *ghatwal* or indicated an implied acceptance by an absence of objection after twelve years' notice of the transfer. This evidence satisfied both the High Court and the Judicial Committee. It is plain that the custom depended on the proof, and as the

(10) 1 C. 186 ; 19 W. R. 8 ; 3 Sar. P. C. J. 174 ; 8 M. L. J. 151 ; 2 Suth P. C. J. 744 ; 1 Ind. Dec. (N.S.) 119 (P. C.)

(11) (1842) 10 M. and W. 218 ; 12 L. J. Ex 57 ; 6 Jur. 305 ; 152 E. R. 448; 62 R. R. 575.

(12) 9 B. L. R. 374 ; 17 W. R. 316.

(13) 15 I. A. 18 ; 15 C. 471 ; 12 Ind. Jur. 172 ; 5 Sar. P. C. J. 121 ; 7 Ind. Dec. (N.S.) 858 (P. C.).

tenure in question was one in the *Zemindari* of Kharakpur and under its *Zemindar*, it could have no reference to *ghatwali* tenures not under him or forming part of his *Zemindari*. The personal intervention or omission to intervene on the part of the *Zemindar* could not be material unless the *ghatwali* tenure, to which it applies, was one as to which the *Zemindar* had the right to appoint to the office of ghatwal, and this view is confirmed by the further observations of Lord Fitzgerald, that the conclusion arrived at is encouraged by the fact that the purposes for which the Kharakpur *ghatwals* were originally appointed no longer existed. In sundry cases, both previously and subsequently decided in India in conformity with this decision, the *ghatwali* lands appear always to have been held under the *Zemindar* of Kharakpur (*e.g.*) *Rajah Leelahnund Singh* v. *Doorgabutty*) (14). The explanation of the customary rule, that the *Zemindar's* consent is necessary, is said in, *Kartick Chander Dey* v. *Bhugut Churrut Chunder Singh* (15), which was followed in *Doorgabutty's* case, to be that the *Zemindar* is responsible to Government if the *ghatwal's* services which are public services, are not performed, and so ought in self-defence to have a veto on any transfer. If this is so, it is an additional reason for saying that, until the Government releases or abolishes the services in some effective and lawful manner, the tenure-holder remains bound and holds the lands without power of alienation (see too *Nilmoni Singh Deo* v. *Lakranath Singh* (7).

With regard to Hundwa this is not so. All that can be said of *Ram Chandra Marwari* v. *Rani Keshabati Kumari* (16) is that, if the Udit Narayan Singh then concerned was the appellant's father, as may be the case, no one seems to have thought it advisable on the occasion to rely on the inalienability of his tenure. Nothing, therefore, comes of it. Their Lordships see no ground for thinking that the custom of Kharakpur, relied on by the respondents' Counsel, has any application to *ghatwali* tenures, which, like Hundwa, are independent of the Kharakpur *Zemindari*, even though they may be not far off Kharakpur.

(14) W. R. 1864, 249.
(15) (1863) S. D. A. 900.
(16) 2 Ind. Cas 935 ; 36 C. 840 ; 36 I. A 85 ; 10 C. L. J. 1 ; 6 A. L. J. 617 ; 6 M. L. T. 1 ; 11 Bom. L. R. 769 ; 13 C. W. N. 1102 ; 19 M. L. J. 419. (P. C.).

The ultimate conclusion of the High Court was that "the property mortgaged by the late Udit Narain Singh was a *ghatwali* tenure not held by him as a *ghatwal*," and it was on this ground that they decided the suit in favour of the mortgagee. The proposition requires somewhat close examination.

It is true Udit Singh neither himself rendered the services prescribed in Captain Brown's potta, nor appeared to be conscious of any legal restrictions upon his power of alienating the lands of Hundwa. In the first respect he differs little, if at all, from the position of his predecessors after the time of Purandar Singh ; in the latter he certainly stands alone, for he was the spendthrift of the family and purported to dissipate the estate of Hundwa by all forms of alienation, nor in his lifetime did anyone venture to say him nay. As, however, there is no question here of any actual assent being given either by his family or by the Government, and as the whole matter in dispute is whether his alienations were valid, the fact that in other transactions besides the present he purported to alienate and appeared to believe in his own power to do so proves nothing. What is singular is that from the time of Purandar Singh the officials of the ruling Power never required that the services in question should be rendered, and for long periods and in important connections even seem to have been unaware that any obligation of the kind existed.

The first matter to be cleared up is the relation of Hundwa to Kharakpur. As early as 1781 a perwana, signed by Mr. Hastings as Governor-General in Council, records that the duties of Zemindar of the Pergana Kharakpur have been conferred on Raja Kadir Ali, and includes, at a revenue payment of Rs. 2,800, Hundwa among the esates, to which the perwana applies. A Potta and Kabuliyat of 1796 are next forthcoming, which purport to include in Raja Kadir Ali's *Zemindari* of Kharakpur the Pergana Hundwa. To these documents, however, and to the transactions, whatever they were, out of which they arose, no ancestor of the present appellant was a party, and although the East India Company itself is a party, still, as they relate only to the jumma payable and to other ordinary obligations of Zemindars, and as the jumma for Hundwa was in fact paid through the

Raja of Kharakpur, these documents do not greatly advance matters. What is of more significance is that in 1802 the result of the Permanent Settlement for Hundwa was registered as involving the annual payment of a *jumma* for Rs. 2,701 under Captain Brown's *potta*; that Purander Singh is then recorded as the present possessor, personal and not hereditary; and that in the "Remarks" column it is stated that the *potta* was subject to *ghatwali*, while the *perwana* of 1794 is recorded as a *sanad*, under which the persons named, other than Purandar Singh, were in possession as heirs of their father.

Between 1809 and 1819 protracted litigation was carried on between Kadir Ali, then *Zemindar* of the Kharakpur *Mahals*, and the family of Purandar Singh, recently deceased, with reference to the estate of Hundwa. Kadir Ali asserted a right to nominate the *ghatwal*, who was to succeed to Purandar Singh, a claim which eventually Jhabban Singh disputed asserting that he was *mokuraridar* of Pergana Hundwa with heritable rights. Though he was also described as *malik Zemindari*, this is not enough in such a context to show that he alleged that his estate was not a *ghatwali* tenure. In order to inform itself as to the ownership of the disputed *Taluqs*, the Court referred it to the Collector of the District to report, who the *Zemindar* of the lands in litigation really was, although this would appear to have been one of the very questions which arose for the determination of the Court itself. This report, which is now not forthcoming, was in favour of the Raja of Kharakpur. Nevertheless, when the case was heard in the Civil Court of Bhagulpore in 1812 and on appeal in the Court at Murshidabad in 1819, both judgments were in favour of Jhabban Singh, the ancestor of the present appellant. Accordingly, no further appeal being taken, the claim of the Raja of Kharakpur to be entitled to appoint the *ghatwali* of Hundwa, whenever a vacancy occurred, was finally dismissed. It is not necessary to consider how far, it at all, these judgments, which as between the holders of the two estates are *res judicata*, would technically preclude the present respondents, as mortgagees from one of the holders of Hundwa, from reopening this question as against their mortgagor's heir, for in fact no attempt has been made to do so and in no event after the lapse of a century would their Lordships have been disposed to entertain or to make criticisms upon judgments, arrived at upon ampler documentary materials than those now available, which have for long laid at rest a claim once so keenly advocated.

These decisions, which separate Kharakpur from Hundwa so far as this appeal is concerned, have a profound effect on the position of Hundwa. Whatever else Hundwa may be now, it is not nor ever was for present purposes a *ghatwali* estate under Kharakpur and its rajas. Comment is however justly made that, with the documents of 1776 and 1794 before them, neither Court pointed out nor apparently was invited to hold that, as they granted Hundwa to Subhao Singh and to Purandar Singh on the terms of services to be rendered to the Government, the holders of Hundwa were therefore Government *ghatwalis* and could not be the *ghatwalis* of the Raja of Kharakpur. Futher-more, as has been already stated, the reports relating to the Santal Perganas generally and to Kharakpur and Hundwa in particular, nowhere mention Hundwa as an original and direct Government *ghatwali*. Thus Mr. Sutherland in 1819 records the history of the estate of Hundwa, but nowhere suggests that the holders owed military service to the Ruling Power. In 1833 a Special Commissioner, Mr. Ward, deals with the relations of the Rajas of Kharakpur and Hundwa from Mogul times downwards and refers in some detail to the *potta* of 1776, to the *perwana* of 1794 and to the litigation above discussed, and records his conclusion thus:—

"24. Under the foregoing history of Hundwa the tenure under which the *jagir* is held can only be considered *ghatwali* subject to the payment of a certain fixed rent and other conditions of service, but claimed by Jhuban Singh as a *Zemindari* for which no revenue has been paid since 1823."

All that can be said of these and similar passages from other and later reports is this. The writers were dealing with large tracts of country and were chiefly concerned with questions strictly affecting the Government revenue. *Ghatwali* services, as services to be actually called for and performed, were not in question. Their sources of information were largely hearsay. Dr. Buchanan, for example, records that he was only told the family

account of Hundwa matters and did not hear the other side. It is doubtful if they had the opportunity of seeing the actual documents of 1776 and 1794, but if they had, the interest of the Government in the service of the barkandases of Hundwa was so inconsiderable that it is small wonder if the somewhat complex language of those instruments did not deeply engage their attention. High as the reputation of these reports for care and research deservedly stands, there can be nothing surprising if an error is made in the account given of particular rights connected with a single estate, where the value of those rights to the Government must be trivial and on the whole problematical, and where their relevancy, as this case shows, chiefly regards the private rights of heirs as against the incumbent for the time being. If, in the result, their conclusions were erroneous, they can, fortunately, be corrected by attaching the real weight to the *potta* and the *sanad* and upholding the rights as disclosed therein, without further considering the mistaken accounts of them given by some officials and the pardonable ignorance of them displayed by others. Nor must it be forgotten that the entry in the register of permanent *mokurrari* right in 1802 is a precise statement to the contrary and rests on a precise reference to the material documents of title, and that the entries in the Record of Rights of 1874-79 and 1898-1907 are not inconsistent, to say the least of it, with the same state of things ; (*see* observations in the cases reported *Munrunjun Singh* v. *Rajah Lelanund Singh* (3) and *Lilanund Singh Bahadur* v. *Thakur Munoranjan Singh* (5).

The High Court appears to have attached little or no importance to the express direction in the *sanad* of 1794 that "production of fresh *sanads* every year is not to be demanded," and dwells on the fact that since the death of Puranaar Singh no proprietor of Hundwa had applied for a renewal of the *Istemrari Mokurrari ghatwali* grant or had been required to do so. For a hundred years no *muchilika* or *kabuliyat*, undertaking military service, had been given. No *ghatwal* of Hundwa had been appointed by Government. Udit Narayan Singh "was merely *de facto* holder, without licence from the ruling Power, of the lands attached to the post of *ghatwal*," and it was as such that he mortgaged these lands to the plaintiffs. His son, who succeeds by inheritance, cannot, it is concluded, impugn his title or ask that it should be investigated, for, the ruling Power not being represented, its permanent title cannot be gone into.

It appears to their Lordships that, as this decision does not purport to rest on prescription or adverse possession of the lands by Udit Narayan or his predecessors against the Government, it must be rested on legal assumption that, if during a sufficiently long period the incumbent of the office of *ghatwal* does not happen to be called on to render the services which he is bound to render when required, the quality and incidents of his tenure of *ghatwali* lands change, at any rate so long as this abeyance of the services lasts, and that he becomes, to the prejudice of his heirs —who are, be it said, heirs of *ghatwali* lands with the advantages as well as the disadvantages attaching thereto—a full *mokurrari istemrari* proprietor for the time being. This seems to be involved in the argument, on which Roe, J., bases his conclusion, for he propounds this dilemma. If the defendant's right to succeed was a right to succeed to Udit Singh's interest as *ghatwal*, there was nothing to succeed to, for Udit Singh, if *ghatwal* at all, held nothing heritable in virtue of that office. If, on the other hand, the right to succeed was a right to succeed to the right and interest, which Udit Singh then had even *pro tempore*, that right was one which Udit Singh could and did encumber in favour of the plaintiffs, and since the defendant is not in a position to discharge the encumbrance, he must suffer the legal consequences and submit to have these lands alienated from him. In truth the defendant is not asking, as the learned Judge seems to have thought, to have the Government's title investigated. He is relying on his own interest in the tenure of the Hundwa estate, which on the true construction of the original grants bears the character of a *ghatwali* tenure with its legal incidents. He does not set up a *jus tertii* ; his case is not that there is an interest outstanding in a stranger to the suit—the Government, to wit—in which he seeks some defence against a decree for sale against himself, but he alleges a title in himself to succeed his father in the enjoyment of lands which, as against himself, his father had held without any

right to encumber them in favour of strangers. This and this alone, is the relevancy in the present suit of the circumstance that the lands are held on *ghatwali* tenure, for the *ghatwali* services themselves have long been so insignificant that little remains in the tenure, except potentially, beyond the quality of being heritable, impartible and inalienable.

To terminate the *ghatwali* character of the lands, it seems to their Lordships that it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and re-grant of the lands on new terms, or, at any rate, of a release of the right to appoint the *ghatwal* and call for the performance of the services. Nothing of this sort, at any rate, is shown. The burden of proof is on the mortgagees, and the Government not having been made a party, such proof may even have been for the time being inadmissible. Even the crops of barkandases was still in existence within living memory, whether in embryo or in dissolution does not matter. Not to mention the dubious exploits of this force in the Santal rebellion of 1855, when with their bows and arrows they were said to have slain 300 rebels at the cost of three casualties, there was called as a witness a veteran member of the force, who still held a *jagir* as such, and down to twenty years before had continued to receive from the raja presents of money on the occasion of weddings in his family. The Trial Judge does not deal with this evidence at all, though he comments naturally and adversely on the supposed battle, by which the force of barkandases quelled the revolt of the Santals.

As is well known, the estate of Kharakpur was the subject of long and complicated litigation arising out of claims to re-assess or to resume *ghatwali* lands where, as was no doubt generally the case, *ghatwali* services had ceased to be of practical importance. Long before 1765 *ghatwali* tenures under the *Zemindar* of Kharakpur had been created by the various holders of these lands for their own purposes, and as late as 1770-1785 Mr. Cleveland, who managed the estate during the minority of Kadir Ali, followed the same policy. The lands thus made the subject of *ghatwal* tenure were included in the Permanent Settlement of the whole Kharakpur estate in 1796, and the Government of Bengal sought long afterwards to re-assess these lands to a further *jumma* beyond that fixed in 1796 on the ground that local *zemindars* had ceased to be called on to render police services, since the Government had itself undertaken the necessary *Thanadari* organisation (Regulations 49 and 50 of 1792). The claim was finally dismissed by their Lordships' Board in 1855 (*Raja Lelanund Singh* v. *The Government of Bengal* (6). Now there is a clear distinction between the case where the Government thinks fit itself to perform duties theretofore performed by *ghatwals* and the case where the *ghatwali* service is formally abolished or discharged (per Sir Barnes Peacock, Suppl. vol. Ind. App., p. 185; and see the analogous case as to a *palayam* in Madras *Malayandi Appasami Naickar* v. *Midnapore Zemindari Co.* (17). In the Kharakpur district it does not appear that there has been any formal termination by law of *ghtawali* public services apart from the above-mentioned composition *inter partes* with the *Zemindar* of Kharakpur.

It is true that in Appendix XVII to Mr. Macpherson's Report on the Santal Perganas, which contains extracts from Dr. Buchanan's MSS., there occurs this passage: "By far the greater part of Hundwa is still in the possession of a Kshetauri family, although it pays to the Raja of Kharakpur Rs. 2,372 a year; but it has been entirely exempted from military service." What foundation there may have been for this statement remains unknown. It may be a lax allusion to the Regulations of 1792. At any rate, Roe, J., records, "To this day no outpost has been set up in *Pergana* Hundwa, which is still a non-police tract." After 1855 there followed numerous suits, in which Raja Lelanund endeavoured to resume his *shikmi ghatwali* lands, alleging that he was entitled to disclaim the services and thereupon to oust the *ghatwal*, and also that by his agreement of compromise with the Government for an annual money payment in lieu of further services, the ground for the

(17) 60 Ind. Cas. 953; 48 I. A. 100; 26 C. W. N. 106; 20 A. L. J. 393; 40 M. L. J. 537; (1921) M. W. N. 352; 34 C. L. J. 6; 44 M. 575; 14 L. W. 49; 29 M. L. T. 388; 3 U. P. L. R. (P. C.) 78; (1922) A. I. R. (P. C.) 154.

appointment of *ghatwals* and for the tenure of *ghatwali* lands had disappeared. These attempts failed, and it was held that he could not renounce the services without the consent of Government or some legislative or administrative extinction of them (*Kooldeep Narain Singh* v. *The Government of India* (18) and see *Raja Lilanand Singh Bahadur* v. *Thakur Manoranjan Singh* (8), *Munrunjun's* case, (3), *Raja Lelanund Singh* v. *Thakur Munorunjan Singh* (8). As long as they were ready and willing to render services if required, the *Zemindar* could not put an end to the *ghatwals'* services, whether required or not, even by compromising with the Government and substituting a rent for the former services, for, as against the tenure-holders, this was *res inter alios acta*, see *Raja Lilanand Singh Bahadur* v. *Thakur Manoranjan Singh* (8.)

Although none of these decisions governs the present case, they involve the principle that where a tenure is created, as distinct from a mere personal employment, the tenure-holder has such an interest in the rendering of the services as entitles him to such benefits of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land; it constitutes a personal right in so far as the land held on that condition is concerned, and a personal obligation in so far as concerns the grantor, which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage. nor, being in the nature of a title to the lands, can be relegated to desuetude for the mere disadvantage of the *ghatwal*. The truth is that, where rights can once be shown to have been established and continue to be vested in living persons, obsolescence and desuetude are popular expressions rather than solid legal grounds for refusing a continuing recognition to the right as originally established.

One circumstance remains to be mentioned, if only for the purpose of pointing out that no definite conclusion can be drawn from it one way or the other. For a time the revenue assessment on the Hundwa lands was paid to the Government direct, but now and for a century or so past—in fact ever since the time of the Permanent Settlement—it has been paid to the *Zemindar* of Kharakpur by the Hundwa proprietors, he being assessed to the revenue on the lands both of his own *zemindari* and on those of Hundwa too, and paying the revenue contribution direct in respect of both. As it is now settled that Hundwa is not an under-tenure to Kharakpur, one obvious inference from these facts is finally negatived. The other, that there is a direct liability of Hundwa for revenue payments, which are for convenience collected indirectly, is, after all, immaterial when once it has been decided that the *ghatwali* tenure of Hundwa, as it now exists, rests on grants made directly by the East India Company. The explanation suggested for the bare fact is that in disturbed times the transport of treasure through the jungles from Lagwa in Hundwa to Bhagulpore was precarious, but as it is not shown to have been any safer from Kharakpur to Bhagulpore, and as in any case Hundwa's money must have run the risks of transport to Kharakpur, the explanation is unconvincing. Fortunately, it is also academic.

In the result the appeal succeeds. The judgments of the High Court and of the Subordinate Judge in favour of the plaintiff-mortgagees ought to be set aside and their action should be dismissed with costs both here and in both Courts below. There is a cross-appeal by them consolidated with the defendant's main appeal, which refers to the interest to be allowed to them upon a decree, if any, in their favour and this cross-appeal fails and should be dismissed with costs.

There Lordships will humbly advise His Majesty to the above effect.

Z. K. *Appeal allowed.*

Solicitors for the Appellant—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent—Messrs. *Watkins* and *Hunter*.

(18) 14 M. I. A. 247 ; 11 B. L. R. 71 ; 2 Sar. P. C. J. 734 ; 2 Suth. P. C. J. 491 ; 20 E. R. 779.

VAZIR *v.* DWARKOMAL

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 9 OF 1919.

April 6, 1922.

Present :—Mr. Kincaid, J. C., Mr. Raymond, A. J. C. and Mr. Kennedy, A. J. C.

VAZIR *alias* DINO AND ANOTHER—APPELLANTS

versus

DWARKOMAL AND OTHERS—RESPONDENTS.

Muhammadan Law—Co-heirs—Alienation by co-heir—Suit for partition—Partial partition.

A co-sharer under the Muhammadan Law suing to recover his share in a portion of his ancestral property wrongfully alienated by another co-sharer to a stranger, who is in possession, is not required to seek for partition of the whole estate and can maintain a suit for partition of the portion alienated.

Case-law reviewed.

In the case of Muhammadans the co-heirs are only tenants-in-common, and there is no joint family in the Hindu Law sense of the term.

Appeal from the decree of the District Judge, Sukkur.

Mr. *Srikishindas Harbhugwandas Lulla*, for the Appellants.

Mr. *Tahilram Maniram*, for the Respondents.

JUDGMENT.

Kincaid, J. C.—The facts of this case are simple but involve a most important point of law.

A certain Pinjal died leaving two minor sons and a widow *Musammat* Izat and the following properties—(*a*) Survey No. 239 which included a 6 annas share in a well, (*b*) Survey No. 156, (*c*) a family dwelling house, (*d*) a cattle pen. In 1914 after Pinjal's death the widow sold (*a*) Survey No. 239 to two Hindus Narsiomal and Kundanmal. From 1914 the purchasers of (*a*) enjoyed possession of the land and appropriated the produce. In 1917 the minor sons and their friends dispossessed the Hindu purchasers and filed a suit for partition of the Survey No. 239 and the share in the well. They admitted that *Musammat* Izat had the right to sell her 2 annas share in this property, but claimed that she had no right to sell their 14 annas share. They, therefore, prayed that the Court would partition off *Musammat* Izat's two annas share and give them the remainder. Subsequently the Hindus obtained a decision in the Mamlatdar's Court which awarded them possession.

Both the lower Courts held a Mussalman mother had no right to alienate her minor sons' estate. At the same time they held that the minor sons could not sue for partial partition for their estate and that they should have demanded its entire partition. The minor plaintiffs lodged a second appeal to a Bench of this Court formed of Messrs. Raymond and Madgavkar, A. J. Cs. Both these learned Judges doubted the correctness of the decision of this Court in *Dhanoomal* v. *Kaim Khatu* (1) in view of the decision of *Hanmandas Ramdayal* v. *Valabhdas Shankerdas* (2). They referred the following question for the decision of a Full Bench, *viz.* " Whether a co-sharer under the Mahomedan Law suing to recover his share in a portion of his ancestral estate wrongfully alienated by another co-sharer to a stranger, who is in possession, is required to seek for partition of the whole estate and, if not whether a suit for partition of the portion alienated is competent ? "

The difficulty in deciding a question of this kind lies chiefly in the frequency with which English Judges have applied to suits between Mussalmans, the rules that appertain to Hindu co-parcenaries. Crouch, A. J. C. in *Dhanoomal Chandiram* v. *Kaim Khatu* (1) observed "We see no reason for holding that the position of a Mahomedan plaintiff who claims partial partition is any stronger than that of a Hindu plaintiff." In *Abdul Kadir* v. *Bapubhai* (3) Parsons, J. wrote as follows : "The District Judge refused (partition) because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Mussalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Mussalmans is hardly distinguishable from a partition suit by Hindus." With every deference to the eminent Judges who expressed the above views I find myself in disagreement with them. There

(1) 1 S. L R. 193.
(2) 46 Ind. Cas. 133 ; 43 B. 17 ; 20 Bom. L. R. 472.
(3) 23 B. 188 ; 12 Ind. Dec. (N.S.) 124.

is no real resemblance between the laws which control the ownership of property by Mussalmans and those which govern a Hindu co-parcenary. The Hindu joint family system is unknown to Islam; nor is this to be wondered at seeing the vast distance of sea that divides the peninsulas of Arabia and India. In this view I am fortified by the remarks of Sir Norman Macleod, C. J. in *Mangaldas* v. *Abdul Razak* (4). "The notions of joint family, joint family property, joint family business are utterly unknown to Mahomedan Law" and by the observations of Beaman, J. in *Jan Mahomed* v. *Datu Zaffar* (5) "Mahomedans under their own law are never joint in estate whether they live together or whether they do not." But if there is no resemblance between the law of the Hindu joint family and the Mussalman Law then to try and decide a question of Mussalman Law in the light of decisions in suits between Hindu coparceners is not only to waste time but to risk error. I shall therefore confine my examination to those judgments which are not concerned with joint Hindu families. At the outset it must be remembered that when a Mussalman dies, his heirs at once become vested with the shares to which the Islamic Law entitles them. They have not to wait until the property is divided by metes and bounds. If it is not divided they remain tenants-in-common until the actual division takes place. We have thus to enquire whether tenants-in-common are obliged when anxious to distribute a particular property to sue for a partition of all the other properties in which they are interested. Surely the answer must be in the negative; and I am fortified in this opinion by several decisions. In the case of *Ram Mohan Lal* v. *Mulchand* (6) one Ram Mohan Lal bought a five-sixth share in two shops, that belonged to a joint Hindu family. Afterwards he sued for the partition of one of the shops. It was objected that he should have sued for the partition of both shops. The lower Courts upheld the objection and dismissed the suit. But Banerji and Richards, JJ. observed. "We think that in so holding, the Courts below were in error. The case was not that of a joint Hindu family seeking partition of a portion of the joint family property. The plaintiff is admittedly not a member of a joint family. Therefore, the property sought to be partitioned is property held by certain persons, who can only be deemed to be joint owners of it. There is nothing to preclude one of the joint owners of several items of property from seeking a partition of one of such items of property. It may be that the joint owners may not deem it desirable to partition one portion of the property, but one of the owners may be desirous of partitioning another portion. There is no reason why such a partition shall not be allowed." In the case of *Srimati Padmamani Dasi* v. *Srimati Jagadamba Dasi* (7), one of two daughters and co-heiresses sued the other for partition. Daughters under Hindu Law do not become co-parceners but inherit separate shares in the inheritance even if undivided. One of the two daughters in the Bengal case brought a suit for partition of part of the undistributed property only. The usual objection was taken that she should have sued for partition of the whole estate. Phear, J. overruled it, with the words "I find nothing to make me think that the plaintiff must necessarily bring a suit, if he (or she) brings a suit at all, for partition of the joint property. In the case of *Karumbah Katapaukum Vengalasheri Moideen Kutti* v. *Thuniyilandiyal Mariamumma* (8) the whole law on the subject was clearly and admirably stated by Spencer and Ramesam, JJ. The plaintiff there had acquired their share in a certain landed property from two Mussalman brothers. He sued for partition so that he might obtain what he had bought. The other members of the family contended that the suit was not maintainable, being one for partial partition. Their Lordships overruled the objections, remarking "Even as a rule of Hindu Law it (*viz.* the defendant's contention), is a rigid rule only as far as joint family property is concerned being a substantial rule of Hindu Law—See Bakewell, J. in *Nanjaya Mudali* v. *Shanmuga Mudali* (9). If the property is not joint family property

(4) 23 Ind. Cas. 565; 16 Bom. L. R. 224.
(5) 22 Ind. Cas. 195; 38 B. 449; 15 Bom. L. R. 1044.
(6) 28 A. 89; 2 A. L. J. 700; A. W. N. (1905) 169.
(7) 6 B. L. R. 134.
(8) 70 Ind. Cas. 113; 41 M.L. J. 457; 14 L. W. 502.
(9) 22 Ind. Cas. 555; 38 M. 684; 26 M. L. J. 576; 15 M. L. T. 186; (1914) M. W. N. 356.

and the parties are not co-parceners but only co-owners or tenants in-common the rule is not so rigid and partial partition may be allowed if there is not much inconvenience to the other sharers and if the plaintiff will be left without a remedy.

"In the case of Muhammadans the co-heirs are only tenants-in-common, and there is no joint family in the Hindu Law sense of the term. The rule can at best apply to the Muhammadans only in the manner it applies to tenants-in-common among Hindus and we understand the case in *Mahomed Fuzlur Rahman Chowdhury* v. *Mahomed Fayzur Rahman Chowdhury* (10), in which the parties were Muhammadans (distinguished, though not disapproved in *Hem Chandra Chowdhury* v. *Hemanta Kumari Debi* (11), only to lay down that it is not desirable to allow a suit for partial partition among co-heirs, if it causes much inconvenience to the defendants who are co-heirs, because such suits lead to a multiplicity of suits and to endless litigation. That the scope of the rule as applicable to Muhammadans cannot be extended beyond this is clear from the observations of Ayling and Tyabji, JJ. in "*Moideensa Rowthen* v. *Mahammad Kasim Rowthen.*" (12).

In the latter case *Moideensa Rowthen* v. *Muhammad Kasim Rowthen* (12) the Judges stated the law in the following terms :—

"With reference to the first point (*i.e.*, whether a suit for partial partition was maintainable), it need only be stated that under Muhammadan Law the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate. It is, therefore, futile to describe a suit in which one heir claims to receive his share of the property of the deceased from another heir as a suit for partial partition and to say that, therefore, the suit is not maintainable. Both the terminology and the principles of Hindu Law are in such a case inapplicable."

It is clear from the above rulings that the objection of the respondents is untenable. The matter in dispute is a separate and clearly defined part of Pingal's estate. It consists of a whole survey number and of a one-sixth share in a well. Even if it were not so clearly defined the mere fact of alienation to an outsider would make it a separate portion. This was the view taken by Whitworth, J. C. in *Bibi Meharulnissa* v. *Dad Muhammad Khan* (13). The minor plaintiffs therefore succeeded to a definite portion of this separate portion in their father's estate and are entitled to sue to recover it.

I, therefore, would answer the first part of the question referred to our decision in the negative and the second part in the affirmative.

Raymond, A. J. C.—I concur. It was in the case of *Abdul Kadir* v. *Bapubhai* (3), that Parsons and Ranade, JJ., remarked that in the Presidency of Bombay a suit for partition amongst Mahomedans is hardly distinguishable from a partition suit by Hindus. In *Jan Mahomed* v. *Datu Jaffer* (5), Beaman, J. with reference to the above remark which had been frequently cited in previous cases and was unchallenged, as he was told, observed that "Sweeping *dicta* of that sort, for which it might be difficult to find any solid basis tend to add to the confusion in which the precise extent of the applicability of a part of the Hindu Law to Mahomedans in this Presidency is involved." Under the Mahomedan Law there is no such thing as joint family property which is a peculiar concept of the Hindu Law. As said by Macleod, J., in *Mangaldas* v. *Abdul Razak* (4). "The notions of joint family, joint family property, joint family business are utterly unknown to Mahomedan Law." The property left by a deceased Mahomedan and divisible among his heirs is not joint family property but all sharers in it until division are tenants-in-common. The shares of the owners are definite and known before actual partition whereas according to the Mitakshara Law no individual member of an undivided family whilst it remains undivided, can predicate of the joint undivided property that he has a certain definite share. This joint family property is called the co-parcenary property and under the Mitakshara Law no co-parcener has any definite share in it before partition. In Mitra's Law of Joint Property and Partition, page 194,

(10) 10 Ind. Cas. 354 ; 15 C. W. N. 677.
(11) 23 Ind. Cas. 442 ; 19 C. W. N. 356.
(12) 28 Ind. Cas. 895.
(13) (1887) Sind. Sad. C. R. 90.

it is said that "under the Mahomedan Law the jointness of the property consists only in the same tangible thing or incorporeal right being the subject of ownership by several individuals; otherwise the rights of the owners are distinct. In such a case the result of partition is only to mark out separate portions of the property and allot such portions to the exclusive use and enjoyment of the separate owners. Even in the absence of a partition any of the joint owners can transfer his share by sale. The share of the owner being definite and known the purchaser acquires that share. By his purchase he becomes entitled to joint possession with the remaining co-sharers and can also demand partition by metes and bounds." Whereas as remarked in *Nanjaya Mudali* v. *Shanmuga Mudali* (9)." When a co-parcener alienates his share in certain specific family property, the alienee does not acquire any interest in that property, but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible, and such an alienee has no right to possession and no status as a tenant-in-common. A purchaser of the interest of a co-parcener must sue for a general partition of the entire family property."

With these fundamental distinctions as to the interest of a co-parcener in joint family property under the Mitakshara Law and the interests of Mahomedan heirs in whom the property vests in specific shares, it is highly undesirable to apply notions of Hindu Law in respect of partition to Mahomedans. In the present case on the death of Pinjal, a seven-eighth share in his property was vested in the appellants, his sons, and one-eighth in his widow Izat. During their minority she purports to transfer their share in the property in suit which undoubtedly she had no power to do, to the respondents. The appellants who are innocent parties in this transaction now seek to set aside her action so far as their shares are concerned, which are specific and definite in the property that has been transferred and which vested in them on the death of their father Pinjal. Why should they be driven to a suit for general partition of all the property left by Pinjal wherein respondents have no interest except in the one-eighth share of Izat in the property in suit. As far as the equities of the case are concerned, respondents can claim no equitable consideration when they choose to take a conveyance from Izat not only of her share in the property but the shares of others. Even according to Hindu Law whether a suit should comprise all the joint family property, or whether it can be brought in respect of a portion only of the property, depend upon who the parties to the suit are and though no doubt the general rule is that where a suit for partition is brought by a co-parcener against the other co-parceners, it should embrace the whole family property, yet as Gour remarks in his Hindu Law at page 655, without prejudice to the generality of the foregoing rule, partial partition is permitted *inter alia* (1) where the portion excluded is not in the possession of co-parceners and (2) where the portion excluded is held jointly with a stranger who has no interest in the family property, and in Mayne's Hindu Law, 6th Edition, pages 647, 648, one of the exceptions to the general rule that every suit for partition should embrace all the joint family property is stated to be where a portion "is held jointly with strangers who have no interest in the family partition and, therefore, cannot be made parties to the general suit for partition." This is of course an *a fortiori* argument so far as Mahomedans are concerned with whom there is no such thing as co parcenary nor is there any general rule that when a co-sharer seeks distribution of the estate, his suit must embrace the whole property vested in him and the other co-sharers. We are not concerned with the case of the remedy that a stranger purchaser may have to pursue if he desired to obtain possession of the share of his vendor by partition, the question before us is whether in the circumstances of the present case it was obligatory on the appellants to file a suit for partition of the entire property left by Pinjal at his death and I am of opinion it was not and the suit as framed was maintainable.

I therefore concur in the answer to the reference.

Kennedy, A. J. C.—I agree with the proposed answers to the reference. I also think that much error is caused by the application of Hindu Law to the case of Muhammadans. This is particularly the case when

the Hindu Law applied is the *Mitakshara*. The state of a Muhammadan family after the inheritance has opened but the estate has not been divided is far more like that of a *Daya-bhaga* family after the death of the father. But in truth neither system of law is applicable and the matter must be decided according to equity and good conscience.

If *A* alienates *B*'s property to *C* without authorisation from *B*, then no doubt *C* ought to have some remedy against *A*, inasmuch as he has paid *A* valuable consideration for the delivery of something that *A* does not own, and cannot effectively deliver. But why should *B* suffer; Why should *B* because of *A*'s wrongful act, and merely to facilitate matters for *C*, to whom *B* is in no way bound, be put in a worse position than he would have been, had not the transfer taken place? Thus I never could see why *B* even when he is a Hindu coparcener should be compelled to sue for general partition if he did not desire it.

What remedy is therefore open to *B*? I was inclined to think merely that he might ask for joint possession of the whole property including the part improperly alienated.

But I think that in the case of Muhammadans who hold the estate before division as tenants-in-common there is sufficient authority for the proposition that *B* may ask for separate partition of the part of the estate improperly alienated. This seems to follow from the authorities quoted. A Muhammadan heir is not a coparcener. He has not merely a right to acquire by partition a share in a defined property which share is unascertained till partition is effected, but a right to a defined and immediate share in each portion of the estate, and if any portion of the estate is, in any case, marked off and divided from the rest of the estate he has a right to an immediate share in that portion. This is of course without prejudice to any remedies that *C* may have against *A*.

N. H. *Reference answered.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 852 OF 1921.

February 15, 1924.

Present:—Mr. Justice Krishnan.

BANDARU CHELLAMMA—PLAINTIFF—APPELLANT

versus

DUNGALA PENTAYYA—DEFENDANT—RESPONDENT.

Landlord and Tenant—Forest lands in Zemindari*—Zamindar, rights of—Reclamation of forest land—Tenant, whether acquires occupancy rights—Burden of proof.*

A tenant who sets up an occupancy right has to establish it.

The *Zemindar* owns an absolute estate in forest lands in the *Zemindari*.

Arunachella Ambalam v. *R. G. Orr*, 29 Ind. Cas. 634; 32 *M.* L. J. 407; 40 M. 722, followed.

A man who reclaims *Zemindari* forest land and makes it cultivable does not thereby acquire permanent occupancy right in that land.

Suryanarayan v. *Patamma*, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 20 C. L. J. 163; 1 U. P. L. R. (P.C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 468; 45 I. A. 209 (P. C.); *Nandigam Subbarayulu* v. *Kannam Saheb*, 54 Ind. Cas. 22; (1919) M. W. N. 836, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Vizagapatam, in Appeal Suit No. 141 of 1920, preferred against the decree of the Court of the District Munsif, Vizagapatam, in O. S. No. 444 of 1918.

Mr. *Y. Suryanarayana*, for the Appellant.

Messrs. *B. Sitarama Rao and R. Narasimham*, for the Respondent.

JUDGMENT.—In this case the plaintiff is a *pattadar* under the *Zemindar* of Vizianagaram. He brought this suit for the recovery of rents from the defendant as well as for ejecting him from his holding. The land is situated in a *jeroyiti* village within the *zemindari* estate. The first Court granted a decree both for the rent and for ejectment, but on appeal, the Subordinate Judge has reversed the decree so far as the claim for ejectment goes, on the finding that the defendant has occupancy right in the land and that he is not, therefore, liable to be ejected. The question argued before me is as to the existence of the defendant's occupancy right.

BANDARU CHELLAMMA *v.* DUNGALA PENTAYYA

According to the rulings of the Privy Council, the latest of which is in Appeal No. 48 of 1922 in a case which went up from this Court, a tenant who sets up an occupancy right has to establish it. The facts appear to be that the lands in question in this case were originally forest lands in the *zemindari*. As regards such lands it was laid down by this High Court in *Arunachela Ambalam* v. *R. G. Orr* (1) that the *zemindar* owns an absolute estate in it. The lands in question seem to have been reclaimed by the defendant's father somewhere in 1868 and converted into cultivable lands and the evidence also shows that he had been in possession of the lands till his death and was succeeded in possession by the present defendant, his son, who has continued in possession ever since. The occupants paid rent first of all to the *mustajari* or leaseholder from the *zemindar* and, since 1898 when the plaintiff obtained his *patta*, they have been paying rent to the plaintiff. The rents have not been invariable as would appear from the receipts that are produced, Ex. I series; in 1914, the rent was enhanced from Rs. 35 to Rs. 55 by the plaintiff, and, as the defendant did not pay that, a small cause suit was brought for the purpose and a decree obtained. The rent was enhanced, because it would seem that some of the lands were converted from dry lands into wet lands. There is no other circumstance in this case from which any inference as regards the permanent occupancy right can be drawn. It seems to me that these circumstances are not sufficient to justify an inference that the tenants had originally an occupancy right which is continuing. By mere length of tenancy no occupancy right can be acquired. The circumstances which have been proved here do not seem to me to justify any conclusion that the tenants have obtained occupancy rights in the land, but it is contended before me, on the authority of the ruling in *Cheekati Zemindar* v. *Ranasooru, Dhora* (2) and similar cases that I must presume that, as soon as a person enters upon a *zemindari* land and converts that land into a cultivable land, by that fact alone he acquires a right of permanent occupancy. Whatever the old view might have been on the point, the view can hardly be supported now after the Privy Council ruling in *Suryanarayan* v. *Patanna* (3), where their Lordships say at page 1019 that the assumption that the ownership of the soil in India was not in the Sovereign or Ruler and that the right of the Ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator is an assumption that no Court is entitled to make and in support of which there is no reliable evidence. They also point out that such an assumption as contended for in that case, was not recognised in Regulation XXXI of 1802, and the words of that Regulation are quoted by their Lordships. It has been held by this Court in *Nandigam Subbarayulu* v. *Kannam Saheb* (4) that this observation of their Lordships of the Privy Council, which referred to Reddi kings, refer equally well to the *zemindars*. In view of this ruling of the Privy Council and the subsequent ruling of the Madras High Court, I do not think I can support the position that, because a man reclaimed some land in a *zemindrai* and made it cultivable land, he thereby got permanent occupancy rights. What then is the basis of this claim for permanent occupancy right that the defendant puts forward? The mere fact of the length of his possession will not do. The Estates Land Act cannot be said to have given him a right of occupancy at all; for at the time the Act came into force it was the plaintiff, and not the defendant, who had a right in the land under the *patta* he got from the *zemindar* and was holding the land. Though the defendant was in actual occupation of the land he was occupying it only as a tenant of the plaintiff and he would be only an under-tenant of the plaintiff, the *ryot* and could not, therefore, claim to have any occupancy rights at all.

In these circumstances, it seems to me that the only decree that can be passed in this case is a decree allowing the ejectment of the defendant. The decree of the Subordinate Judge to the contrary must, therefore, be set aside and that of the District Munsif restored with costs throughout.

K. S. D. *Appeal allowed.*

(1) 29 Ind. Cas. 634; 32 M. L. J. 407; 40 M. 722.
(2) 23 M. 318; 8 Ind. Dec. (N. S.) 624.
(3) 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 559; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A, 209 (P. C).
(4) 54 Ind. Cas. 22; (1919) M. W. N. 836.

MOTUMAL PERUMAL *v.* LEKHUMAL

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 11 OF 1918.

September 21, 1920.

Present :—Mr. Kennedy, J. C., and Mr. Madgavkar, A. J. C.

MOTUMAL PERUMAL—APPLICANT

versus

LEKHUMAL AND ANOTHER—OPPONENTS.

Mamlatdar's Courts Act (Bom. II of 1906), ss. 23, 24 —Collector's order—Revision.

Under section 24 of the Mamlatdar's Courts Act, the Court of the Judicial Commissioner of Sindh has powers of revision over orders of the Collector passed in his jurisdiction under section 23 of the Act.

When the Collector has set aside an order of the Mamlatdar which is based on no evidence, the Judicial Commissioner's Court will not interfere in revision.

Per Madgavkar, A. J. C.:—

Two conditions must co-exist before the Court of the Judicial Commissioner will interfere in revision with an order of the Collector passed under section 23 of the *Mamlatdars* Act. The first is illegality or patent material irregularity and the second that no remedy except by way of revision is open to the applicant.

Application for revision against the order of the Collector, Hyderabad.

Mr. *Hasomal Mulchand*, for the Applicant.

Mr. *Rewachand Vasumal*, for the Opponents.

JUDGMENT.

Kennedy, J. C.—This is an application for revision of an order passed by the Collector of Hyderabad, dated 27th November 1917, in which he set aside an order of the Mamlatdar of Hyderabad, dated 22nd October 1917, in which order the Mamlatdar found that one Motumal had been ejected within the statutory period from possession of certain survey numbers of Dewanmal and ordered the restoration of possession to him.

The Collector in exercise of the jurisdiction under section 23 of the Mamlatdar's Court Act came to the conclusion that the finding of the Mamlatdar that the plaintiff ever had possession, and, therefore had lost possession within the statutory period was incorrect and not based on any evidence. He therefore found that the plaintiff was not entitled to possession and that the plaint should have been dismissed in the Mukhtyarkar's Court and accordingly reversed the order of the Mukhtyarkar.

The applicant, who is the original plaintiff, now comes here in revision on the ground that the Collector had no jurisdiction to interfere with the findings of facts of the Mamlatdar.

The first point is whether we have any powers of revision of the Collector's order, and we have no doubt that we have such power under section 24 of the Act and we have the same powers as the High Court has in the Presidency and that Court indubitably does exercise such revisional powers, on the orders of the Collectors, in its capacity as successors to the Sadar Diwani Idalat, which exercised these powers under Regulation II of 1917, and which powers were vested in the High Court by the Statute 24 and 25, Victoria Chapter 104.

The next question is whether it is a case in which the Court would grant revision. It is in our opinion not a case in which we should be anxious to interfere because the order of the Collector is summary and not of a permanently binding effect and in such case it is better that, if the parties are dissatisfied with the orders, they should apply to the ordinary tribunal and get a regular decree which should finally settle the disputes between them. We do not mean to say that there are no cases in which revision may be necessary, and may be desirable, but we do not see that the present case is one in which we should be anxious to exercise revisional powers.

It is said that the Collector made a flagrant error in setting aside the finding of fact of the Mamlatdar and a great deal of authority has been quoted from the Bombay High Court to show that the Collector has no power to set aside the finding of facts of the Mamlatdar. On this point there are as yet no rulings in this Court and it is not necessary in this case to express assent to or dissent from these rulings. In the present case it seems to us that the finding of the Mamlatdar was based on nothing but the unsupported

allegations of the plaintiff and must be called a finding based on a total misappreciation of what evidence is. It is not based on evidence such as is necessary to establish a disputed claim and the error in the Mamlatdar's finding amounts, therefore, not only to an error of fact but also an error of law. In any case, therefore, the Collector was perfectly justified in setting aside the finding of the Mamlatdar and we decline to interfere.

Madgavkar, A. J. C.—I concur.

The jurisdiction of this Court under section 24 of Bombay Act II of 1906 has been considered and an instance of its exercise can be found in *Khamiso* v. *Rasu* (1). Two conditions must usually co-exist before this Court will interfere. The first is illegality or patent material irregularity, the second is that no remedy except by way of revision is open to the applicant: *Kashinath Sakharam Kulkarni* v. *Nana* (2), *Irbasappa Mallappa Bilehal* v. *Basangowdag Fakirgowda Patil* (3).

Both are absent in the present case. The Mamlatdar on the uncorroborated evidence of the plaintiff found his possession proved. The Collector held that this finding was improper and set it aside and dismissed the suit. We do not think that this order of the Collector was inconsistent with the Act or was outside his powers because of clause (1) of section 23, under which a *party* has no right of appeal from any order of a Mamlatdar under the Act. With respect to the decision in *Kashiram Mansing* v. *Rajaram Dayaram Patil* (4), the following observations may be perhaps ventured. The language of that decision is itself very guarded. Under the Code of Civil Procedure, it is true section 115 deals with material irregularities and a Court of first appeal only can reverse a finding of fact by the trying Court. But, as this Court has held in the cases *Khamiso* v. *Rasu*, (1) above, the Code of Civil Procedure has no application to proceedings under Bombay Act II of 1906; and reasoning in the latter by analogy with the former is, therefore, difficult. In section 23 as we read it, clause (1) bars the right to appeal, *of the parties*, but, as appears from clause (2) not the power of the Collector. And the result is that while a party cannot, as of right, ask the Collector to reconsider the evidence and findings, the Collector, if he thinks that a finding is, whether on the evidence or in law, improper, has ample power to set it aside. These observations are perhaps necessary since, in the circumstances of Sind, with which we are concurred, the Legislature meant, we think, not that the Mamlatdar should be the final Judge of fact, without authority to the Collector to alter his finding, but that the parties should not be allowed to fritter away time in appeals but should rather resort to the Civil Courts if they were dissatisfied with the decision of the Mamlatdar.

On these grounds I concur with the learned Judicial Commissioner that this application against the order of the Collector should be dismissed with costs.

N. H. *Application dismissed.*

(1) 16 Ind. Cas. 675; 6 S. L. R. 67.
(2) 21 B. 731: 11 Ind. Dec. (N. S.) 492.
(3) 57 Ind. Cas. 432; 22 Bom. L. R. 746.
(4) 12 Ind. Cas. 856; 35 B. 487 at p.492; 13 Bom. L. R. 879.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 20 of 1924.

April 7, 1924.

Present:—Mr. Neave, A. J. C., and Mr. Kendell, A. J. C.

Mt. MOHANYA—DEFENDANT—APPLICANT

versus

PANNA LAL AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 75—*Instalment bond—Default in payment of instalment—Cause of action—Limitation—Civil Procedure Code* (*Act V of* 1908), *s.* 115—*Small Cause Court, Judgment of—Limitation, question of—Revision.*

An instalment bond provided for the payment of the debt in twelve monthly instalments and authorised the obligee to sue for the unpaid balance either on default in payment of any of the instalments or on the expiry of one year fixed for the payment of the entire debt:—

MT. MOHANYA *v.* PANNA LAL

Held, that Art. 75 of Sch. I to the Limitation Act applied and in the absence of any waiver, time began to run from the date of the first default.

Shib Dayal v *Meharban*, 69 Ind. Cas. 981 ; 45 A. 27 ; 20 A. L. J 819 ; (1923) A. I. R. (A) 1 ; *Sheo Narain v. Ram Din*, 11 Ind. Cas. 526 ; 14 O. C. 129, followed.

Durga v. *Tota Ram*, 19 Ind. Cas. 738 ; 16 O. C. 45 distinguished.

The judgment of a Small Cause Court is liable to be upset on a question of limitation in revision.

Application against the decree of the Judge, Small Cause Court, Lucknow, dated the 5th January 1924.

Messrs. *Bhawani Shankar* and *K. M. Yusuf Ali*, for the Applicant.

Messrs. *P. D. Rastogi* and *Wasi Hasan*, for the Opposite Party.

ORDER.—This is an application under section 25 of the Provincial Small Cause Court Act against the order of the Judge of the Small Cause Court, Lucknow, decreeing the plaintiff's suit for Rs. 234. The question that has arisen is one of limitation. The bond on which the plaintiff sued was an unregistered one, and provided for the payment of the debt in 12 monthly instalments, these instalments including repayment of the principal as well as of interest. The bond also authorised the plaintiff to sue for the unpaid balance either on default in payment of any of the instalments or on the expiry of one year fixed for payment of the entire debt. The learned Judge held that Art. 80 of the Limitation Act applied and that the bond became payable on the expiry of the period of one year, and not on the occasion of the default. He relied on *Durga* v. *Tota Ram* (1), a ruling of 1912. The applicant asked for revision of the order and in arguments has pointed to the Full Bench decision of the Allahabad High Court published in *Shib Dayal* v. *Meharban* (2), and also to a Bench decision of this Court published in *Sheo Narain* v. *Ram Din* (3).

The respondent has at the outset raised the objection that the judgment of a Subordinate Court should not be upset on a question of limitation in revision, but for authority on this point it is not necessary to go further than the decision which has been quoted by the Judge in the present case, namely *Durga* v. *Tota Ram* (1) where the application was admitted but dismissed on its merits.

As regards the question of limitation, however, that decision is clearly distinguishable from the present case. The debt in question there was a simple money bond providing that the money should be repaid with interest within three years, that interest should be paid monthly and that if default were made in payment of interest for six months, the creditor would be at liberty to realise the principal and interest due on the bond without waiting for the expiry of the said term, or after the expiry of the said term whichever he thought proper and the learned Judge held that as the bond gave the plaintiff an option the claim would not be regarded as barred by time because he chose to stick to the longer term. The bond money was not repayable by instalments as in the present case. In fact it was specifically distinguished from an instalment bond in the judgment. There appears to be a conflict of authority between this decision and *Shib Dayal* v. *Meharban* (2) where in a similar case it was decided that limitation began to run from the date of the first default in payment of *interest*. It is not, however, necessary for us to decide between these two authorities in the present case, because the bond here is an instalment bond, and it seems clear, therefore, that Art. 75 of the first schedule to the Limitation Act must apply. The learned Counsel for the respondent has argued that Art. 75 need not apply, because the bond itself does not definitely say that the whole amount was to become payable by the debtor on default of one instalment but only that the plaintiff will have the option of suing on default of one of the instalments. This appears to us to be making a distinction without a difference. The actual amount advanced by the plaintiff was Rs. 192 repayable in monthly instalments of Rs. 16. It was, dated 11th Oct. 1919, the first instalment was due on 11th Nov. 1919 and the plaintiff was then in a position to sue for the whole of the unpaid balance. In other words the money had become due. It has not been seriously argued that there has been any waiver by the plaintiff. If he had sued for the unpaid instalments

(1) 19 Ind. Cas. 738 ; 16 O. C. 45.
(2) 69 Ind. Cas. 981 ; 45 A. 27 ; 20 A. L. J. 819 ; (1923) A. I. R. (A) 1.
(3) 11 Ind. Cas. 526 ; 14 O. C. 129.

only, he might have been held to have waived his right to sue, but there is plenty of authority to show that his omission to sue for the whole of the balance will not operate as a waiver *Jadah Chandra Bakhsh* v. *Bhairah Chandra* (4) and *Khairuddin* v. *Atu Mal* (5). We must hold, therefore, that Art. 75 of the Limitation Act applies to the case, that the default was made when the first instalment was not paid in full, and that there was no waiver. The only question that remains is that raised on behalf of the respondent that there was part payment of Rs. 5 on August the 5th 1922 and that this will start a fresh period of limitation under section 20 of the Limitation Act. There is certainly a statement in the plaint that various payments were made, ending up with the one referred to. There is however, a proviso to section 20 that in the case of a part payment of the principal of the debt the fact of the payment must appear in the handwriting of the person making the same. If the payment was made at all, it was a part payment of one of the instalments and was, therefore, intended to be a payment of the principal of the debt, but there is no evidence to show that the fact of the payment was proved in the handwriting of any of the defendants. We must hold therefore, that the plaintiff's suit was barred by limitation and should have been dismissed. The fact that one of the defendants admitted the claim does not affect the legal question. The application is, therefore, allowed, the judgment and decree of the lower Court are set aside and the suit of the plaintiff is dismissed. The applicant will receive costs in this Court from the plaintiff-respondent.

G. H. *Application allowed.*

(4) 31 C. 297.
(5) 188 P. R. 1883.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 51 OF 1921.

January 9, 1924.

Present :—Mr. Justice Ramesam and Mr. Justice Jackson.

KANNIAPPA MUDALIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. V. RAJU CHETTIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16 (5), 31 —Proceedings in Insolvency—Secured creditor, rights of —Sale of insolvent's property—Official Receiver, notice by to mortgagee—Mortgagee, failure of to reply—Application to set aside sale, dismissal of—Suit to recover money due on mortgage, whether maintainable.

Under the Provincial Insolvency Act only the property of the insolvent vests in the Official Receiver. The Act contains no provision for selling the whole property free from all encumbrances even with the consent of the mortgagees and the rights of secured creditors are entirely unaffected by proceedings in insolvency.

On the adjudication of a person as insolvent, the Official Receiver gave a notice to his mortgagees in which he stated that he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale proceeds as they might have on the properties, and called upon them to consent to the proposal. He added that in case they did not intimate to the contrary before a certain day, he would take it that they had consented to the above proposal. The mortgagees did not reply to the notice and the Official Receiver after proclamation sold the properties free from incumbrances. The mortgagees thereupon applied for cancellation of the sale and the petition was ultimately dismissed as being out of time.

Subsequently the mortgagees brought the present suit for recovery of the principal and interest due on the mortgage; the purchasers of the property contended that the suit was not sustainable;

Held, (1) that the mere silence of the mortgagees to the Official Receiver's notice did not amount to a relinquishment of their security within the meaning of s. 31 of the Provincial Insolvency Act;

(2) that the plaintiffs were not estopped from maintaining the present suit by the proceedings in insolvency, nor did the mere fact that they once chose the wrong remedy of applying to set aside the sale in insolvency jurisdiction, preclude them from their elitigmate remedy.

KANNIAPPA MUDALIAR *v.* RAJU CHETTIAR

Appeal against the decree of the Court of the Subordinate Judge, Vellore in O. S. No. 34 of 1918 and Memorandum of Cross-objections preferred in the said appeal.

Messrs. *A. Krishnaswamy Aiyar* and *B. C. Seshachala Aiyar*, for the Appellants.

Mr. *A. Viswanatha Iyer*, for the Respondents.

JUDGMENT.—In this case the 9th defendant and the legal representatives of the 10th defendant are the appellants. Respondents Nos. 1 to 3 are the plaintiffs. The suit was brought for recovery of the principal and interest due on a mortgage bond executed by the husband of the second defendant and defendants Nos. 1 to 6. The defence was that the plaintiffs were not entitled to maintain the suit on account of certain proceedings in insolvency.

The further facts necessary to be stated for understanding this defence are that the sixth defendant became insolvent and his properties were vested in the Official Receiver, Chittoor. On the 16th August 1915, the Official Receiver gave a notice to the mortgagees in which he stated that he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale proceeds as they might have on the properties, and called upon them to consent to the proposal. He added that, in case they did not intimate to the contrary before a certain date, he would take it that they had consented to the above proposal. Incidentally it may be mentioned that the original notice is not exhibited in the case and all that has been exhibited is an office copy. This office copy contains blanks in all important places where dates and amounts have to be mentioned, in particular the date before which a reply was expected is not in the document and is also a blank. This notice was received as appears from the acknowledgment Ex. I (*a*) on the 26th August 1915 but there was no reply by the mortgagees to the notice. The Official Receiver proclaimed the sale of the properties and the proclamation is dated the 16th December 1915. It was signed by the Official Receiver as Official Receiver and was issued from his office. It mentions that the entire right of the insolvent was intended to be sold and also mentions that the property was to be sold free from encumbrances; and this particular mortgage was intended to be mentioned there but was described incorrectly, but we do not think that very much turns on the incorrectness of the description of the mortgage. The property was then purchased by defendants Nos. 9 and 10 who are now represented by the appellants. On the 22nd February 1916 the mortgagees, applied to the District Judge for cancellation of the sale on the ground that the notice was not served upon them, that the price realised was not adequate, that the sale was held at a time when there was plague prevailing, and the petition also implies that they did not consent to the sale. The matter came up to the High Court and it was held that the petition was out of time and the petition was dismissed on that ground. The mortgagees then brought the present suit.

On these facts, it is contended by the appellants that the present suit does not lie, and that the former sale is binding on the mortgagees. Under the Provincial Insolvency Act III of 1907 only the property of the insolvent vests in the Official Receiver. The Act contains no provisions for selling the whole property free from all encumbrances even with the consent of the mortgagee. Section 16 (5) says, that

> "nothing in the section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it, if this section had not been passed."

Section 31 contains some provisions according to which a secured creditor may, after realising his security, prove for the balance, or he may relinquish his security and prove for the whole of his debt like any other unsecured creditor, or he may prove for the difference between his debt and the estimated value of the property where the estimated value is less than that of his debt. Here, it cannot be said that the mortgagees have relinquished their security. Therefore, none of the provisions of section 31 applies. It cannot be said that the Official Receiver was a person with certain limited powers and the silence of the mortgagees in not replying to the notice amounted to a consent as would justify the Receiver to sell the properties. Mr. Krishnaswami Aiyar, the learned Vakil for the appellants, then argued that, apart from any limited powers under the Act, the

Official Receiver at least stands in the position of a mortgagor, and any mortgagor can sell the mortgaged property with the consent of the mortgagees. But it seems to us that a sale by a mortgagor without a relinquishment by the mortgagee but with the consent of the mortgagee expressed in an unregistered document cannot be valid unless the facts amount to an authorisation of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realised in the sale in discharge of his debt. In the present case, it is very difficult to make all these implications on account of the mere silence of the mortgagees when they received the notice Ex. I. There is no doubt that the Official Receiver and the purchasers thought that the Official Receiver was authorised to sell under the Act and had limited powers of sale. I find it difficult to accept the contention for the appellants that the plaintiffs are estopped by the proceedings in insolvency. Nor can it be said that the plaintiffs chose one remedy, namely, of applying to set aside the sale in insolvency jurisdiction and that, therefore, they are precluded from their legitimate remedy. They chose the wrong remedy and they never got a relief. They never got any relief when they applied in the Insolvency Court.

We think that the judgment of the Court below is right and that this appeal must be dismissed with costs of respondents Nos. 1 to 3.

Now as regards the memorandum of Objections the learned Subordinate Judge has committed a clerical error in paragraph 22 of his judgment where the figure ought to be Rs. 2,500 instead of Rs. 2,800. The amount due to the plaintiffs will be amended accordingly.

With reference to the interest, the judgment is right, but the decree directs that it should be calculated at 6 per cent. from the date of the decree. This should be altered into " at the contract rate up to the date fixed for payment and 6 per cent. thereafter."

Clause 3 of the decree will also be deleted as the purchasers will be liable for costs personally and for the balance of any unrealised debt the plaintiffs-respondents can prove in insolvency.

The respondents Nos. 1 to 3 will be entitled to the costs of the Memo. of Objections.

V. N. V. *Appeal dismissed.*
K. S. D. *Cross-objections allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NOS. 2325 AND 2420 OF 1920.

March 29, 1923.

Present :—Mr. Justice Rankin and Mr. Justice Buckland.

MANINDRA CHANDRA NANDI—
PLAINTIFF—APPELLANT
versus
KAULAT SHAIK AND LAGNU MANDAL—
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 52—Lease on basis of measurement—Tenant what has to prove—Contract for re-assessment—Burden of proof.

When a lotting upon the basis of a measurement is proved, the tenant has *prima facie* to show that the rent was a consolidated rent for all the land within specific boundaries but in the absence of such proof the mere production of *dakhilas* containing entires of area and rate does not suffice to throw any onus on the tenant.

There is no reason whatever forbidding a landlord from proving, if he can, a contract that the tenant is liable to reassessment upon the actual area, but the mere fact that rent has been calculated in the past on the supposition that the holding is of a certain size does not prove such contract.

Gouri Pattra v. *Reily*, 20 C. 579 ; 10 Ind. Dec. (N. S.) 392, *Nilmani Kar* v. *Sati Prasad Garga Bahadur*, 61 Ind. Cas. 82 ; 48 C. 556 ; 32 C. L. J. 302 ; 25 C. W. N. 230 (F.B.), followed.

Appeals against the decrees of the Additional Subordinate Judge, Maldah, dated the 12th June 1920 affirming the decree of the Munsif, dated the 15th August 1919.

Babu *Dwarkanath Chakravarti* (with him Babu *Hemendra Nath Sen*, Babu *Ram Charan Mitra*, Babu *Ram Chandra Mazumdar* and Babu *Sarat Kumar Mitra*), for the Appellant.

MANINDRA CHANDRA NANDI *v.* KAULAT SHAIK

JUDGMENT.

Rankin, J.—These two second appeals (2325 and 2420 of 1920) arise out of two suits for increased rent (1484 and 1495 of 1918) brought by the Maharaja of Kasimbazar against Kaulat Sheikh and Lagnu Mandal respectively. The plaintiff claimed additional rent for excess area and also enhancement of rent on the ground that the rate of rent hitherto paid was lower than the rates prevailing in the locality. The Munsif of Malda disallowed both claims and appeals to the Additional Subordinate Judge of Rajshahi have been dismissed by him with costs.

In Kaulat's case the tenancy has hitherto stood as comprising an area of 1 *bigha*, 8 *cottahs*, 8 *chittaks*, bearing a *jama* of 14-annas 9-pies. The plaintiff claimed that this should be found to be a tenancy of 2 *bighas*, 1 *cottah*, bearing a *jama* of Rs. 2-12-7½.

In Lagnu's case the tenancy has hitherto stood as of 10 *bighas*, 15 *cottahs* bearing a *jama* of Rs. 15-6. The plaintiff claimed that this should be 13 *bighas*, 15 *cottahs*, 1 *chittak*, at a *jama* of Rs. 26-12-9.

The plaintiff's case is that the whole of Kaulat's land is now mulberry land and the whole of Lagnu's land is now orchard. That the land originally settled with Kaulat was partly mulberry land but chiefly paddy land and that of Lagnu was mulberry land. The plaint sets forth the "prevailing rates" per *bigha* as these: paddy 14 annas, mulberry Rs. 1-5-9, and orchard Rs. 1-15-2.

The plaintiff's claim is for the years 1322-4 in each case. The first ground of claim was that the tenants had agreed to his demand in or about 1321. Apart from proof, with or without the aid of a custom, of a term in the original contract of tenancy that the tenant should hold at a rent varying from time to time according to the quality or user of the lands, this ground of claim is in the present case quite untenable and the findings of the Courts below are in no way incorrect. I see no proof of *bona fide* dispute and the compromise thereof as affording consideration for an agreement as to excess area or as justifying an enhancement of rent contrary to section 29. The landlord claims by agreement to have got all he can possibly claim.

The question of the original conditions of the tenancy arises also when the plaintiff's claim to alteration of rent for excess area is considered under section 52. The difficulty here is the plentiful lack of evidence. Save that the holdings were not in existence in 1266 the only evidence which is of use to the plaintiffs is the mention of the areas in the *karchas* on the back of the *dakhilas*. In Kaulat's case there seem to be eight of such endorsements the earliest being 1311. In Lagnu's case there seem to be three only the earliest being 1320. The details are as follows:—

Kaulat's case.

Mulberry land—7½ *cottahs*, rate per *bigha* Rs. 1-5.9, total Rs. 0-8-3.

Crop-bearing land—1 *bigha*, 1 *cottah*, rate per *bigha* Rs. 0-6-0, total Rs. 0-6-6. Total rent Rs. 0-14-9.

Lagnu's case.

Mulberry land—10 *bighas*, 15 *cottahs*, rate per *bigha* Rs. 1-4-7, total Rs. 15-6-0.

These are short particulars written on the back of rent receipts; nothing more. The question is how much can be distilled from them and in answering that question they cannot be treated as though they were the vital words in the operative part of a written instrument of tenancy.

There is no evidence that the lands were originally settled, or at any time re-settled, after any measurement. There is no evidence that the tenants have overstepped any previous boundaries. There is no evidence that any waste lands lay adjacent to these lands. There is no written instrument creating or re-affirming either tenancy; no mention anywhere of boundaries or that the land was within certain boundaries.

The learned Subordinate Judge has dismissed the plaintiff's claim by reason of the insufficiency of his own evidence. He has not dealt with or relied upon any evidence for the defence as to this matter. The question, therefore, is whether on the face of the *dakhilas* he was bound to infer such conditions of tenancy as would entitle the plaintiff to succeed; and if not whether he has properly applied the law in considering the problem.

The respondents, who seem to be small cultivators, have not appeared to contest these appeals but we have had the great advantage of an argument by Babu Dwarkanath Chakravarty on behalf of the appellant.

MANINDRA CHANDRA NANDI *v.* KAULAT SHAIK

The Courts below have been led to their conclusions by a consideration of *Gouri Pattra* v. *Reily* (1). This case has often been followed and so far as I know has never been dissented from in this Court. The facts as they appeared to Prinsep and Beverley, JJ., were these: Areas were specified in rent receipts and *zemindari* papers. There was no proof that the lands had ever been measured until recent proceedings under Chapter X had resulted in a measurement. The holdings were very old holdings. There was no trace of any sort of description by boundaries. There was a custom under which remissions of rent had been granted for fallow land. I cannot find from the report that the rent receipts showed the total rent as worked out by applying a certain rate to the area given: otherwise Gouri Pattra's case and the cases now under consideration appear to me to be alike in all material respects. The decision was that the landlord has to prove that there is an excess: that he does not prove this unless he proves what area of land was originally let. This involves proof of the terms of the original settlement and whether it was by any and if so by what process of measurement. The statement of area in a *dakhila* does not prove measurement: it does not prove that the land originally let was in fact so many *bighas*: it does not prove or disprove that the subject-matter of the contract was a definite or ascertainable tract of land.

Surja Kanta Acharjee v. *Baneswar Shaha* (2) repeats that the landlord must prove "for what quantity of land the defendant is paying rent." *Rajendra Lall Goswami* v. *Chunder Bhusan* (3) is a decision addressed to the question of the *terminus a quo*. It holds that the landlord must prove the area of the tenure at its inception—not the area of the land at some intermediate stage after fluvial action may have lessened it but the area with reference to which the rent had been assessed or adjusted.

Leaving aside the case of *Ratan Lall Biswas* v. *Jadu Halsana* (4) where there was a finding that the tenant was holding the same lands without any variation in the boundaries, the case of *Rajkumar Pratap* v. *Ram Lal Singh* (5) reaffirmed the principle that even if it is proved that the original rent was settled with reference to a quantity of land let out as distinct from the case of a consolidated rent for land within specified boundaries—even then, the landlord must first prove what the original area was and with reference to what standard that area was determined. For this purpose a statement of areas in *zemindari* papers and rent receipts was held insufficient. In *Lakhi Narain* v. *Sri Ram Chandra* (6) we come across a case where the landlord was able to prove measurement at the inception of the tenancy according to a known standard and that the rent was assessed thereon. The *kabuliyats* mentioned the area as well as the rent. I do not gather that they mentioned any boundaries. In these circumstances, (I understand the decision to lay down) the onus was on the tenant to show that the rent was a consolidated rent for an area within specified boundaries: otherwise excess area was completely proved. This case does not affirm that there is a presumption against the rent being a consolidated rent apart from the circumstances proved in that case. Indeed the two cases previously cited *Ratan Lall Biswas* v. *Jadu Halsana*, (4) *Rajkumar Pratap* v. *Ram Lall Singh*, (5) seem to show that there is no initial presumption either way.

In *Akbar Ali* v. *Hira Bibi* (7) it was proved that in 1301 the lands had been measured and that the rents had then been adjusted at the old rates according to that measurement. Some years later upon a re-measurement it was found that the measurement of 1301 had been very badly done and had much understated the areas. It was held in second appeal that the finding that in 1301 the rents has been adjusted according to that measurement excluded the theory that the parties intended to settle such and such a piece of land be the area what it may. The case was, therefore, held to be such that "the area for which rent has been previously paid" was less than the area actually occupied at the time of the claim, though the area actually occupied was the same throughout.

(1) 20 C. 579; 10 Ind. Dec. (N. S.) 392.
(2) 24 C. 251 at p. 255; 12 Ind. Dec. (N. S.) 834.
(3) 6 C. W. N. 818.
(4) 10 C. W. N. 46.
(5) 5 C. L. J. 538 at p. 541.
(6) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.
(7) 15 Ind. Cas. 832; 16 C. L. J. 182.

This decision was not apparently intended as narrowing the rule in *Gouri Pattra's* case (1). Nevertheless it marks a certain change in the current of authority. In *Akbar Ali's* case (7) the tenants were clearly intended to go on occupying their holdings as they stood in 1301. For these holdings the rent was miscalculated because the area was under-measured. The phrase of Banerjee, J., in *Rajendra Lal Goswami* v. *Chander Bhusen* (3) by which he paraphrases the words of section 52 is cited but apparently without reference to its real intention. "The area with reference to which the rent previously "paid has been assessed or adjusted " meant the area of the tenure as originally created as distinct from the area of any intermediate year in which the size of the holding may have been lessened by fluvial action. The whole point of *Gouri Pattra's* case (1) was that a rent receipt might very well show that, upon a rough estimate that the land was of such and such a size, a rent of so much may have been imposed and accepted, but unless there was a measurement and an assessment on the basis of measurement there was no presumption that the land was not an ascertained tract of a size differing from the area stated. The Statute says "the area for which rent has been previously paid." I think it quite possible that it means that. *Prima facie* section 52 would seem to be concerned with cases of alteration of area, not miscalculation of area ; nor is it easy to suppose that it is intended to provide an exceptional form of relief against mutual mistake. I find it difficult to think of the tenant in *Akbar Ali's* case (7) saying or meaning " I will take so many *bighas* be the actual piece of land what it may," though there is no difficulty in seeing that the rents were readjusted according to the measurement. What the bargain was is this " Now at last we both know what the extent of my land is : we agree to it and we agree that for it I shall pay you so much per *bigha* being 10 rupees." Still there was a measurement and an intention to pay according to actual area.

Now *Akbar Ali's* case (7) was followed by *Dhrupad Chandra* v. *Hari Nath* (8). The facts were in dispute but as found they were these: There had been a measurement to which the tenants were parties in 1227 and a *chitta* of that year recorded them. It was invariably consulted whenever a transfer took place. A rent roll was prepared from it in 1305 giving the area and annual rent. The area as there recorded gave exact and minute quantities running to *karas* and *krantis*. The area at the time of suit was in excess. There was thus proof of actual measurement and it was held that the burden lay upon the tenant to prove that the rent was a consolidated one for an area within specified boundaries. In saying quite correctly that it was not for the landlord to prove how the excess area came to be held, the Subordinate Judge made a remark that it must be due either to encroachment or to erroneous or fraudulent measurement on the previous occasion. The case seems to have raised no new question of law and no question whatever as to the correct presumption in the absence of any proof of measurement. But Richardson, J., states two ways as open to a landlord, generally speaking, to prove an increase in "the area for which rent has been previously paid." The first is the simple case where he proves that the tenant has over-stepped original boundaries. The second is by proving that the rent was fixed at a rate per unit of area and that "in fact and substance the agreement was "that the tenant should pay at that rate for "all the land of which he was put in possession according to its true area" and by further proving that the existing rent is less than the rent payable under such agreement. This is the reasoning upon which the learned Vakil for the appellants chiefly insists in the present cases. Now a landlord who can prove such a contract is entitled to additional rent by virtue of his contract and without the aid of any statutory provision. No doubt a landlord anxious to bring jungle and waste lands into cultivation may well make such a contract. It accords well with primitive notions of rent as a share of the produce. There have been times when cultivating tenants were hard to get. Moreover, I do not doubt that many holdings now hemmed in by land-grabbing neighbours were originally taken on some such terms. Still these are the very conditions with reference to which the very old holdings in *Gouri Pattra's* case (1) were considered. When all is said, it can hardly be true throughout Bengal to-day that on

(8) 45 Ind. Cas. 660 ; 22 C. W. N. 826, at p. 827 : 27 C. L. J. 563.

the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size a contract can be inferred that he is liable at any time to re-assessment upon the actual area. This is to read the Act into the contract : not to apply the Act to the contract. How far such a view may take us is, I think, well illustrated by the Patna case *Kesho Prasad Singh* v. *Tribhuan* (9). "The *jamabandi* of 1272 if it recites a certain rent for a certain area at a certain rate per *bigha* is evidence of a contract and the learned Judge must take that evidence into consideration with the other evidence in the case and determine whether the tenancy was created on a consolidated rental. The landlord may ask the Judge to find on the strength of the *jamabandi* that the original contract was that the rent would vary with the area. If upon a consideration of the evidence adduced by the landlord the Judge declines to believe this and he finds that notwithstanding the *jamabandi* and the rent-receipts the tenant has succeeded in showing that the original *jama* was a consolidated one then the landlord cannot succeed. And again "In my opinion it is not incumbent upon the landlord to prove that there was an actual measurement or that there has been a practice of measurement." Now whatever may be thought of the decision in *Akbar Ali's case* (7) it is clear that nothing was then inferred in the absence of proof of measurement. Measurement was proved in the cases of *Lakuhi Narain* (6) and of *Dhrupad Chundra* (8) Chatterjea, J., in the Full Bench case of *Nilmani Kar* v. *Sati Prosad Garga Bahadur* (10) both at the beginning and the end of his judgment seems to me to re-affirm the law of *Gouri Pattra's* case. I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has *prima facie* to show that the rent was a consolidated rent for all the land within specific boundaries but that in the absence of such proof the more production of such *dakhilas* as those now in evidence does not suffice to throw any onus on the tenant. The position then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving if he can, a contract of the nature indicated in *Dhrupad Chandra's* case (8) but entries of area and rate in *dakhilas* or *jamabandis* do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence.

The remaining question is as to whether the plaintiff is entitled to enhancement of rent. The only case made as to this rests upon the allegations that the tenant Kaulat has converted or improved paddy land into mulberry land and that Lagnu's mulberry land has been made orchard. The plaintiff appears to have claimed for the higher class of land at the prevailing rate therefor in each case. The learned Subordinate Judge has held it to be inequitable to grant enhancement as all the cost and labour of the improvements had been borne by the tenants. No doubt as an abstract and universal proposition applicable to all cases and in all circumstances there is room here for qualification or for criticism. A tenant may, for example have been so over paid for his labour by its result that part of the latter should be attributed after a certain time to the land whereon he laboured. I see no ground for thinking that in these cases the learned Judge was called upon by the evidence before him to deal with any sensible case made by the landlord to that effect. For all that appears, the suggestion of such a theory now is quite *in nubibus*. It is to be presumed that the Courts below are well aware that enhancement of rent is equitable or inequitable in all the circumstances of each case and the fact that as in duty bound they indicate the general considerations that weigh with them, in no way warrants the conclusion that their discretion was not properly exercised upon the facts before them.

In my judgment these appeals fail and should be dismissed.

Buckland, J.—I agree.

K. S. D. *Appeals dismissed.*

(9) 39 Ind. Cas. 611 ; 2 P. L. J. 276 ; 1 P. L. W. 409.

(10) 61 Ind. Cas. 82 ; 48 C. 556 ; 32 C. L. J. 302 ; 25 C. W. N. 230, (F.B.).

ADURI CHELMAYYA *v.* ADURI LAKSHMI DEVAMMA

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 105 OF 1923 AND CIVIL REVISION PETITION NO. 638 OF 1923.

December 5, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Waller.

ADURI CHELMAYYA MINOR REPRESENTED BY NEXT FRIEND CHELLAMMA—PLAINTIFF APPELLANT—

versus

ADURI LAKSHMI DEVAMMA AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XLI, r. 23—Suits Valuation Act (VII of 1887) s. 11—Trial Court, findings by, on all issues—Appeal—Order of remand—Appellate Court, procedure of—Second appeal—High Court whether can interfere—Revision—Jurisdiction, objection as to.

Where the Trial Court recorded evidence on all the issues framed in a case, and gave findings on all but one, though without any reasons in five of them, and on appeal by defendant, the Appellate Court, treating the case as one disposed of on a preliminary point, set aside the decree of the lower Court and all the findings and remanded the case for fresh decision after a fresh trial :—

***Held*, (1) that the procedure adopted by the lower Appellate Court was irregular ;**

(2) that the order of remand was not a proper order and ought to be set aside ;

(3) that the order could not be maintained simply because the party appealing would be prejudiced in not being able to raise an objection as to jurisdiction in the Appellate Court ;

(4) that the order of remand being an order which the lower Appellate Court was incompetent to pass the High Court could interfere in revision, if no appeal lay ;

It is clearly the policy of the law that when any question of jurisdiction is raised, it should be raised in the Court of first instance at the earliest stage and that it should be given effect to by the Appellate Court only if there has been prejudice caused by the trial in the first Court.

Appeal against the judgment and order of remand of the Court of the Subordinate Judge, Kistna at Ellore in A. S. No. 374 of 1922 preferred against the decree of the Court of the District Munsif, Kovvur in O. S. No. 137 of 1920.

Messrs. *C. V. Ananthakrishna Iyer* and *V. Viyanna*, for the Appellant.

Mr. *B. Satyanarayana*, for the Respondents.

JUDGMENT.—This is an appeal against an order of remand by the Subordinate Judge of Kistna. The objection taken before us to it is that the order of remand was incompetent and that it should be set aside. What happened was : the Munsif tried the whole of the suit recording evidence on all the issues framed in the case. There were altogether eleven issues, ten issues originally framed and one additional issue. He gave findings on all the issues except the eleventh issue, namely, the additional issue. But in doing so he gave reasons and discussed the evidence only as regards issues 2, 4 and 10 but as regards issues 5 to 9 he merely recorded,

"I find the issues for the plaintiff."

He has not given any reasons for the conclusion that he came to in favour of the plaintiffs on those issues. On appeal, the Subordinate Judge treated the case as if it had been disposed of on a preliminary point, set aside the decree of the lower Court and all the findings which it had come to and remanded the case for fresh decision after a fresh trial.

We think that the order of the Subordinate Judge cannot be supported. In the first place, the order set aside the findings of the District Munsif on questions of fact on the various issues for which he had given reasons without those reasons or the evidence on which they were based being considered. We think that this was an improper procedure. In the second place, we do not think that the order of remand was a proper order under O. XLI, r. 23. All the evidence having been taken the Subordinate Judge might have acted under O. XLI, r. 24 or if he desired to get reasons from the Munsif on the issues for which he had not given reasons, he might have acted under O. XLI, r. 25 and asked the Munsif to try those issues and send up fresh findings on them. Instead of adopting that course, what he did was to reverse the decree altogether. The order has been tried to be supported by the learned

Vakil for the respondent on the ground that this was an order passed not under the Civil Procedure Code but under the inherent jurisdiction of the Appellate Court. It has also been argued that the respondent would be greatly prejudiced if we make an order remanding the appeal to the Subordinate Judge because he would not be able to give effect to the objection that the respondent raised in issue 7 as regards the jurisdiction of the first Court ; the learned Vakil says that under section 11 of the Suits Valuation Act, he could not properly urge that ground as a ground of attack against the decree of the first Court in the Appellate Court unless he is able to show that he has been prejudiced by the trial of the case in the Munsif's Court which apparently he thinks he would be unable to do. We do not think that this is any ground for supporting the order of the lower Appellate Court. It is clearly the policy of the law that when any question of jurisdiction is raised, it should be raised in the Court of first instance at the earliest stage and that it should be given effect to by the Appellate Court only if there has been prejudice caused by the trial in the first Court. The point of jurisdiction was raised in the first Court in this case and the District Munsit has given his finding on it though he has given no reasons for it. It is not the policy of the law to allow this kind of objection to be raised in appeal by the parties except under very restricted conditions. We do not think that the order of remand can be justified on the ground that the party appealing would be prejudiced in not being able to raise such an objection in the Appellate Court and, therefore, the first Court should be made to try the case once again to give effect to it. As contended by the learned Vakil for the respondent, there is no legal prejudice in the matter at all considering the policy of the law underlying section 11 of the suits Valuation Act.

It has also been contended that this appeal does not lie because the Subordinate Judge must be taken to have acted in the exercise of his inherent jurisdiction. After the Full Bench Ruling in *Raman Nayar* v. *Krishnan Nambudripad* (1) it is very doubtful whether the Court has got any inherent jurisdiction in the matter, but we do not decide that point because there is also a civil revision petition filed. We are clearly of opinion that the order of remand being an order which the lower Appellate Court was incompetent to pass we can interfere in revision if an appeal does not lie. We must, therefore, set aside the order of remand passed by the Subordinate Judge and direct him to restore the appeal to his file and to dispose of the case according to law. Costs of the miscellaneous appeal and the Civil Revision Petition will both abide and follow the result in the lower appellate Court.

K. S. D. *Order set aside.*

(1) 69 Ind. Cas. 828 ; 45 M. 900; 31 M. L. T. 208 ; 16 L. W. 425; 43 M. L. J. 354; (1922) M. W. N. 589 ; (1922) A. 4. R. (M.) 505.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 883 OF 1922.

March 27, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

PARTAP NARAYAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
NATHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Nakdi *holding*—*Suspension of rents*—*Landlord's failures to provide irrigation facilities.*

In the absence of a condition of the tenancy that the landlord should provide the necessary irrigation facilities, the tenant paying *Nagdi* rent are not entitled to suspension of the rent on the landlord's failure to provide those facilities.

Appeal from a decision of the Subordinate Judge, Gaya, dated the 29th July 1922, reversing a decision of the Munsif, Gaya, dated the 27th March 1922.

Messrs. *S. M. Mullick* and *Rai Gurusaran Prosad*, for the Appellants.

Mr. *Bimola Charan Sinha*, for the Respondents.

PARTAP NARAYAN SINGH *v.* NATHAN SINGH

JUDGMENT.

Das, J.—The only question raised in these appeals is whether the tenants are entitled to a suspension of the *nagdi* rent on the ground that the landlord did not provide the necessary irrigation facilities. The tenants do not suggest that it was a condition of the tenancy that the landlord should provide those facilities; but it has been broadly argued before us that the obligation of the tenants to pay rent is dependant on the obligation of the landlord to construct and maintain the irrigation works. In my opinion, there is no foundation for the argument in the Bengal Tenancy Act. I have no doubt whatever that in the absence of a contract or custom, there is no obligation on the part of the landlord to provide the tenants with the means to cultivate their lands. It is sufficient, for the purpose, to refer to the terms of section 30 (*c*) and section 76 of the Act. Section 30 (*c*) provides that the landlord is entitled to an enhancement of rent on the ground that the productive powers of the land held by the *raiyat* have been increased by an "improvement" effected by, or at the expense of, the landlord during the currency of the present rent; and section 76 defines "the improvement" to include water channels and other works for the storage, supply or distribution of water for the purposes of agriculture. Under the general law, then, the landlord is entitled to enhancement of rent if he provides irrigation facilities. Can it be argued that he is not entitled to any rent if he fails to maintain those water channels?

It may of course have been a term of the original tenancy that the landlord should provide irrigation facilities. But this is not the case of the tenants in their written statement, nor has the learned Judge in the Court below investigated such a case. As I understand the judgment of the learned Judge, his view is that there is a customary obligation on the part of the landlord to construct and maintain these water channels. The custom, however, was not pleaded in the written statement, and it was not open to the learned Judge to investigate a case of custom in the Appellate Court. I do not, however, desire to rest my decision on so narrow a ground, for I am satisfied that, on the facts found by the learned Judge, he should not have held that, in respect of the *nagdi* holdings, there was a customary obligation on the landlord to construct and maintain these water channels. The learned Judge has based his decision, first, on the entry in the Record of Rights, and, secondly, on a passage in Mr. O'Malley's volume on Gaya in the District Gazetteers' series. Now, in dealing with the entry in the Record of Rights, it is necessary to remember that the tenants have both *nagdi* and *bhawli* holdings and that, whereas the area of the *nagdi* holdings is 3·1 acres, the area of the *bhawli* holdings is 12·34 acres. Now, in regard to the argument founded upon the entry in the Record of Rights, the learned Munsif said as follows:—"The *khatian* filed in the case Ex. F shows that the fact that the landlord is responsible for irrigation is noted as one of the incidents of the *bhawli* holding and not of the *nagdi* holding." The learned Judge in the Court below, without making any attempt to meet the point made by the learned Munsif, makes a sweeping assertion that "the entry in the survey *khatian* (Ex. F.) shows that the expenses for irrigation and *gillandazi* should be borne by the landlords." In order to save a remand, I have myself examined the survey *khatian*, and it is perfectly clear that the entry recognizing the obligation of the landlord to provide irrigation facilities has reference to the *bhawli* holdings and not to the *nagdi* holdings. The passage from the District Gazetteer quoted by the learned Judge undoubtedly supports his view; but a careful reading of chapter XI shows that the passage upon which the learned Judge has relied has no reference to *nagdi* lands. Now it is well known that, though *nagdi* rents are payable in Gaya, the general system of rent payment is that known as *bhawli*. Mr. O'Malley points out that this system is a necessary result of the physical configuration of the country and is intimately connected with the system of irrigation in vogue. Now Gaya owes not only its fertility but almost its very existence as an agricultural country to artificial irrigation which it is impossible for the tenants to undertake. Now obviously there would be no inducement to the landlord to undertake the construction and maintenance of the artificial irrigation if the tenant paid a fixed cash rent to the landlord. This is the origin of the system of rent payment prevalent in Gaya under which

the landlord provides the irrigation facilities and receives a fixed share of the produce in return. But it is obvious that his obligation is in respect of *bhawli* lands and not of *nagdi* lands. Mr. O'Malley makes this perfectly clear in the following passage:—" Without pains and *ahars*, the tenant in many parts would get no rice crops; and on the other hand, if he paid a fixed cash rent to his landlord, the latter would be in a position to spend the money in other ways and to neglect the duty of laying out channels and embankments and of keeping them in order. Custom has, therefore, decreed that these works shall be made and maintained by the landlord, each tenant paying the quota of the expense by giving a certain proportion of the harvest as rent."

In my opinion, the decision of the learned Judge on the question of the *nagdi* rent cannot be supported. I would allow the appeals so far as this point is concerned, set aside the decision of the learned Judge in the Court below, and restore the decision of the Court of first instance. His decision on the question of *bhawli* rent must however be affirmed.

The appellants are entitled to their costs proportionate to their success both in this Court and in the Courts below.

Ross, J.—I agree that in this case it has not been shown that the tenants are entitled to remission of cash rents when the landlord fails to maintain the irrigation works. But I see no reason in principle why there should be an obligation to maintain these works in the case of *bhawli* holdings and not in the case of *nagdi* holdings, although the inducement to do so in the former case is greater than in the latter. If the obligation was there originally and prevails by custom it should affect both classes of lands equally. But there is no proof in this case that the obligation was there either from the inception of the tenancy or by custom in the case of *nagdi* holdings. In the case of *bhawli* holdings there is the evidence of the Records of Rights. It is significant that the landlord does not deny this obligation to maintain irrigation works, but adduced evidence to prove that that obligation had been fulfilled. This evidence has been disbelieved. This fact, however, does not relieve the defence from proving that in case of *nagdi* holdings the obligation was there. This has not been done. I, therefore, agree to the order proposed.

P. D. *Appeal partly allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 31, 32 AND 33 OF 1923.

September 5, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswamy Sastri.

KASIBHOTLA VENKATA SESHAMMA—PLAINTIFF—APPELLANT
versus
KALAGA GUNNESWARA RAO—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 9, O. XLIII, r 1 (k)—Death of plaintiff—Order refusing to bring applicant on record as legal representative—Appeal whether lies.

Where several persons apply to be brought on the record as the legal representatives of a deceased plaintiff and the application of some of them is granted and that of others is refused, there is no abatement of the suit and no appeal lies against the order refusing to bring on record some of the applicants as legal representatives of the deceased.

Lakshmi Achi v. *Subbarama Ayyar*, 29 Ind. Cas. 142; (1915) M. W. N. 327; 39 M. 488; 2 L. W. 403; 28 M. L. J. 491; 17 M. L. T. 385, followed.

Ayya Mudali Velan v. *Veerayee*, 58 Ind. Cas. 498; (1920) M. W. N. 467; 12 L. W. 188; 39 M. L. J. 218; 43 M. 812; *Gangadhara Ramarao* v. *Surya Rao (Raja of Pittapur)*, 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. J. 184, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Narasapur, in I. A. Nos. 584 and 585 of 1922 in O. S. No. 54, of 1922, I. A. Nos. 586 and 587 of 1922 in O. S. No. 56 of 1922 and I. A. Nos. 588 and 589 of 1922 in O. S. No. 64 of 1922, respectively.

Messrs. *G. Lakshmanna* and *V. Viyanna*, for the Appellant.

Mr. *B. Satyanarayana*, for the Respondents.

JAWAHIR LAL *v.* JARAU LAL

JUDGMENT.—These appeals arise out of the order of the Subordinate Judge dismissing the application to be brought on record as the deceased plaintiff's legal representative. The appellant and others filed separate petitions to be brought on record and the Subordinate Judge decided that the person claiming to be the adopted son of the deceased be brought on record. The appellant's application was dismissed as out of time. It is admitted that the suits have been withdrawn by the adopted son with leave to file fresh suits. A preliminary objection is taken that no appeals lie from the orders.

We think that the contention should be upheld. O. XLIII, r. 1 (k) of the Code of Civil Procedure provides appeals against an order under r. 9 of O. XXII refusing to set aside the abatement or dismissal of a suit. In the present case there has been no abatement. The application of one of several persons who applied to be brought on record as the legal representative was granted and it is difficult to see how there can be any abatement. None of the cases cited by the appellant's Vakil has any application. *Ayya Mudali Velan* v. *Veerayee* (1) is a case where it was held that the cause of action did not survive to the appellant. It was not a case of contest between rival claimants, one of them succeeding. *Gangadhara Rama Rao* v. *Surya Rao, Rajah of Pittapur* (2) was a case where a defendant was struck out as an unnecessary party and the suit dismissed as against him. Where a legal representative is brought on record there is no abatement within the meaning of O. XLIII, r. 1 (k) nor is there any decree within the definition of Section 2, clause 2.

In *Lakshmi Achi* v. *Subbarama Ayyar* (3) it was held that no appeal lies from an order refusing to bring on record a person as legal representative on an application under O. XXII, r. 3, and we think the present case is covered by the decision.

We think the Subordinate Judge was wrong in having expressed any opinion on the genuineness of the will under which the petitioner claims. As he held that the petitioner was out of time and that the delay was not satisfactorily explained it was unnecessary to go into the merits of the claim. We express no opinion as to the genuineness or validity of the will or as to the appellant's rights thereunder.

The appeals fail and are dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 58 Ind. Cas. 498 ; (1920) M. W. N. 467 ; 12 L. W. 188 ; 39 M L. J. 218 ; 43 M. 812.
(2) 49 Ind. Cas 835 ; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329 ; 25 M. L. J. 161.
(3) 29 Ind. Cas. 142; (1915) M. W. N. 327; 39 M. 488; 2 L. W. 403 ; 28 M. L. J. 491 ; 17 M. L. T. 385.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 331 OF 1920.

November 29, 1923.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

JAWAHIR LAL—PLAINTIFF —APPELLANT
versus
JARAU LAL AND OTHERS—DEFENDANTS —RESPONDENTS.

Hindu Law—Succession—Migration—Law applicable to migrated family—Daughters, whether take absolute estate—Mitakshara and Mayukha—Nagar Brahmans of Vadnagar, settled in U. P.—Commentaries, value of.

The law of succession is, in any given case, to be determined according to the personal law of the individual whose succession is in question. *Prima facie*, any person governed by the Hindu Law is held to be subject to the particular doctrines of the Hindu Law recognized in the Province in which he is residing. That law becomes the personal law and part of the status of every family residing in it. Consequently where any such family migrates to another province governed by another law, it carries its own law with it.

Where a family migrates from one territory to another and preserves its ancient ceremonies and practices the presumption is that it also preserves its personal law of succession, unless there is proof of the renunciation of the original law for that of the place migrated to.

Parbati Kumari Debi v. *Jagadesh Chunder*, 29 I. A. 82 ; 29 C. 483 ; 6 C. W. N. 490 ; 4 Bom. L. R. 365 ; 8 Sar. P. C. J. 205; *Balwant Rao* v. *Baji Rao*, 57 Ind. Cas. 545 ; 47 I. A. 213 ; 39 M. L J. 166; (1920) M.

JAWAHIR LAL *v.* JARAU LAL

W. N. 483; 22 Bom. L. R. 1070; 3 N. L. J. 251; 28 M. L. T. 157 ; 18 A. L. J. 1049 ; 12 L. W. 679 ; 16 N. L. R. 187 ; 25 C. W. N. 243 ; 48 C. 30 (P.C.), followed.

The Vyavahar Mayukha is considered to be a work of paramount authority in Gujerat, and where the Mitakshara and the Mayukha do not harmonise, the latter takes precedence of the former.

33 I. A. 176, followed.

Under the Vyavahar Mayukha a daughter Vtakes an absolute estate in property to which she succeeds as her father's heir.

Pranjwandas Tulsidas v. *Devkunvarbai*, 1 Bom. H. C. R. 130 at p. 133 : *Haribhat* v. *Damodarbhat*, 3 B. 171 ; 2 Ind, Dec. (N.S.) 115 ; *Balwant Rao* v. *Baji Rao*, 57 Ind. Cas. 545 ; 47 I. A. 213 ; 39 M. L. J. 166; (1920) M. W. N. 483 ; 28 M. L. T. 157 ; 18 A. L. J. 1049 ; 12 L. W. 679 ; 16 N. L. R. 187 ; 25 C. W. N. 243 ; 48 C. 30 (P.C.), relied on.

Among Vadnagar Nagar Brahmans settled at Aligarh, daughters take an absolute estate in their father's property, and on the death of one of them, her share does not go by survivorship but devolves on her own issue,

Commentaries on the Hindu Law do not enact the law, they merely explain it, and are evidence of the congeries of customs which form the law.

Balwant Rao v. *Baji Rao*, 57 Ind. Cas. 545 ; 47 I.A. 213 ; 39 M. L. J. 166 ; (1920) M. W. N. 483 ; 22 Bom. L. R. 1070 ; 3 N. L. J. 251 ; 28 M. L. T. 157 ; 18 A. L. J. 1049 ; 12 L. W. 679 ; 16 N. L. R. 187 ; 25 C. W. N. 243 ; 48 C. 30 (P.C.), followed.

Appeal from a decree of the Subordinate Judge, Aligarh.

Messrs. *Peary Lal Banerji*, *Girdharilal Agarwala*, *Panna Lal* and *Kailas Nath Katju*, for the Appellant.

Messrs. *B. E. O'Connor*, *M. L. Agarwala* and *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for the recovery of possession of certain property and for an account of the profits thereof on the allegation that the said property belonged to Balmukand ; that he was succeeded by his two daughters, *Musammat* Godavari and *Musammat* Gopi, and that on the death of *Musammat* Gopi, the entire property devolved on *Musammat* Godavari, the mother of the plaintiff. On the death of Balmukand, mutation of names was effected in respect of the property left by him, in favour of *Musammat* Godavari and *Musammat* Gopi. *Musammat* Gopi died in Sambat 1935, leaving a son, Moti Lal, who died three years later. The defendant Jarau Lal is the son of Moti Lal; and the other defendants, Panna Lal and Hira Lal, are his grandsons.

On the 31st December, 1899, a partition is said to have been effected between *Musammat* Godavari and her sons, Jawahir Lal and Ganeshi Lal, on the one hand, and Jarau Lal, the grandson of *Musammat* Gopi, on the other, and a deed of partition was executed and registered at Aligarh in evidence of the same.

Ganeshi Lal died childless in Sambat 1961. The allegation of the plaintiff was that after the death of *Musammat* Gopi, *Musammat* Godavari became entitled, according to the Mitakshara law, to the entire estate left by her father; that her grandson Jarau Lal was brought up *Musammat* Godavari, who treated him with great affection, and that the above deed of partition was obtained by Jarau Lal from *Musammat* Godavari by misrepresentation of facts and concealment from her of her real rights. It was also stated that the deed in question was not explained to her ; that she had no independent advice, and that the plaintiff and his brother Ganeshi Lal were kept ignorant of their rights and of the arrangement then being made. It was further alleged that at the instigation of Jarau Lal, the plaintiff and his brother Ganeshi Lal were compelled by *Musammat* Godavari to sign the deed, and that the deed was without consideration and invalid and unenforceable.

The defence was that the parties were governed by the *Mayukha* law, which prevailed in Gujerat, their original home; that *Musammat* Gopi got an absolute estate in the property inherited by her from her father and that the defendants were entitled to that property in succession to *Musammat* Gopi and her son Moti Lal. It was also urged that the deed of partition of the 31st December, 1899, was executed by *Musammat* Godavari and the plaintiff and his brother by their free consent, without any misrepresentation or undue influence ; that the said partition had been acted upon since 1899 and that the plaintiff was estopped from questioning its validity. It was further pleaded that the claim was barred by limitation. It is not necessary to go into the other pleas raised in the suit.

JAWAHIR LAL *v.* JARAU LAL

The Court below found that although no authentic history of the migration of this family from Gujerat was traceable, it was more than probable that it left Gujerat after the advent of Nil-Kanth in the 16th century; that the family came and settled in Aligarh about 150 years ago and continued to observe its original customs and practices, and that it was governed by *Mayukha* Law, according to which a daughter was entitled to take an absolute estate in the property inherited by her from her father. It further found that *Musammat* Godavari and the plaintiff and his brother executed a deed of partition after fully understanding its terms, and, in doing so, acted after mature deliberation and in accordance with the advice of old men of their caste and their relations and friends, and that the deed operated as a family settlement and was valid and binding on the parties. It also held that the plaintiff was estopped by his conduct and acts, and that the claim was barred by limitation.

The main question for consideration is whether the family is governed by the *Mitakshara* law or by the law which prevailed in Gujerat before the family migrated to these Provinces, or, in other words, whether, according to the law applicable to the family, a daughter is entitled to an absolute estate.

The parties are Nagar Brahmans, whose original home was in Vadnagar, a large town in the Baroda State. From Vadnagar a section of the Nagar Brahmans proceeded to Idar and settled there, and that section thereafter came to be called Idaria Nagars. From Idar they subsequently migrated to different places but at what period of time it is not possible to say. There is some evidence to show that the family to which the parties belong lived at one time in Banswara, Bundi and Kotah in Rajputana, and that Dina Nath, the earliest known ancestor of the family, moved from Muthra to Amroha and from Amroha to Aligarh, where a grove was planted by him, which is still in existence. The grove is said to be about 150 years old and goes by the name of Dina Nath's grove. The family can, therefore, be said to have settled in these Provinces sometime about or before that period, that is, about 150 and 200 years ago.

It is practically admitted by the witnesses of both the parties that after the family migrated from Gujerat and settled in these Provinces, it continued to observe its original customs and practices in the matters of births, marriages and deaths. At home the Gujerati language is used; and marriages are celebrated outside the *gotra* even within 4 or 5 degrees. The ceremonies and ritual observed on occasions of births, marriages and deaths are those which used to be observed in their original home in Gujerat. There is nothing to show that they departed in any way from their old practices or customs or adopted the law which prevails in these Provinces after they settled here. It is well-settled that the law of succession is, in any given case, to be determined according to the personal law of the individual whose succession is in question. *Prima facie*, any person governed by the Hindu Law is held to be subject to the particular doctrines of the Hindu law recognized in the Province in which he is residing. That law becomes the personal law and part of the status of every family residing in it. Consequently where any such family migrates to another Province governed by another law, it carries its own law with it (Mayne's Hindu Law, paragraph 48).

In *Parbati Kumari Debi* v. *Jagdish Chander* (1) and *Balwant Rao* v. *Baji Rao* (2), their Lordships of the Privy Council held that where a family migrated from one territory to another and preserved its ancient ceremonies and practices, the presumption was that it also preserved its personal law of succession, unless there was a proof of the renunciation of the original law for that of the place migrated to. The reason for the rule is that the Hindus being notoriously conservative in the matter of religious observances and rights, it is extremely improbable that the family which migrates would change its personal law, with which its religion is intimately connected.

It is important, therefore, to enquire what the law governing the Nagar Brahmans was in their original home in Gujerat and whether the same has been followed after they migrated to and settled in these Provinces.

(1) 29 I. A. 82; 29 C. 433; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205.

(2) 57 Ind Cas. 545; 47 I. A. 213; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 3 N. L. J. 251; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 16 N. L. R. 187; 25 C. W. N. 243; 48 C. 30. (P.C.)

JAWAHIR LAL *v.* JARAU LAL

The *Vyavahar Mayukha* is considered ot be a work of paramount authority in Gujerat. It was written by Nil-Kanth, a Mahratta Brahmin, residing in Benares, sometime in the 17th century, and forms a part of a larger treatise called Bhagwant Bhaskara, which was written under the direction of King Bhagwant Varman of the Sangar dynasty, who flourished in Bundelkhand and whose capital was situated in Bhareha at the confluence of the Chambal and the Jamna. The Bhagwant Bhaskara is divided into 12 books, one of which deals with *Vyavahar* or recognized law and usage. A branch of the family of Nil-Kanth was settled in Poona. The work soon obtained considerable celebrity in Mahratta country and some of the adjoining territories, and was early recognized as a standard work of authority on the subjects with which it dealt (Sarvadhicari's Hindu Law of Inheritance, second edition, page 311). The quotations frequently made by the *Shastris* attached to the Courts in Bombay and Gujerat in their *Vyavasthas* or opinions show that it was considered by them as an authentic source of the written law on the matter (West and Buhler's Hindu Law, 4th Edition, page 12). Indeed, as observed by their Lordships of the Privy Council in *Bai Kesser Bai* v. *Hansraj* (3) where the *Mitahksara* and the *Mayukha* do not harmonise, the latter takes precedence of the former.

The *Mayukha* does not specifically discuss whether a daughter takes a mere life-estate or an absolute estate in the property inherited by her from her husband. All that it says is :—

> " In default of her (the wife), the daughter succeeds ; for says Manu (Ch. 9. V. 130); 'The son of man is even as himself and the daughter equal to the son. How then can one inherit (his wealth) but she, who stands as it were himself ?' If there are more daughters than one, they should divide the wealth and take shares " (*Mandlik's Vyavahar Mayukha*, page 79).

Nil-Kanth allows a similar division in the case of co-widows, so that the right to divide carries by itself no particular significance. The citation from Manu that, " the son of a man is even as himself and the daughter is equal to the son" has been taken to mean that like a son, a daughter takes an absolute estate. But the citation is not followed by any comments by the author himself as to the nature of the estate inherited by a daughter, and while it is remarkable that what Manu said was, judging by the context, said with reference to a *putrika* or appointed daughter (Buhler's Law of Manu page 352), both the authors of the *Daya Bhaga* and the *Vyavahar Mayukha* utilize it for the purpose of strengthening their contention that a daughter was entitled to inherit, in the absence of sons, in preference to the more distant relations. Probably the practice of killing daughters at the time of their birth or of excluding them from inheritance was at that time coming into fashion and attracting attention.

Anyhow, whatever the intention of the author of the *Vyavahar Mayukha* in citing that passage from Manu was, from as far back as 1859, if not earlier, the view attributed to the *Vyavahar Mayukha* namely, that a daughter is entitled to an absolute estate has been accepted and enforced in Gujerat.

In one of the earliest cases the old Supreme Court of Bombay, after describing Manu, the *Mitakshara* and the *Vyavahar Mayukha* as the books of chief authority in that part of India, observed :

> " Now according to all the authorites the daughters take next after the widow, what then is the nature of the estate they take ? Here again there are differences of opinion ; but dealing with the question according to the three books I have mentioned, it appears to me that the daughters take an absolute estate. We find quoted in the *Mayukha* a passage from Manu—'The son of a man is even as himself and the daughter equal to the son; how then can any other inherit property, but a daughter, who is, as it were himself ?' With reference to this point also I consulted the *Shastris* both here and Puna and enquired whether daughters could alienate any, and what portion of the property inherited from a father, who died separate. The answer was that daughters, who so obtained, could alienate it at their will and pleasure ; and in this the *Shastris* of both places agree, both also referring to the

(3) 33 I. A. 176 ; 30 B. 431 ; 10 C. W. N. 802 ; 4 C. L. J. 9 ; 8 Bom L. R. 446 ; 3 A. L. J. 484 ; 1 M. L. T. 211 ; 16 M. L. J. 446 (P. C.).

JAWAHIR LAL *v.* JARAU LAL

above text in the *Mayukha* as their authority for that position." *Pranjiwan Das* v. *Deo Kuar Bai* (4).

In *Hari bhat* v. *Damodar bhat* (5) and other cases, the same view was adopted, and it has recently been affirmed by their Lordships of the Privy Council in *Balwant Rao* v. *Baji Rao* (2).

An attempt has been made on behalf of the plaintiff to establish that the family migrated from Gujerat long before the *Vyavahar Mayukha* was written, that is about 800 years ago; but the oral evidence produced on the point—and that is the only evidence here produced on the point—is not worth serious consideration. Even if adequate materials had existed, it may be well to remember, what LORD DUNEDIN pointed out, that the commentaries are only commentaries; they do not enact; they explain and are evidence of the congeries of customs which form the law. *Balwant Rao* v. *Baji Rao* (2).

In a case relating to a family of Ahban Thakurs, who had originally come from Gujerat and settled in Oudh many centuries ago, their Lordships of the Privy Council similarly said:—

> "Although the migration may have taken place before the *Mayukha* was written, it may well be that the rule was in force in earlier times and that on this point the *Mayukha* only embodied and defined a pre-existing custom." *Chandik Baksh* v. *Muna Kunwar* (6).

In any event it is important for the purposes of this case to enquire what the practice among the Nagar Brahmins in Gujerat was and has been during the last century in regard to the right of survivorship between the daughters of the last male-holder in the case of the death of any of them with or without issue. A large number of instances have been cited on behalf of the defendants, extending from the time of Dina Nath, the common ancestor of the parties.

Dina Nath had two daughters *Musammat* Tej Kuar and *Musammat* Sahaj Kuar. He left a grove which was divided on the death of *Musammat* Tej Kuar between her son Lajja Shankar and *Musammat* Sahaj Kuar. *Musammat* Sahaj Kuar transferred her share of the grove to Kesho Ram, from whom it passed by successive transfer to Ganga Bishun, who is now in possession. The statement of the plaintiff was that the grove had been divided between *Musammat* Tej Kuar and *Musammat* Sahaj Kuar in their life-time. But in the sale-deed executed by Kesho Ram, in favour of *Musammat* Gaura, on the 14th November, 1886, a half share of the grove in the question was described as having fallen on the death of Dina Nath to the share of *Musammat* Sahaj Kuar and the other half to the share of Lajja Shankar and the private partition effected between them was also referred to (Ex. K. K. K.).

The land of the grove was held by Dina Nath under a *muafi* grant. In 1839 the land was resumed but was exempted from the payment of Government revenue so long as the trees existed; and a copy of the order, granting the exemption, was given to the agent of *Musammat* Sahaj Kuar and Lajja Shankar, who held the grove at the time (Ex. R. R.).

Kameshwarji of Kotah had two daughters, *Musammat* Dhan Kaur and *Musammat* Gulab Kuar. The estate of Gulab Kuar devolved on her son Ganpat Lal and that of Dhan Kaur on her son Nathu Lal. The plaintiff states that on the death of Gulab Kaur her share devolved on *Musammat* Dhan Kuar; but that statement is refuted by the evidence of Ganpat Lal, the son of the former.

Kirpa Shankar had two daughters who inherited his estate. According to Ganpat Lal, the elder is dead and the younger is alive; and on the death of the former, her share went to her children and not to the younger sister.

Jaru Lal, a Nagar Brahman, residing in the Partabgarh State, says that Parasramji of Aterbhind had two daughters, *Musammat* Varjibai and *Musammat* Chhagi Bai, who succeeded to the property of their father. On the death of Varjibai, her share passed to her son Izzat Ramji, although her sister, *Musammat* Chaggibai, was then alive. On the death of *Musammat* Chaggibai, her interest passed to her sons Harakhramji and Sita Ramji.

(4) 1 B. H. C. R. 130 at p. 133.
(5) 8 B. 171; 2 Ind. Dec. (N. S.) 115.
(6) 24 A. 273 at p. 278; 6 C. W. N 425; 29 I. A. 70; 4 Bom. L. R. 376; 8 Sar. P. C. J. 233 (P. C.)

JAWAHIR LAL *v.* JARAU LAL

Thakur Lalji, a Nagar Brahman of Banswara, states that his father-in-law Gomti Lal had two daughters, who got his estate. The younger daughter died first and her interest devolved on her sons, Shiam Lal and Labh Shankar, although the elder, who is married to the witness, is still living. He also states that Gomti Lalji had a son, Anand Lalji, whose estate devolved on his death on his sister, who is married to the witness ; but it is not clear whether Anand Lalji had died in the life-time of his father or not, for the estate of Gomti Lalji could not have otherwise devolved on his daughters.

Sundarlalji, a Nagar Brahman of the Banswara State, deposes that his father-in-law Jikaji had 3 daughters who got his property. One of the daughters was dead. Her share devolved on her daughter's daughter, who is alive although the other two daughters of Jikaji are still living. He also states that Nukoji Madho Lal died leaving two daughters named *Musammat* Monghi and *Musammat* Lurki, and that on the death of the latter, her share devolved upon her son Kanhaiya Lal.

Nathu Lalji of the Banswara State deposes that Khara Lal had two daughters, *Musammat* Rasili and *Musammat* Parbati, who got his estate ; and that on the death of *Musammat* Parbati, her four daughters got her estate, and *Musammat* Rasili, who was alive, laid no claim to her sister's property. He also mentions that when his father-in-law, Ganga Lal, died, his four daughters inherited his property, and that on the death of one of those daughters, her daughters, named *Musammat* Pashyawati and Gulawati, became the owners of the share, which she had inherited from her father, although the other daughters of Ganga Lal were alive.

Gurwant Rai, a Nagar Brahman practising as a vakil in the Baroda State, says that the *Vyavahar Mayukha* is followed in the Baroda State, including Vadnagar, the original home of the parties, and he cites several instances in which daughters got an absolute estate.

Desai Dullabji of Patan had three daughters who got the estate of their father. There was litigation in this matter but the absolute right of the daughters to the estate inherited from their father was upheld by the Baroda State.

Daulat Rao of Patan had two daughters, *Musammat* Champa Kuar and *Musammat* Birmati, who similarly got an absolute estate in the property inherited from their father.

Madho Rai had two daughters, *Musammat* Ishwari and *Musammat* Shambhu, who got the estate of their father. On the death of *Musammat* Shambhu, her share devolved upon her son Babu and not on her sister who was alive.

Jado Lal of Patan had three daughters, *Musammat* Tara, *Musammat* Jai and *Musammat* Tribeni, who got his estate. Of these *Musammat* Tara died first and her share devolved on her four sons, though her sisters were alive. Dhaya Bhai of Ahmedabad deposes that if a Nagar Brahman dies, leaving two daughters behind him, they become the owners of his estate ; and if one of the daughters subsequently dies, then her descendants will be the owners of her share in the estate and not his sister though she may be alive. He cites several instances.

Magut Ram had three daughters, *Musammat* Baba, *Musammat* Nani and *Musammat* Parbhaya, who inherited the estate. Of them the last-named died first and her husband entered into possession of her share in the estate. Then *Musammat* Baba died and her son Manjubhai got possession of her share. When *Musammat* Nani died, her three sons got her estate. Hari Lal left two daughters, *Musammat* Dhanba and *Musammat* Atanba, who inherited his estate. On the death of *Musammat* Dhanba, her son Magan Lal inherited her share. When *Musammat* Atanba died, her share devolved on her sons, Pirthi Rai and Nannu Bhai. Again Kesho Lal left two daughters, *Musammat* Bhomi Ben and *Musammat* Channu Ben, who inherited his estate. On the death of the former, 2 or 3 years ago, her sons Anand Lal and Himmat Lal got her share, though *Musammat* Channu Ben was alive.

Vireshwar had two daughters, *Musammat* Sada Lakshmi and *Musammat* Dawali Ben, who inherited his estate. The former died first, and her son Uttam Lall inherited her share. The latter died two or three years later and her share devolved on her daughter, *Musammat* Munni Ben. Hardeo Ram had two daughters, *Musammat* Ganga Lakshmi and *Musammat* Jasba Ben. Of these the former died first and her husband got her share in the estate. 4 or 5 years later *Musammat* Jasba Ben died

and her sons Rasik Lal and Basant Lal became the owners of her share.

Bhaskar Lal, a pleader of Ahmedabad belonging to the Vadnagar community, corroborates the previous witness with regard to two of the instances cited by him and adds that Moti Lal of Ahmedabad died, leaving two daughters *Musammat* Majanba and *Musammat* Anandba, who inherited his property, which included among other things certain plots of land situated at Godhrabi in the Panchmahal district, and that both of them sold certain property out of what they had inherited without the validity of the sale having been contested by any of the agnates of Moti Lal, who were alive.

Jayendra Rai, another pleader of Ahmedabad belonging to the same community, deposes that his maternal grand-father Trikam Lal died, leaving two daughters named *Muamsmat* Jai Lakshmi and *Musammat* Umia Lakshmi, who inherited his property, that his mother *Musammat* Jai Lakshmi died first, and that he and his brother inherited her property as her sons, although *Musammat* Umia Lakshmi was then and is still living. He confirms the statement of Dhayabhai in regard to the manner in which the property of Virashwarji of Ahmedabad devolved on his two daughters and on the death of one of them her share devolved on her son Uttam Lal in the life-time of her sister.

Dr. Mukand Rai of Ahmedabad states that Hari Lalji died, leaving two daughters, *Musammat* Mani Ganga and *Musammat* Hari Ganga, and on the death of the former in 1906, he and his brother inherited her share as her sons, though *Musammat* Hari Ganga was alive. He further states that the share of *Musammat* Hari Ganga devolved on her death in 1917 on her two daughters *Musammat* Ganwant Bai and Sanwal Bai.

Mr. Anand Shanker, the Principal of the Hindu University, Benares, deposes that the parties belong to his caste, and that in Gujerat the *Mayukha* is followed in preference to the *Mitakshara*, where the two conflict, and that the daughters inherit an absolute estate from their father.

Sheo Lal, another pleader of Ahmedabad belonging to the same community, corroborates some of the previous witnesses with regard to four of the instances cited by them. Makund Rai, another pleader of Ahmedabad belonging to the same community, states that his maternal grand-father, Hari Shanker, died, leaving a widow and three daughters, and on the death of the widow, his three daughters inherited his property, and that when one of the daughters died, he and his nephews inherited her share as her heirs. He further states that when another daughter died, her interest wes inherited by her two daughters.

Ishwar Rai of Patan cites three instances from his city wherein daughters inherited an absolute estate. He states that Dasai Dullabji had three daughters, *Musammat* Dhan Lakshmi, *Musammat* Sri Lakshmi and *Musammat* Hira Lakshmi, who inherited his estate. *Musammat* Hira Lakshmi died first and her share devolved upon her sons, Moti Nath and Rang Nath. Then *Musammat* Dhan Lakshmi died and her share devolved on her sons Shambhu Chand, Nanda Chand and Moti Chand. The third daughter *Musammat* Shri Lakshmi is still alive. He also states that Desai Amidhar had 3 daughters, *Musammat* Swagta, *Musammat* Alankrita and *Musammat* Panaika, who sold his estate, and on the death of *Musammat* Swagta, the eldest of them, her share devolved upon her son, Nawal Shanker, though the other daughters of Desai Amidhar were alive.

The remaining instance cited by him is that of Madho Rai which has already been mentioned by some of the other witnesses.

Naunidh Lal of Jhalrapatan states that his maternal grand-father had a brother, Amba Shankar, who had a daughter, *Musammat* Kasturi Bai, and that on the death of that daughter, her daughter got her estate.

There are thus in all about 30 instances showing that among Vadnagar Nagar Brahmans, the daughters inherit an absolute estate and that on the death of one of the daughters, her share does not go by survivorship but devolves on her own issue. There is no proof of any cogent instance to the contrary. Most of the witnesses adduced by the plaintiff are persons belonging to other castes, who could not have possessed any accurate knowledge as to the customs and practices, prevailing in the Nagar Brahman community. Most of those, who belong to that community, merely

make vague and general statements without citing any specific instances in proof of what they assert. The only witness, who has made an attempt to cite some instances, is Jani Itchashankar of Aligarh. He states that the Nagar Brahmans of the United Provinces and Rajputana do not write the names of their fathers after their names, and that, unlike what they do in Gujerat, the ladies of their families observe *pardah*; but he forgets that the difference of surroundings is often responsible for a change of habits of that kind. There are, for instance, many people, who, following the English method, describe themselves by their surnames and their full or real names are often unknown to the outside world. He states that the daughters of Kameshwarji of Kotah were Musammat Dhan Kuar and Musammat Phul Kuar and that on the death of the former, the other got the whole of his estate; but he is refuted on that point by Naunidh Lal, a descendant of Kameshwarji, and many other witnesses.

Naunidh Lal explains that Kameshwarji was a *jagirdar* of Kotah; and he adopted Nathu Lal, the son of his daughters, in order that the *jagir* might continue in the family, inasmuch as no ladies were allowed by the State to get the *jagir*. The adoption, if made, did not, however, affect the devolution of the other property, which as stated by Naunidh Lal devolved on the daughters of Kameshwarji and on their descendants in succession. He admits that Jhamman Lal Jha of Benares had three daughters, *Musammat* Jamna Kuar, *Musammat* Jugli Kuar and *Musammat* Manni Kuar, and that on the death of the first named, her sons got her property. He suggests that Jhamman Lal Jha left no money or ornaments and lived in a house on rent; but he goes on to say that when Musammat Manni Kuar and her daughter died, he wanted that her mother, Musammat Jugli Kuar should get all the property, but he took no steps to enforce his claim. He also mentions that Jagan Nath Jha of Benares left three daughters, Musammat Chameli, Musammat Manki and Musammat Jamna Kuar, and that when the last named died childless, her sisters got her property. He, however, admits that she had no other relative alive and that on the death of Musammat Chameli, her sons got her property and on the death of Musammat Manki, her son got her share.

There can be no stronger instance the other way than that of the daughters of Dina Nath, already referred to; for, on the death of one of the daughters of Dina Nath, the ancestor of the parties, the grove left by Dina Nath, was divided between her son Lajja Shankar and his surviving daughter. There are 19 instances of similar succession from Ahmedabad, six from the Banswara State, one from Aterbhind, and the rest from Rajputana and the United Provinces.

On behalf of the plaintiff some stress has been laid on the decision in *Lakshmi Ram Jani* v. *Hari Ram Dube* (7), but in that case the question related to the right of succession to a *stridhan*; and though the family was found to have migrated from Gujerat to Jaipur and from Jaipur to Benares, about 100 or 150 years ago, no instance of succession under the *Mayukha* Law had been deposed to by any of the witnesses examined in the case; and that was treated as a fact of some significance, for the family was a big one and instances might have been expected to be forthcoming if the *Mayukha* Law had applied. Here an instance from the very family, to which the parties belong, has been proved and established beyond the possibility of doubt by the oral and documentary evidence adduced; and corroborated as it is by a large volume of evidence, coming from Gujerat and Rajputana, the presumption that the family brought its personal law when it migrated from Gujerat to these Provinces, stands affirmed; and the claim of the plaintiff to the property, which Musammat Gopi had inherited from her father, must, therefore, fail.

The subsequent conduct of Musammat Godaveri and her sons, Jawahir Lal and Ganeshi Lal, in agreeing to a partition of the property, left by Balmukand and Jarau Lal, the son of Musammat Gopi, further supports the same conclusion. There is evidence to show that Musammat Godavari thoroughly understood what she was doing when she executed the deed of partition of the 31st December 1899. The deed was written after the plaintiff had an opportunity of consulting a pleader who is dead and could not be produced. After the death of Onkar Lal, the husband of Musammat Gopi, the plaintiff claimed the entire pro-

(7) 52 Ind. Cas. 25; 1 U. P. L. R. (A) 18.

perty belonging to Balmukand, relying on the *Mitakshara* law in support of his claim. A dispute arose and the parties sought the intervention of some members of the caste at Aligarh. They settled that *Musammat* Godaveri and the present defendant should divide the property half and half and got the latter to pay Rs. 7,000 to the plaintiff in order that all possibility of litigation might be obviated and the matter finally closed. In accordance with that settlement a deed of partition was drawn up with the full consent of the plaintiff and his brother Ganeshi Lal. The Sub-Registrar went over to the house of *Musammat* Godaveri; and there he read and explained the deed to her, and there can be no doubt that neither the plaintiff nor *Musammat* Godaveri were under any misapprehension as to the effect of the transaction into which they were entering. The learned Subordinate Judge rightly characterised the evidence produced by the plaintiff as unreliable. The demeanour of the plaintiff in the witness-box was found to be unsatisfactory; and, as the learned Subordinate Judge points out, he went on saying anything on the spur of the moment to fit in with his case. There was clearly a *bona fide* dispute between the parties as to the nature of their rights. That dispute was amicably settled and a large amount was paid by the defendant Jarau Lal to the plaintiff and his mother to set the matter at rest.

Section 6 of the Transfer of Property Act, has no application because, as pointed out by their Lordships of the Privy Council in *Kanhai Lal* v. *Brij Lal* (8), there is no question here of any conveyance of or of an agreement to convey any future right or expectancy or of an agreement to relinquish any such right or expectancy. *Musammat* Gopi had an absolute interest in the share, which she had inherited from her father. The claim laid by t*Musammat* Godaveri and the plaintiff to that share was set at rest in the manner settled by the parties and entered in the deed of partition aforesaid. That partition has since been acted upon, mutation of names was effected in accordance therewith and the parties have enjoyed their respective shares in accordance with the allotment then made. The claim is now barred by limitation. The other pleas have not been pressed.

This appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(8) 47 Ind. Cas. 207; 40 A. 457 at p. 495; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 757 OF 1921.

February 4, 1924.

Present :—Mr. Justice Wallace.

MAMILLAPALLI VEERESALINGHAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

PONNUKOLLU KONDAYYA—PLAINTIFF—RESPONDENT.

Registration Act, (XVI of 1908), s. 28—Mortgage-deed—Fraudulent registration—Fictitious property included—Mortgagee unaware of fraud—Registration, validity of.

When a mortgagor includes in the mortgage-deed for purposes of registration property which does not belong to him, the registration is not invalid at least so far as the interests of the mortgagee are concerned if no collusion by the latter to assist the mortgagor in the fraud is made out.

Venkata Lakshmi Kamaraju Garu v. *Pada Venkata Jagannadha Raju Garu*, 77 Ind. Cas. 464: 46 M. L. J. 12; (1924) M. W. N. 125; 38 M. L. T 243; (1924) A. I. R. (M) 281; *Harendra Lal Roy Chowdhury* v. *Haridasi Bibi*, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L T. 6; 18 C. W. N. 817; 19 C. L J .484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L W. 1050; 41 I. A. 110 (P. C.); *Biswanath Prasad* v. *Chandra Narayan Chowdhury*, 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127, (P. C), followed.

Second appeal against the decree of the Court of the Subordinate Judge, Masulipatam in A. S. No. 3 of 1920, (A. S. No. 255 of 1919 District Court, Kistna) preferred against the decree of the Court of the Principal District Munsif, Gudivada in O. S. No. 223 of 1917.

Mr. *P. Narayanamoorthy*, for the Appellants.

RAMA *v.* WAMANRAO

Messrs. *A. Krishnaswamy Aiyer* and *V. Krishna Mohan*, for the Respondent.

JUDGMENT.—The only point raised before me is whether the mortgage is void on the ground that its registration was effected by a fraud on the registering officer, in as much as the mortgagor intentionally included therein for purposes of registration property which did not belong to him. There is no allegation that the mortgagee was aware of the fraud and shared in it. In these circumstances I must accept the ruling of a Bench of this Court in *Venkata Lakshmikantaraju Garu* v. *Pada Venkata Jagannadha Raju Garu* (1) following *Harendra Lal Roy Chowdury* v. *Haridasi Bibi* (2) *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (3), and *Pahlad Lal* v. *Laraiti* (4), that where no collusion by the mortgagee to assist a fraud by the mortgagor in respect of the registration of the document has been made out, the registration is not invalid, at least so far as the interests of the mortgagee are concerned. The decree of the lower Appellate Court is, therefore, right and this Second Appeal is dismissed with costs. Time for payment is extended up to 16th April 1924.

V. N. V. *Appeal dismissed.*

N. H.

(1) 77 Ind. Cas. 464 ; 46 M. L. J. 12 ; (1924) M. W. N. 125 ; 98 M. L. T. 248 ; (1924) A. I. R. (M) 281.

(2) 23 Ind. Cas. 637 ; 41 C. 972 ; 27 M. L. J. 80 ; (1914) M. W. N. 462 ; 16 M. L. T. 6 ; 18 C. W. N. 817 ; 19 C. L. J. 484 ; 16 Bom. L. R. 400 ; 12 A. L. J. 774 ; 1 L. W. 1050 ; 41 I. A. 110 (P.C.).

(3) 63 Ind. Cas. 770 ; 48 C. 509 ; 48 I. A. 127 (P. C.).

(4) 48 Ind. Cas. 200 : 41 A. 22 ; 16 A. L. J. 871.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 397 OF 1922.

April 8, 1924.

Present:—Mr. Kinkhede, A. J. C.

RAMA AND ANOTHER—PLAINTIFFS —APPELLANTS
versus
WAMANRAO—DEFENDANT—RESPONDENT.

Mortgage, usufructuary—Redemption before expiry of term when allowable.

Unless in a usufructuary mortgage securing possession to the mortgagee for a fixed term, there is either a special condition for the earlier redemption or there is a pleading and proof of fraud, duress or undue influence owing to which the period was fixed, the mortgagor or his representative or transferee cannot offer or claim to redeem and recover back possession from the mortgagee before the expiry of the specified period.

Case-law reviewed.

Appeal against the decree of the District Judge, Wardha, in Civil Appeal No. 14 of 1922, dated the 15th June 1922.

Mr. *T. J. Kedar*, for the Appellants.

Sir *B. K. Bose* and Messrs. *G. S. Lule* and *P. N. Rudra*, for the Respondent.

JUDGMENT.—Both the parties are agreed before me as to the nature of the document, dated 31st March 1884, that it is a usufructuary mortgage and not a lease for 77 years as was contended in the Courts below. Owing to this agreement between the parties there is no necessity for me to decide either ground No. 5 of the appeal or the cross-objection urged by the respondent.

The only points, which require attention in this Second Appeal, are (1) whether the present suit for redemption before the expiry of 77 years from the date of the mortgage is maintainable, (2) if so, what should be the price of redemption according to the strict terms of the said mortgage.

It is conceded on behalf of the mortgagors appellants that ordinarily the right to redeem and the right to foreclosure are co-extensive so that just as a mortgagee cannot foreclose before the mortgage debt becomes payable, similarly a mort-

gagor cannot claim to redeem before the principal money becomes due and payable, that is, before the expiry of the term fixed, or the date fixed for payment, that this again depends upon the terms of each mortgage. If a mortgage-deed contains a covenant securing to the mortgagee possession of the mortgaged property for a fixed term and also contains a clause giving the mortgagor an option to redeem the mortgage earlier on certain conditions, the question of the interpretation of the terms of the mortgage, for the purpose of gathering therefrom the real intention of the parties, is always a matter of great difficulty.

In *Jivanlal* v. *Dhunde* (1) which, however, was not a case of usufructuary mortgage, Ismay, J. C., held that despite the creation of a term the mortgagor may redeem, at any time unless it appears from the nature of the mortgage or from other circumstances that the term was created in favour of the mortgagee as well as of the mortgagor.

There has been a body of decisions in which it was held that redemption before due date was permissible in spite of the creation of a long term, provided it was proved that the long term fixed by the mortgage was inserted in the deed as the result of undue influence or misrepresentation, so that its terms could, therefore, be relieved against : *Sayad Abdul Hak* v. *Gulam Jilani* (2), and *Dalthawan Singh* v. *Amardeo Singh* (3). I may add here three cases of our own Court. In *Doma* v. *Domadeo* (Second Appeal No. 181 of 1918) and *Meghraj* v. *Dinia* (Second Appeal No. 8 of 1922) respectively decided by Batten, A. J. C. and Hallifax, A. J. C., redemption before due date was permitted on the ground that the condition entitling the mortgagee to retain possession after payment of the amount due under the mortgage was a clog on the equity of redemption so that it was a term which might be presumed to have been inserted by undue influence, and, therefore, fit to be relieved against. In *Daolat Rai* v. *Sheikh Chand*, (4) Batten, A. J. C., held that a stipulation in a deed of usufructuary mortgage that after the mortgage-money is paid off, the mortgagee shall remain in possession as a perpetual lessee on payment of a yearly rent is a clog on the equity of redemption which the Court will not enforce. These cases are easily distinguishable from the other cases mentioned below, and even from the facts of the present case, where no fraud, duress or undue influence is held proved, and no question of a permanent release of the right to redeem is involved.

In *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Viracherla Surianarayana Raju Bahadur* (5), it was laid down by Turner, C. J., and Muttusami Iyar, J., that in each case the Court must look to the language of the contract to ascertain whether the parties intended that redemption should take place only at the end of the term or at any earlier period at the option of the mortgagor ; that where the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract, it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract is one of mortgage and that where parties have agreed that possession of the property shall be transferred to a mortgagee for a certain term an intention may be inferred that redemption should be postponed until the end of the term. Applying these tests to the facts of their case the learned Judges upheld the decree restoring the mortgagee to possession for the term of 19 years, although the mortgagor's transferee had offered to redeem him and upon his refusal to be redeemed earlier ousted him and thus compelled him to sue upon the mortgage for recovery of possession.

In *Mansaram* v. *Sakru* (Second Appeal No. 679 of 1907) decided on 16-6-1909, which was a case of a mortgage dated the 26th June 1883 securing possession to the mortgagee for 30 years, but which was sought to be redeemed in 1906, 7 years before the expiry of the term thereby fixed, it was held by Drake-Brockman, J. C., following the Madras case, that there was no need in that case to draw any inference from a mere fixation of a term, as was done in the Madras case, because the mortgagors laid upon themselves an onerous burden to be discharged if they did not let the term expire. The 30 years term fixed by the deed was not

(1) 16 C. P. L. R. 59.
(2) 20 B. 677 ; 10 Ind. Dec. (N. S.) 1021.
(3) 28 Ind. Cas. 926 ; 12 A. L. J. 492.
(4) 31 Ind. Cas. 869 ; 11 N. L. R. 180
(5) 2 M. 314 ; 4 Ind. Jur. 500 ; 1 Ind. Dec. (N. S.) 489.

objected to as in itself unenforceable on the ground of undue influence or of the length being an excessive and oppressive length, and as such that case was ditinguishable from the Bombay case cited above. It was found in that case that the fields were not in good condition at the time of the mortgage and also subsequent to that date, and that the mortgagee was not to get anything from the mortgagor, even if he suffered loss in any year ; and in view of the stipulation about interest and the profits of fields it was held that the term prescribed for the payment of the mortgage-money must ordinarily be allowed to expire before the mortgagor could claim possession. The mortgagors had, in that case, expressed their unwillingness to pay what would be due from them under the stipulation for early redemption. The suit was, therefore, dismissed on the ground that plaintiffs were not entitled to redeem within 30 years except in compliance with that stipulation.

In *Beniram* v. *Tatya* (Second Appeal No. 282 of 1914) the question was whether the mortgagors were entitled to redeem the usufructuary mortgage dated the 19th June 1883 before the expiry of the term of 50 years. There was a clause in the deed by which the mortgagor expressly undertook not to re-pay any principal within 50 years and it also contained an express covenant that if any payment was made towards principal within 50 years, the mortgagee's possession shall, nevertheless, continue, undisturbed for the full term. The mortgagee was, by the terms of mortgage, relieved from all need to account as it was expressly provided that he should pocket all profits. Drake-Brockman, J. C., took the view that co-extensiveness, in the absence of a binding agreement to the contrary, of the rights to redeem and to foreclose was the general principle recognised by the Transfer of Property Act, and that mere length of the term for which redemption has been postponed was not a sufficient reason for not enforcing the postponement, and upheld the District Judge's dismissing the suit as premature, on the authority of *Puran Singh* v. *Kesar Singh* (6), *Ram Prasad* v. *Jagrup* (7) and the cases cited at page 553 of *Sarbdaman Singh* v. *Bijai Singh* (8).

In *Sonba* v. *Mahadeo* (Second Appeal No. 425 of 1915) Stanyon, A. J. C., followed the decision in *Beniram* v. *Tatya* (Second Appeal No. 282 of 1914) and upheld the dismissal by lower Appellate Court of a similar suit filed in 1911 for redemption of a usufructuary mortgage dated the 30th April 1885, before the expiry of the term of 60 years, and observed that the term of 60 years mentioned by the mortgage was fixed in the interest of the mortgagee. This he inferred from a stipulation in the deed to the effect that even if the mortgagor were to pay before the expiry of the term, the mortgagee would still be entitled to hold on for the full period. He held that this clause could not be an agreement to allow redemption before 60 years, as argued for the plaintiff-appellant, but that it was just the other way. He laid down in emphatic terms that the mortgagor could not, by tender or deposit of the money before due date, claim to recover the land from the possession of the mortgagee.

In the case of *Bala* v. *Ghasi*, (9) decided by Hallifax, A. J. C., it has been pointed out that the view taken in *Jiwanlal* v. *Dhunde* (1) was obsolete, and could no longer be regarded as sound law in view of the decision of the Privy Council in *Bakhtawar Begum* v. *Husaini Khanum* (10), to the effect that ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period, though there is, of course, nothing to prevent the parties from making such a special condition.

In the case of *Purna Chandra Sarma* v. *Peary Mohan Pal* (11) decided by Harrington and Mookerjee, JJ., which is cited in *Bala* v. *Ghasi* (9), it was held that unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be

(6) 39 P. R. 1907; 119 P. L. R. 1907; 165 P. W. R. 1907.

(7) 15 Ind. Cas. 880; 10 A. L. J. 157.

(8) 24 Ind. Cas. 705 ; 36 A. 551 at p. 553; 12 A. L. J. 927.

(9) 64 Ind. Cas. 730; 17 N. L. R. 202 at p. 204.

(10) 28 Ind. Cas. 355 ; 36 A. 195 ; 18 C. W. N. 586; 26 M. L. J. 474 ; 12 A. L. J. 473 ; 19 C. L. J. 477 ; (1914) M. W. N. 411 ; 15 M. L. T. 389 ; 16 Bom. L. R. 844 ; 1 L. W. 813 ; 41 I. A. 84 (P. C.).

(11) 15 Ind. Cas. 287 ; 39 C. 828 ; 17 C. W. N. 149.

deemed to be co-extensive, although in that particular case, it was found that there was a special agreement to the contrary which made it permissible for the mortgagor to pay before the date fixed. This necessarily took the case out of the general rule. The case of *Bala* v. *Ghasi* (9), is thus the latest reported decision of this Court which gives effect to the view that "in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption only arises on the expiry of the specified period." It is further laid down in this case that a tender of the principal, made before the end of the term of the mortgagee, with interest only for the time that has already elapsed is not a valid tender of the full price of redemption and does not disentitle the mortgagee to interest thereafter.

In view of the above decision it must be taken as settled law that unless in a usufructuary mortgage securing possession to the mortgagee for a fixed term, there is a special condition for earlier redemption the mortgagor or his representative or transferee cannot offer or claim to redeem, and recover back possession from the mortgagee before the expiry of the specified period. Examining the language of the mortgagee deed dated 31st March 1884 (Exhibit D-1) for the purpose of ascertaining what the intention of the parties was, and considering the facts of the case in the light of the tests laid down in *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Viracherla Surianarayanaraju Bahadur* (5), and in the other cases, I am of opinion that the learned District Judge has correctly interpreted it and the view taken by him appears to me to be sound. The document in question recites that the land bearing certain number of *mouza* Yeli is leased out "for cultivation in satisfaction of the debts *from the year* 1294 *Fasli to the end of the year* 1370 *Fasli so that you may enjoy possession of the field for* 77 *years and appropriate from year to year until the expiry of the full term the produce and income thereof* each year. Since you are the malguzar of Yeli you should pay the rent of the land on my account. . . . *Your possession of the field for the period agreed above* neither we nor our kinsmen nor any one else will disturb. Should any obstruction be made it will be treated as not right. Should we, or our kinsmen or anybody else think of disturbing, none shall be lawfully entitled to disturb without first depositing the principal amount of Rs. 748-15-0 and whatever may be due on account of the interest thereon for 77 years at 1 per cent. per mensem, with some respectable man for payment to you; besides, we shall not claim credit for the income of the field, which you may take before such disturbance of possession. We are not responsible whether there be profit or loss in the field." The deed further authorises the mortgagee "to construct a well, to plant fruit trees and to erect *Kotha* or other structures also in the field and stipulates to make good the cost of such improvements, *the moment the full period of* 77 *years expires and the mortgagor gets the right to take back possession.*" The deed further declares that the mortgagor "*will then take back possession on expiry of the term.*" The official translation was not quite accurate and hence I have myself translated the above passage.

The one intention that pervades throughout the deed is to secure undisturbed possession to the mortgagee over the field mortgaged, for the *full term of* 77 *years specified therein*. It does not appear that the intention was to curtail the period of the mortgagee's enjoyment of the usufruct of the land during any portion of the term. The stipulation for the payment of principal money together with interest for 77 years without the liability on the part of the mortgagee to account for profits already appropriated appears to have been inserted in the deed by way of a further assurance or guarantee or covenant for securing peaceful, quiet and undisturbed enjoyment of the mortgagee for the full term of 77 years and for providing against all kinds of disturbances of such possession before the expiry of such term whether they be at the hands of the mortgagor or his kinsmen or anybody else. Such a covenant for quiet enjoyment could not be a clog on the equity of redemption or a penal provision which the Courts will endeavour to relieve against. If an earlier redemption of the mortgage was at all contemplated which, however, to my mind, does not seem to be likely, such redemption could under no circumstances be, except in compliance with the stipulations contained in the mortgage deed.

On the whole I think the intention of the parties to the mortgage in suit has been correctly interpreted and gathered and the present suit for redemption has been rightly dismissed as premature.

The appeal fails and is dismissed with costs in all the Courts.

G. R. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 757 OF 1920.

March 3, 1922.

Present :—Mr. Justice Oldfield and
Mr. Justice Venkatasubba Rao.

SI. POTTI NAYAKAR—PETITIONER
versus
SUPPAMMAL AND ANOTHER—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Sale in Execution—Trespasser in possession, right of, to set aside sale.

A trespasser in possession of property sold in execution of a decree has sufficient interest in the property to entitle him to make an application to set aside the sale under O. XXI, r. 89 of the Civil Procedure Code.

Per Oldfield, J. (contra) :—A trespasser in possession of property sold in court sale who has not completed his prescription does not possess an interest in property in virtue of a title acquired before the sale within the meaning of O. XXI 89 Civil Procedure Code.

Nature of possessory title examined.

Subbiyah Pandaram v. *Mahamad Mustafa Maracayar*, 40 Ind. Cas. 50; 32 M. L. J. 85 at p. 93, 21 M. L. T. 62; 5 L. W. 690; *Narayan* v. *Amgaude Malganda*, 62 Ind. Cas. 104; 45 B. 1004: 23 Bom. L. R. 455; *Naryan Kutti Goundan* v. *Pachiammal*, 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M.W.N. 358; 22 M. L. J. 864. *Asher* v. *Whitlock* (1866) 1 Q. B. D. 1; 35 L. J. Q B. 17; 11 Jur (N. S.) 925; 13 L. T. 254; 14 W. R. 26; Ex parte *Winder*, 1877 6 Ch. D. 696; 46 L. J. Ch. 572; 25 W. R. 768, explained.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge at Tuticorin, dated the 19th day of August 1920 in C. M. A. No. 10 of 1920 preferred against the order of the Court of the District Munsif, Tuticorin dated the 31st day of December 1919 and made in E. A. No. 830 of 1919 on S. C. S. No. 1223 of 1918.

Mr. *T. R. Venkatarama Sastriar*, for the Petitioner.

Mr. *K. V. Sesha Iyangar*, for the Respondents.

JUDGMENT.

Oldfield, J.—The first question in this case is whether any of the conditions specified in section 115 of the Civil Procedure Code for the exercise of our revisional powers are established. We can of course proceed only on the facts as found by the lower Court; and shortly the decision on the facts found is that a trespasser, who enters on possession of property sold in court sale, before the sale took place "holds an interest in that property by virtue of a title acquired before the sale," and is entitled to apply under O. XXI, r. 89. If, as petitioner contends, the lower Court has used the powers conferred by the rule on the application of a person, who has not the legal character specified therein, such use of powers would be the exercise of a jurisdiction not vested in it by law. The present case in fact closely resembles in this respect *Sundaram* v. *Mausa Mavuthar* (1). Following that authority I hold that petitioner's contention if established, will justify interference in revision.

It is said next that the lower Court reached its finding in favour of the respondents' possession in the absence of, or without considering evidence. This is incorrect, since there is evidence on the point on record and the judgment contains a reference to it.

Turning now to the question which arises with reference to the lower Court's jurisdiction whether a trespasser in possession who has not completed his prescription, has an interest in property in virtue of a title acquired before the sale, I hold that he has not. We

(1) 63 Ind. Cas. 937; 44 M. 554; 40 M. L. J. 497; 13 L. W. 493; 29 M. L. T. 269; (1921) M. W. N. 272.

have been shown several authorities for holding that persons possessing various legal characters have been recognised as entitled to apply under r. 89, or under section 310-A of the former Code. But it is useless to refer to them in detail, since none deals with the case of a mere trespasser or lays down any general principle by which claims to the application of the rule can be tested. Other cases relied on by respondents, as for example *Narayan Vasudevacharya Kathi* v. *Amgaude Malagaude* (2) and *Narayan Kutti Gounden* v. *Pachiammal* (3) are irrelevant, since they deal either with the right to reimbursement under section 69 of the Indian Contract Act for a payment actually made, or with the nature of the interest contemplated in Section 91 of the Transfer of Property Act.

The case being bare of direct authority, its difficulty is enhanced by the fact that the words of the rule under construction are very general. Respondents argue that the right of a trespasser in possession is usually and no doubt conveniently described as a possessory title and that to adopt one out of many descriptions of it "he has the right to maintain his possession against all the world except the rightful owner, he can sue in ejectment and recover possession not merely in trespass-from any person who subsequently dispossesses him, unless the latter is the real owner or claims under him, or justifies under his authority; proof by the defendant that the real title is outstanding would be no defence. In fact the prior possession is itself a root of title and the prior possessor has all the rights of a true owner except against the owner himself. *Subbayya Pandaram* v. *Mahomed Musthapa Maracayar* (4). These dicta may be accepted as founded on *Asher* v. *Whitlock* (5) and the extract from Pollock and Wright on possession quoted with approval therein by Lindley, L. J. But in that case the conflict was between persons successively in possession and throughout the title was referred to as valid only against others than the real owner. In a case at first sight of conflict between a person in possession and the real owner, *Ex-parte Winder* (6) the representatives of the former no doubt established their claim against the representative of the latter to the purchase money of the land which was in Court, under the Land Clauses Consolidation Act, 1845, section 79. But it is material, firstly that they did so only after the real owner had been out of possession long enough to lose his rights, although no doubt their own prescription was not complete when the company acquired the land and took possession; and secondly that as section 79 of the Act provides the person in possession is, until the contrary is shown, to be deemed the person entitled to the money. On the other hand, at an earlier stage in the same transactions, when the statutory period had not elapsed and the real owner was not represented on the record, the former's title was regarded in *Ex parte Hollingsworth* (7) as only inchoate and as conferring no right to the purchase money. These cases accordingly give no countenance to the claim of a trespasser with an incomplete prescription when the title of the real owner is in question, as it is under r. 89 for the purpose of the present case. For the proceedings between the parties to the decree and the purchaser are on the footing that it is the right, title and interest of the judgment-debtor that are being sold. That is subject no doubt to any derogation from full ownership due to encumbrances or the like, but not to the recognition of a claim which the law had always refused to recognise as valid against one party concerned, the debtor. Some attempt was made in argument to meet this by the suggestion that a person able to establish his full ownership against the debtor, is entitled to apply under the rule. But if that is so (a point, on which I offer no opinion) and such a person is entitled not only to proceed under O. XXI, r. 58 or 100 or generally by suit, but also to pay the decree amount, nothing applicable to the facts before us follows. For such a claimant must be allowed to pay, because in the words of r. 89 he "owns the property" and his claim is of a different kind from that now under consideration.

In *Sundaram* v. *Mamsa Mavuthar* (1) an attempt was made with reference to previous

(2) 62 Ind. Cas. 104; 45 B. 1094; 23 Bom. L. R. 455.

(3) 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 953; 22 M. L. J. 364.

(4) 40 Ind Cas. 50; 32 M. L. J. 85 at p. 93; 21 M. L. T. 62; 5 L. W. 690.

(5) (1866) 1. Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 18 L. T. 264; 14 W. R. 26.

(6) (1877) 6 Ch. D. 696; 46 L. J. Ch. 572; 25 W. R. 768.

(7) (1871) 24 L. T. 347; 19 W. R. 580.

decisions to explain the necessity for adoption of the wider language used in the present Code and by me to suggest its origin. But none of those decisions justifies any application of that language as wide as that now proposed. The rule being one of procedure some weight may be given to the considerations that it can be of no advantage to the debtor if the Court recognises a person who is prescribing against him and cannot be supposed to be offering to pay for his benefits, much less in virtue of any arrangement within him; and that it would deter bidders and enhance the uncertainty to which Court sales are at present subject, if the purchaser were liable to be deprived of the benefit of his purchase or could obtain it only after a lengthy and expensive enquiry into so indefinite a matter as bare possession.

I would accordingly allow the Civil Revision Petition setting aside the lower Court's order and dismissing the petition before it with costs throughout.

Venkatasubba Rao, J.—The properties in dispute were attached by the petitioner before us who was the decree-holder who brought them to sale and purchased them. The daughters of the judgment-debtor who are the counter-petitioners applied under O .XXI r. 89 to have the sale set aside and they deposited in Court the requisite amount. They claimed that their father the judgment-debtor had become a sanyasi and that they took the property as his heirs; or in the alternative that their father had made an arrangement in pursuance of which he gave his properties to them before he left his house and disappeared.

The Subordinate Judge found on the evidence that the case of the daughters on these two points was not made out but he regarded the daughters as trespassers who took possession of the property prior to the execution sale and he held that the daughters as trespassers had sufficient interest in the property to entitle them to make an application under O. XXI r. 89. It is contended on behalf of the petitioner who is the decree-holder and auction-purchaser that on the finding of the Subordinate Judge the daughters had no right to make an application under O. XXI r. 89.

Under this rule the application may be made by a person either owning the property or holding an interest in the property by virtue of a title acquired before the execution sale. Do the petitioners hold such an interest in the property as to entitle them to the benefit conferred by this rule? Rule 89 corresponds to Section 310 (a) of the Civil Procedure Code, Act 14 of 1882. The words

> "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale"

have been substituted for the words

"any person whose immoveable property has been sold." The terms of the present rule are much wider than those of section 310 (a) and no useful purpose will be served by referring to the decisions passed under the Civil Procedure Code of 1882. The object of the Legislature was certainly to widen the class of persons on whom this right is conferred. In the first place, it is evident that it is not only the judgment-debtors who are sought to be protected by this rule. It has been argued on behalf of the auction-purchaser that section 310 (a) and O. XXI, r. 89 were introduced in the interests of the judgment-debtors with a view to afford them protection against loss of their properties at Court sales for inadequate prices, and the observations of Sir John Wallis, the late Chief Justice in *Sundaram* v. *Mamsa Mavuthar* (1), have been relied upon. As a rule, there can be no doubt that this provision will be greatly taken advantage of by judgment-debtors, but there is nothing in the rule to limit its application to them. Some cases were cited to us by the petitioner's Vakil for the purpose of showing that an owner of property, who does not derive a title from the judgment-debtor, has a right to apply under r. 89. As this proposition has not been seriously disputed, it is unnecessary to refer to the authorities. It is also well established that a person having a lesser interest than full ownership, such as a mortgagee, is also entitled to apply under this rule. The interest of the applicant may be that of a lessee, and cases may be conceived where the applicant may possess other kinds of interest.

The question however is:

"Is the interest possessed by a trespasser such as to entitle him to take advantage of this provision?"

I am satisfied that such interest comes clearly within the terms of this rule. The words

"holding an interest therein by virtue of a title acquired before such sale."

would seem to be equivalent to

"holding an interest therein acquired before such sale."

It is difficult to imagine what the significance of the words "by virtue of a title," is in connection with the portion of the rule which refers to the applicant holding an interest in the property. If the words "by virtue of a title" were absent in the section, very little difficulty would exist in holding that the rule would cover the case of a trespasser. The question then is, is the position altered by reason of the words "by virtue of a title" appearing in this rule?

In *Ex parte Winder* (6) a possessor without title agreed with a Railway Company for the sale of land which he had occupied for a time short of the period of limitation. He failed to show a good title. The money was paid into Court under the Lands Clauses Consolidation Act and the company executed a deed-poll under the same Act to vest in themselves all the estate and interest of the vendor. After the expiration of the statutory period, the representative of the true owner claimed the purchase money. Hall V. C. held that the money represented the actual right and interest of the vendor and, as against the representative of the true owner, persons claiming under the vendor were entitled to the amount paid into Court by the company. The Vice-Chancellor refers to the person who had possession without title as being interested in the property and as having acquired a title by possession. I give the following passages from his judgment:

"As a reasonable foundation for dealing with the case, we must, I think, start with this principle, that as far as we can, in applying these sections, we must not let the compulsory taking of the land by the company do injustice to any person who may be interested in the property which the company is authorised to take.

"In this case the party who claims to have the fund paid out had acquired a title by possession of this property for nearly the time which would have operated as a bar to a claim by anybody else."

The right of a possessor is referred to as

"a most valuable right and interest which could have been sold in the market although he had not yet the full statutory title."

In this judgment the expression "possessory title" is also used and in negativing the contention of the representative of the true owner the Vice-Chancellor observes as follows:—

"The argument which has been addressed to me involves this, that because he (the possessor without title) had not, at the moment the company took possession, got a complete title by reason of the period of twenty years not having then expired, the effect of the Act of Parliament was summarily to deprive him of that which certainly was his property subject to the contingency of the real owner turning up and making a claim within half a year from the period when the company intervened and took the property."

In *Asher* v. *Whitlock* (5) it was held that

"A person in possession of land without other title has a devisable interest; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator."

Cockburn, C. J., says

"But I take it as clearly established, that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine."

Again, referring to the interest of the person in possession, he says,

"All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee. It is too clear to admit of doubt, that if the devisor had been turned out of possession he could have maintained ejectment."

SI. POTTI NAYAKAR *v.* SUPPAMMAL

Having thus dealt with the devisor himself the learned Chief Justice deals with the position of the devisee.

"What is the position of the devisee? There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner."

Dealing with the heir-at-law of the devisee the learned Chief Justice observes,

"The devisor might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff."

He concludes his judgment with the observation,

"on the simple ground that possession is good title against all but the true owner, I think the plaintiff is entitled to succed, and that the rule should be discharged."

In the two cases referred to by me the word "title" is used to describe the interest of a possessor of land who is not the owner. Pollock in "'Possession in the Common Law," speaks of possession.'

"as a substantive right in the nature of property, valid against all merely extraneous intrusion"

and he says

"that a possessor acting as owner has not only a personal interest, but a title which is effective against all outsiders, and enures to the benefit of all who may hereafter be able to show a title derived from it by any form of bequest, devolution, or conveyance, appropriate to the nature of the subject-matter" (Edition of 1888 p. 23).

Referring to the rights *inter se* of successive independent occupiers who are all wrong-doers as against the true owner, Pollock says

"Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, has all the incidents and advantages of a true title."

And he comes to the conclusion that the first possessor has a better title than a subsequent possessor and observes,

"possession is good title against all but the true owner." (See pages 95 and 96).

Pollock speaks of a "possessory title" and also uses the expression "possessory interest." I may quote another passage from the same learned writer:

"It seems to me that there is not any real authority for allowing a mere wrong-doer to set up an extraneous title paramount against a possessory title prior to his own entry."

This view has been taken by this Court in *Subbaiya Pandaram* v. *Mahamed Musthapa Maracayar* (4).

There is no mention in the rule in question either of judgment-debtor or of persons deriving title from him. If an applicant under this rule has disputed the judgment-debtor's title to the property, that will not be a ground, in my opinion, to disentitle him to relief. If the judgment-debtor takes no steps to save the property and if the party who is disputing his title thinks it worth his while to apply, will the Court refuse to recognise his right on the ground that by doing so it will be recognising a claim against the judgment-debtor? Whatever the relations between the judgment-debtor and the applicant *inter se* may be, so long as the latter is able to satisfy the Court that he fulfils the conditions laid down by the rule, it seems to me that he is entitled to invoke this provision for his benefit.

Again, can it be said that the legislature intended to exclude for instance a person who has been in possession of the property by virtue of a purchase or a gift from the judgment-debtor, but who is unable to make out a title against the latter by reason of the purchase or gift not having been by a registered instrument? If the vendee or donee is in possession for the full period of limitation he becomes the owner not because of the sale or the gift but by reason of his adverse possession for the statuory period. Will it be said that he cannot apply under this rule before he obtains the full statutory title?

We have not been referred to any case which has decided this point under consideration either under the old Code or under the present Code. None of the cases cited before

us seems to give us any assistance in deciding this question.

Narayan Vasudevacharya Kutti v. *Amganda Malayanda.* (2) and *Narayana Kutti Goundan* v. *Pachiammal* (3), which were relied upon by the petitioner have very little bearing upon the point as they are cases which deal with the expression "interested in the payment of money" occurring in section 69 of the Contract Act.

Having held that, in my opinion, as a matter of construction of this rule, a trespasser can invoke for his benefit the provision contained in rule 89, I shall proceed to examine the objections suggested tothe applicability of this rule to the case of a trespasser on the ground that by permitting him to avail himself of this benefit a hardship will result to decree-holders and auction purchasers and also on the further ground that dishonest trespassers will be encouraged to make applications under this rule and defeat the rights acquired under Court sales. The answer seems to be simple. Under the rule it is only persons fulfilling certain conditions that can make an application and further the applicant must deposit in Court for payment to the decree-holder the amount specified in the proclamation of sale and for payment to the auction-purchasers a sum equal to five per cent. of the purchase money. There is thus a sufficient safe-guard provided in the interests of decree-holders and auction-purchasers. As a prerequisite to the obtaining of an order under this rule, the applicant must deposit in Court not only the entire decree-amount but also a sum to be paid to the disappointed purchaser. Unless the interest which the applicant possesses in the property is at least equivalent to what may be represented by the amount he is required to deposit into Court, it is not likely that he will seek to avail himself of the benefit conferred by this provision. It has been suggested that, if a man has possession before the sale of the property even for a day, he will be entitled to apply under this rule if the view that I have taken is correct. But every occupier is bound to satisfy the Court that he has an interest by virtue of a title acquired before the sale; and whether the occupation of the applicant amounts to possession is a question of act to be decided in each case. *Ex-hypothesi*, the applicant is a trespasser with a possessory title which the statute of limitation has not operated to make absolute, and the title of the owner is not extinguished but is outstanding and an order made under r. 89 does not profess to adjudicate upon the adverse claim to the property in question. If, therefore, a person, who has been in adverse possession as against the true owner, say for only a month, considers that the interest he possesses in the property warrants his depositing into Court the amount specified in the rule and applying for the setting aside of the sale, although he runs the risk of being turned out by the true owner the day after the sale has been set aside, I fail to see why such an applicant should not be able to avail himself of this rule. As against the case of a person who having been in wrongful possession only for a day or a month, applies under this rule, there is the case of a party who has acquired a title by possession for almost the statutory period subject to the contingency of the real owner turning up and making a claim, say within three months from the period when the sale in execution of the decree takes place. The hardship that will be occasioned to such a trespasser by negativing his right to apply under this rule will be very much greater than the hardship that may result to a disappointed auction-purchaser who loses the property purchased at the instance of a person who has been in possession for a very short period.

I would for these reasons hold that the order of the Subordinate Judge is right and dismiss the Civil Revision Petition with costs.

BY COURT.—As, however, my learned brother would confirm the lower Court's order, the Civil Revision Petition must under Section 98, Civil Procedure Code, be dismissed with costs.

V. N. V.
N. H. *Petition dismissed.*

BABU RUDUR PARTAB SINGH *v.* SHEO PRASAD

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 22 OF 1923.

April 16, 1924.

Present :—Mr. Puttan, A. J. C.

BABU RUDUR PARTAB SINGH
—DECREE-HOLDER—APPELLANT

versus

SHEO PRASAD AND OTHERS—
JUDGMENT-DEBTORS—RESPONDENTS.

Limitation (*Act IX of* 1908), *Sch. I, Art.* 182, *cl.* (5)—*Decree directing execution individually—application for joint execution—Application whether in accordance with law—Step-in-aid of execution—Application for substitution of heirs of deceased judgment-debtor.*

A decree-holder who had a decree directing execution individually against several Judgment-debtors, applied for joint execution, after various attempts to execute the decree individually. The application was dismissed. The question was whether the application could be considered as one in accordance with law within the meaning of Art. 182 of the Limitation Act so as to save limitation :—

Held, that although the application was incompetent being against the terms of the decree, nevertheless it could well be considered as one in accordance with law, as it was made *bona fide* without knowledge that the Court could not grant such an application.

The words "in accordance with law" in Art. 182, Sch. I to the Limitation Act should not be pressed too far in favour of a judgment-debtor who has not paid his debt and an application does not become contrary to law merely because it has been dismissed.

An application by the decree-holder for substitution of the heirs of one of the deceased judgment-debtors is a step-in-aid of execution within the meaning of Art. 182 of Sch I to the Limitation Act.

Adhar Chandra Das v. *Lal Mohan Das*, 24 C. 778 ; 1 C. W. N. 676; 12 Ind. Dec. (N. S.) 1188, relied on.

Appeal from the decree of the Deputy Commissioner, Sultanpur, dated the 25th April 1923, in Suit No. 1 of 1923.

Mr. *M. Wasim*, for the Appellant.

Mr. *Bisheshar Nath Srivastava*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Deputy Commissioner of Sultanpur disallowing an application for execution of a decree on the ground that it is beyond time. The decree from which these proceedings arise, was passed on the 4th July 1913 against a number of defendants jointly. Subsequently the Court ordered that a calculation should be made showing the separate liability of each judgment-debtor. This calculation was prepared, and although the decree was not amended, this point is immaterial, because an order of the Deputy Commissioner on the first application for execution laid down the fact that the decree could only be executed against the co-defendants separately according to the list which had been prepared, and no appeal was filed against this order. In accordance with that order, four subsequent applications for execution were made by the decree-holder. The last of these is dated the 13th of May 1919. As the decree-holder obtained no satisfaction, he filed on the 12th of March 1920, a fifth application in which he applied for joint execution on the ground that all his attempts at separate execution had proved infructuous and at the same time he applied that the decretal demand in this case should be added to the decretal demand in a previous case in which the judgment-debtor's property had been put up for sale. An objection was taken to this application on the ground that it was barred by the Deputy Commissioner's order of 1916 and this view was upheld both by the Deputy Commissioner and by this Court. The order of this Court was passed on the 28th November 1922 and the decree-holder then put in a sixth application for execution against the judgment-debtors separately on the 6th of January 1923. This application has been filed more than three years after the application of the 13th of May 1919 and it has been held by the Deputy Commissioner that the application of the 12th of March 1920 was not an application according to law and that, therefore, the present application is barred by time. The question for decision is whether the application of the 12th of March 1920 was or was not according to law. The objector's argument is that the application cannot be according to law because it is contrary to the terms of the decree, and in fact is an application to the Court to do something in execution which by law that Court is

not competent to do, and reliance is placed on a ruling of the Allahabad High Court reported in *Chatter* v. *Newal Singh* (1). It is, however, possible to approach this matter from a different point of view, and that has been done both by the Bombay and the Calcutta High Courts. In the ruling reported in *Adhar Chandra Das* v. *Lal Mohun Das* (2), it is made clear that the words "in accordance with law" should not be pressed too far in favour of a judgment debtor who has not paid his debt; and certainly an application does not become contrary to law merely because it has been dismissed. The appellants lay great stress on a ruling of the Bombay High Court reported in *Bandoo Krishna Kunbargi* v. *Narasimha Kanher Deshpande* (3), from which it appears that their Lordships were inclined to go even further than the Calcutta High Court in taking a liberal view as to the meaning of the words "in accordance with law." In the present case the decree-holder came before the Court with a perfectly honest and *bona fide* application properly expressed for execution of a decree, but while pointing out the fact that he was unable to execute the decree against the judgment-debtors individually, he asked the Court to allow joint execution. Now it has been held, no doubt, that such joint execution was not permissible in view of the order passed by the Deputy Commissioner in 1916, but I am not convinced that the decree-holder, when making his application, can be reasonably considered to have known that he was making an application which the Court was incompetent to grant. Moreover, the second part of his application as to the notification of this decretal amount in a sale in execution of another decree was actually granted, and this fact alone renders it difficult to hold that the application was not in accordance with law. There is also a further fact to be considered. During these proceedings the decree-holder made two other applications: one was for the attachment of certain money in the hands of the judgment-debtors and the other was for the substitution of certain heirs of one of the judgment-debtors. The first of these applications was intimately bound up with the application of the 12th March 1920 and may be considered to fall to the ground with it. The same cannot be said of the application for substitution and on the authority of the ruling already cited in *Adhar Chandra Das* v. *Lal Mohan Das.* (2), I am prepared to hold that that application was a valid step in execution. The date of that application was the 15th of January 1922 which is within three years of the fourth application of 13th of May 1919. In my opinion, therefore, the present application is within time. In the first place I consider that the application of the 12th of March 1920, although disallowed by the Courts, was nevertheless an application according to law and, secondly, I consider that the present application is saved in respect of limitation by the application of the 15th of January 1922 which was within time from the application of the 13th of May 1919. I therefore allow the appeal with costs, set aside the order of the lower Court and dismiss the objection of the judgment-debtors with costs.

N. H. *Appeal allowed.*

(1) 12 A. 64; A. W. N. (1889) 200; 6 Ind. Dec. (N.S.) 790.

(2) 24 C. 778; 1 C. W. N. 676; 12 Ind. Dec. (N. S.) 1168.

(3) 17 Ind. Cas. 210; 37 B. 42; 14 Bom. L.R. 861.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 834 OF 1921.

January 31, 1924.

Present:—Mr. Justice Wallace.

RAMASWAMI THEVAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALAGA PILLAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Tope poramboke—Paramount title, where vests—Tree patta—Pattadar, title of, whether defeasible—Intermediate landlord, ouster of, by title paramount—Tenant, whether can prove cesser of landlord's title—Evidence Act (I of 1872) s. 116.

Prima facie, the paramount title to land registered as *tope poramboke* is with Government Where a tree *patta* is granted by Government in respect of such a land, the occupation of the *pattadar* is subject to the paramount title of the Government and

RAMASWAMI THEVAN *v.* ALAGA PILLAI

his title is a defeasible one liable to be defeated at any time by the entry of the Government. [p. 882, col 2 and p. 883, col. 1.]

A person having a paramount title may put an end to the rights of the intermediate landlord thereby extinguishing the sub-tenancy as well. [p. 888, col. 1.]

Ammu Ammal v. *Puthiah Parambath Moidin*, 43 I. C. 677 ; (1918) M. W. N. 38, relied on.

Eledath Thavazhi v. *Eliangattil Sankara Valia* 45 I. C. 656 ; (1918) M. W. N. 376 ; 7 L. W. 574 ; 8 L. W. 44 ; 24 M. L. T. 79, distinguished.

It is open to the tenant to prove a cesser of his landlord's title by ouster by the holder of the title paramount and to attorn to the latter without actually going out of possession. [p. 883, col. 2.]

Ram Chandra Chatterjee v. *Paramathanath Chatterjee*, 35 C. L. J. 146, followed.

Section 116 of the Indian Evidence Act is no bar to a tenant showing that his landlord had no title at a date previous to the commencement, of the tenancy, or that, since its commencement, it has expired or has been defeated, because the bar operates only during the continuance of the tenancy. In a case of eviction by the title paramount actual and open surrender of possession to the intermediate landlord is not necessary to terminate the tenancy with the latter. [p. 883, col. 2.]

Amma v. *Rama Krishna Sastri*, 2 M. 226: 11nd. Dec. (N. S) 429, followed.

Second appeal against the decree of the Court of the 3rd Additional Subordinate Judge, Tanjore at Mayavaram in A. S. No. 5 of 1920 (A. S. No. 907 of 1919 on the file of the District Court of Tanjore) preferred against the decree of the Court of the District Munsif of Shiyali in O. S. No. 357 of 1918 (O. S. No. 457 of 1917 on the file of the Court of the District Munsif of Mayavaram).

Mr. *C. A. Seshagiri Sastri*, for the Appellants.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—The plaintiff in this case sued to recover possession of a *manikat* from *purakkudi* tenants after removing the superstructure thereon, the allegation being that the first defendant's father, and the other defendants were let into the land on condition of doing service in accordance with the Tanjore custom of *purakkudi* service ; that, when the plaintiff called on the defendants in 1913 to quit the land because they refused to do service, the defendants pleaded title from Government to whom they had executed a *muchilika* in respect of the suit site.

The first Court held that, since the cessation of service was long prior to twelve years before the plaintiffs' suit, the plaintiff's title to the suit site had become extinguished by force of section 28 of the Limitation Act. The Appellate Court held that it was not open to the defendants to plead *jus tertii* in Government until they had determined the existing tenancy by surrendering possession or otherwise and that, therefore, the defendants were not entitled to question the plaintiff's title ; and decreed the suit in favour of the plaintiff. The defendants appeal.

The main question argued before me was whether the tenancy under plaintiff has not already been determined, or whether the defendant is not in law to be allowed to set up his *muchilika* from Government, being estopped by force of section 116 of the Indian Evidence Act from denying the plaintiff's title. The plaintiff's land is Survey No. 498, which, so far as appears, always has been registered as *tope poramboke*. *Prima facie* then, the paramount title is with Government. Plaintiff alleges, however, on the strength of a delivery account, Ex. A, which is said to relate to the suit land, that the suit land was in 1886 not *poramboke* but *punja*. No doubt in Ex. A the land is styled *punja*. On the other hand, Ex. C series is a series of B memos. from 1901 to 1905 whereunder plaintiff has been charged penal assessment for unauthorised cultivation of Survey No. 498 *Tope Poramboke*. Plaintiff explains the entry of the description '*tope poramboke*' in Ex. C series by saying that originally the land was *punja*, that it was handed over to Government at some time unknown for purposes of growing trees and that Government took it over, grew trees thereon and registered the land as *tope poramboke*. But for all this there is absolutely no evidence. A mere document between private parties, such as Ex. A, cannot possibly be proof of the correctness of any description of the land contained therein, in the face of Ex. C series.

It is argued for the plaintiff that it is only the portion covered by the trees which is registered as *tope poramboke*, and that the other portion, on which the suit house site is,

must be considered as being *natham poramboke* and in the ownership of the plaintiff, who has occupied it for long. But I can see no foundation for such a case. There is no suggestion that Survey No. 498 has been sub-divided or that any portion of it is *natham poramboke*.

The plaintiff himself, in his evidence, admits that these B memos. Ex. C series were for the suit land and that he only possessed a tree *patta* in respect of the suit land. It is well known that tree *pattas* are not issued to owners of the land on which the trees stand. He also admits that he put in a petition to the Collector offering to give a *muchilika* in respect of the suit site to Government. From all the facts noted above it is perfectly clear that the plaintiff admits that the paramount title for the suit land vests in Government, and has always done so, and that the plaintiff's occupation of the suit land has been all along subject to the paramount title of Government therein.

The plaintiff's title then was obviously a defeasible one liable to be defeated at any time by the entry of the true owner. Defendants are now claiming title from the true owner, under their *muchilika* Ex. II. The only question then is whether they are estopped by section 116 ofthe Indian Evidence Act from putting forward this claim. The cases relied on by the lower Court and in the argument before me do not in my view support this plea of estoppel in the case. *Ammu Ammal* v. *Puthiaparambath Moidin* (1) is in fact in favour of the defendants, since it lays down that "it may be that a person having a paramount title may put an end to the rights of the intermediate landlord thereby extinguishing the sub-tenancy as well. In the present case Government and the plaintiff are rival claimants." It is not, however, so here. There is no question of any rivalry between Government and the plaintiff since the plaintiff admits paramount title in Government. In *Eledath Thavazhi* v. *Eliangatti Sankara Valia* (2) there was no case put forward of the paramount owner entering and putting an end to the title of the intermediate landlord. Similarly, in S. A. No. 320 of 1915 which has been quoted before me, there is nothing to show that Government had all along held title paramount to that of the 18th defendant. On the other side, there is a case in *Ram Chandra Chatterjee* v. *Paramathanath Chatterjee* (3) in which it was clearly laid down that it is open to the tenant to prove a cesser of his landlord's title by ouster by the holder of title paramount and to attorn to the latter without actually going out of possession. Defendants have here also proved "the equivalent of an eviction." There was by notice Ex. III an ouster of the plaintiff's title by the party having the title paramount, which will operate as a determination of the plaintiff's right on the date of the commencement of the tenancy.

Section 116 of the Indian Evidence Act, is no bar to a tenant showing that his landlord had no title at a date previous to the commencement of the tenancy, or that, since its commencement it has expired or has been defeated, because the bar operates only during the continuance of the tenancy, see *Ammu* v. *Ramakrishna Sastri* (4). In a case of eviction by the title paramount, actual and open surrender of possession to the intermediate landlord is not necessary. The principle rests on the covenant by the lessor for quiet enjoyment to the lessee.

I am quite clear, therefore, that the plaintiff having been ousted by the paramount landlord, has himself no subsisting title to sue. It is not necessary, therefore, to go into the further question whether the defendants have been in adverse possession since the date of the refusal to do service and whether such refusal is a sufficient ground to constitute an adverse possession.

I, therefore, reverse the decree of the lower Appellate Court and restore that of the District Munsif. Defendants Nos. 1 to 4 will get their costs from plaintiff here and below.

V. N. V. *Appeal dismissed.*

K. S. D.

(1) 43 Ind. Cas. 677 ; (1918) M. W. N. 33..

(2) 45 Ind. Cas. 656 ; (1918) M. W. N. 376 ; 7 L. W. 574 ; 8 L. W. 44 ; 24 M. L. T. 79.

(3) 63 Ind. Cas. 754 ; 35 C. L. J. 146 ; (1922) A. I. R. (C.) 237.

(4) 2 M. 226 ; 1 Ind. Dec. (N. S.) 429.

BED PRASAD *v.* NAKCHHED PRASAD

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 152 OF 1923.

April 15, 1924.

Present :—Mr. Hallifax, A. J. C.

BED PRASAD AND OTHERS—DEFENDANTS —APPELLANTS

versus

NAKCHHED PRASAD AND ANOTHER—PLAINTIFF—DEFENDANT—RESPONDENT.

Hindu Law—Joint Family—Partition—Father's debts—Son, liability of—Second appeal—Separation of Hindu joint family—Finding of fact or law.

A Hindu is liable under the Hindu Law for his father's debts only to the extent of the share in the coparcenary property that comes to him at a partition made after the debt has been incurred and to the extent of the property inherited from his father at his death, whether the debt was incurred before or after partition. [p. 885, col. 3]

Dyamonee Debea v. *Bindrabun Chunder Banerjee*, (1856) Beng. S. D. A. p. 97; 14 Ind. Dec. (O.S.) 516; *Devagupta pu Kameswaramma* v. *Vaddadi Venkata Subba Row*, 24 Ind. Cas. 474; 27 M. L. J. 112; (1914) M. W. N. 742; 38 M. 1120.

A finding about the disruption of a joint Hindu Family is not a finding of fact but an inference of the legal effect of the facts found and is not final and can be set aside in Second Appeal. [p. 885, col. 1.]

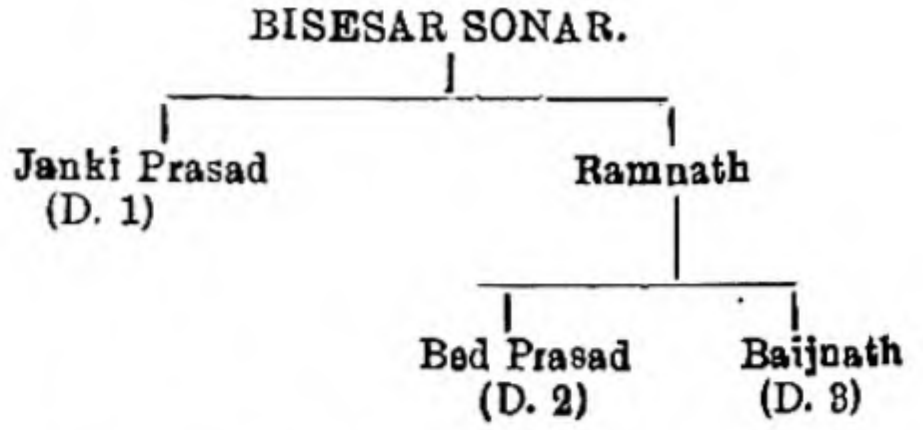
Beni Ram v. *Kundan Lal*, 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

Appeal from the decree of the Additional District Judge, Bilaspur, dated the 16th December 1922, in Civil Appeal No. 107 of 1922.

Mr. *G. R. Deo*, for the Appellants.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—The dispute is narrowed down to one between Janki Prasad the first defendant and his two nephews who were the second and third defendants. The following table shows their relationship :—



Ramnath died before 1918 and Bisesar died in September 1920. In this suit the plaintiff Nakchhed Prasad sued on bonds executed by Bisesar in June 1920. The two sons of Ramnath pleaded that there had been a disruption of their joint Hindu family in 1918, and they were not liable for any debts of their grandfather Bisesar except to the extent of any assets of his that might have come to them at his death, which they said amounted to nothing.

In the first Court it was held that there was a separation in the family in 1918 and a decree was passed against Janki Prasad alone. The finding as to separation of Janki Prasad from his father is not very clear, though the decree declares that "he will not be liable for the claim personally but will pay the decretal (amount) from the assets of the deceased Bisesar in his hands." It may be pointed out that the practical effect of section 52 of the Civil Procedure Code is not to make the liability of a person sued in a representative capacity any less personal or to make the debt recoverable only from certain property ; the application of the section only converts the decree from one for a single stated sum of money into a decree for that sum or another unascertained sum if the latter should be less.

Janki Prasad appealed against this decree, urging that the debt was not proved at all and that in any case his two nephews were jointly liable with him for it, as there had been no partition in the family. The plaintiff put in a cross-objection supporting the latter contention. It was held in appeal that the debt was incurred by Bisesar, and that matter is no longer in dispute.

The other findings of the learned Additional District Judge are as follows. In 1918 all the moveable property of the family was divided, Bisesar and Janki Prasad taking one share and the two sons of Ramnath the other.

The family owned a one-third share in the village of Chorbhatti and in a smaller village called Nirtu, and it was agreed that both shares should remain with Bisesar during his life, but that at his death the whole share in Chorbhatti should go to Janki Prasad and the whole share in Nirtu to the sons of Ramnath. Since then Bed Prasad and his brother have lived apart from their grandfather and uncle, and on the death of the former in 1920 Janki Prasad took possession of the whole share in the larger village and his two nephews of that in the smaller village, in accordance with the arrangement made in 1918. These facts the learned Judge did not regard as indicating "an unequivocal declaration of intention on the part of any of the joint holders to hold his share separately." He found, therefore, that there had been no disruption of the joint family during the life of Bisesar.

This last finding is not a finding of fact but an inference of the legal effect of the facts found, as was pointed out by their Lordships of the Privy Council in *Beni Ram* v. *Kundan Lal* (1). It is not, therefore, final and can be set aside by this Court, though the facts from which it was drawn must be accepted as facts and it is hardly contended by the respondents that the inference from these facts of a continued state of union after 1918 is possible. From that year the whole of the moveable property was owned and possessed separately and the parties lived and messed apart. But also the whole of the immoveable property was divided into shares and allotted to the parties, though it was agreed that one member of the family, Bisesar, was to remain in possession during his life-time, whether Janki Prasad separated from his farther or remained joint with him we are not concerned to enquire. In either case he got the whole of his father's share on his death, either by survivorship or inheritance, and it is admitted that a one-sixth share in Chorbhatti is worth more than the amount of Bisesar's debt that has been decreed. But it is clear that in either case on Bisesar's death no property of his would or did come into the hands of his grandsons Bed Prasad and Baijnath.

(1) 21 A. 496 ; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58 ; 7 Sar. P. C. J. 523 ; 9 Ind. Dec. (N. S.) 1022, (P. C.)

The liability of a Hindu to pay the debts of his father is based by the Sanskrit writers on the duty that lies upon him of freeing his father from the sin of debt and consequent punishment after death. The logical consequence of that is that there is no limit to his personal liability for all his father's debts, contracted before or after partition with him. In regard to this, we find the following passage on page 407 of Mayne's Hindu Law. "Exactly the same obligation seems to have existed among the Tamil tribes. It can hardly have arisen among them from religious grounds,as the father appears to have been equally bound to pay the debts of his sons. Probably at a time when partition could not be enforced, all fair debts contracted by any member of the family were treated as a charge upon its property."

But even if the rule was ever carried to the logical extent indicated by the origin ascribed to it by the Sanskrit writers, a long course of decisions, extending back at least to *Dyamonee Debea* v. *Bindrabun Chunder Banerjea* (2) decided in 1856, shows that the law has been altered by custom in that respect. A Hindu is now liable under the Hindu Law for his father's debts only to the extent of the share in the co-parcenary property that came to him at a partition made after the debt had been incurred, and to the extent of the property inherited from his father at his death, whether the debt was incurred before or after partition, This was the law administered in all the Courts in India except Bombay before 1866, but, as Mr. Mayne says, "in that Presidency also the law has, by legislation (Bombay Act VII of 1866), been brought into conformity with the more equitable rule observed elsewhere." Reference need only be made to the comparatively recent cases of *Kulada Prasad Pande* v. *Haripada Chatterjee* (3), and *Devaguptapu Kameswaramma* v. *Vaddadi Venkata Subba Row* (4).

As the two appellants had separated from their grandfather Bisesar before he incurred the debt for which the plaintiff sued in this case, they are liable for it only to the

(2) (1856) Beng. S. D. A. 97; 14 Ind. Dec. (O S.) 516.

(3) 17 Ind. Cas. 257 ; 40 C. 407 ; 16 C. L. J. 311 ; 17 C. W. N. 102.

(4) 24 Ind. Cas. 474 ; 38 M. 1120 ; 27 M. L. J. 112 ; (1914) M. W. N. 742.

extent of any assets of his that came into their hands, and it has already been held that at Bisesar's death all his property passed to Janki Prasad alone, either by survivorship or by inheritence. The decree of the lower Appellate Court will accordingly be set aside and that of the first Court restored. The plaintiff—respondent will pay all the costs of the two appellants in both the Courts below. Their costs in this Court will be paid by the defendant—respondent Janki Prasad.

G. R. D. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 228 OF 1921.

February 7, 1924.

Present :—Mr. Justice Wallace.

CHATHOTH PARKUM KARETH KOMBI KUNHAMMAD KUTTY—DEFENDANT—APPELLANT

versus

PARAMBATH CHATHENKANDI ENNA PONNAMBILATH PARAPARAVAN CHETIRA MAMMAD AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 2—RESPONDENTS.

Construction of document—Deed of gift—Family custom of donor, consideration of—Marumakkatyam Law—Gift to daughter—Tarwad given powers of enjoyment—Intention of donor—Daughter, whether takes absolutely.

In the construction of deeds of gift or bequests the general test is, having regard to the presumed knowledge of local customs by donor or testator and the manner of holding property in the community of the donor or testator and having regard to the terms in which they have expressed their intention in their deeds of gift or bequests, what was their real intention. Generally unless there are apt words to indicate that the intention was that the property should be held with powers larger than usual, it must be taken that the intention was that the property should be held in the usual manner. [p. 887, col. 1.]

A gift deed executed by a Mahomedan governed by the Marumakkatayam Law in Malabar in favour of his daughter recited that the gift was "to you" (in the singular) and then went on to say that "in future except for you and your offspring (santanam) there is no claim, concern or right of entr y for me over this paramba.....you and your santanams should hold the said paramba in possession and enjoy the same as your jenmom".

Held, that the gift was not for the donee's exclusive benefit but to her as the head of a Tavazhi formed of herself and her children, and that the property gifted was 'putravakasam' property belonging to the donee's tarwad [p. 888, col. 1.]

Kalliani Amma v. *Govinda Menon*, 12 Ind. Cas. 492 ; 35 M. 648, 10 M. L. T. 399 ; (1911) 2 M. W. N. 487 ; 22 M. L. J. 23, relied on.

Second appeal against the decree of the District Court, North Malabar, in A. S. No. 375 of 1919 preferred against the decree of the Court of the Additional District Munsif, Badagara, in O. S. No. 329 of 1918 (O. S. No. 331 of 1918, on the file of the Court of the District Munsif, Nadapuram).

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Messrs. *C. V. Ananthakrishna Iyer* and *B. Pocker*, for the Respondents.

JUDGMENT.—The decision in this appeal turns on the interpretation to be put upon Ex. B a gift deed executed by one Parapravan Bavotti Haji in favour of his daughter. The donor was a Mahammadan of North Malabar admittedly following the *Marumakkatayam* law prevalent in those parts and he was the sole survivor and senior member of his *tarwad*.

2. Ex. B recites that he gifts the property "to you" (in the singular) and then goes on to say in future except for you and your offspring (*santanam*) there is no claim concern or right of entry for me over this *paramba*...you and your *santanams* should hold the said *paramba* in possession and enjoy the same as your *jenmom*." Both the lower Courts have held that the form and the circumstances of the gift necessarily lead to the inference that the gift was not for the donee's exclusive benefit but for her children also, and that the property gifted is, therefore, *putravaksam* property belonging to the denee's *tavashi*.

3. The first defendant in this appeal challenges that finding. The point for determination is whether this was a gift to the daughter exclusively or a gift to her as the head of a *tavashi* formed of herself and her children.

4. Various reported and unreported cases bearing on this question of *Marumakkattayam* law have been cited to me, relating to gift deeds or bequests more or less analogous to the one in suit. The general test is, having regard to the presumed knowledge of local customs by donor or testator and the manner of holding property in the community of the donor or testator and having regard to the terms in which they have expressed their intention in their deeds of gift or bequests, what was their real intention? Generally it has been held that, unless there are apt words to indicate that the intention was that the property should be held in any manner different from the usual manner in which such property is held—apt words to imply that the property is to be held with powers larger than usual, then it must be taken that the intention was that the property should be held in the usual manner.

5. Thus in cases where the gift or bequest has been to a woman and her children and there is no further expression of intention as to how it should be held—no apt words to express the giftof an absolute alienable estate—it has been held that they took it and hold it as a woman and her children usually would hold under the *Marumakkattayam* law, that is, as a legal corporate unit or *tarwad*—See *Kunhacha Umma* v. *Kutti Mammi Hajee* (1); *Korath Amman Kutti* v. *Perungathil Appu Nambiyar* (2) and *Naku Amma* v. *Raghava Menon* (3). When a gift or bequest is to a woman and *her children* with words which might be taken to import an intention to confer an absolute estate, it has been held that, since the usual manner of holding property by a woman and her children under *Marumakkathayam* law is in the form of a *tavashi*, it must be taken that the donees held the property in that way. See *Chakkra Kannan* v. *Kunhi Pokkar* (4), following. *Kunhacha Umma* v. *Kutti Mammi Haji* (1). It may be noted that the bequest in the 39 Mad. case was a bequest to children only.

(1) 16 M. 201 ; 2 M. L. J. 226;5 Ind. Dec. (N.S.) 847 (F.B.)
(2) 29 M. 322.
(3) 18 Ind Cas. 1 ; 38 M. 79.
(4) 30 Ind. Cas. 755 ; 39 M. 317 ; 18 M. L. T. 255; 39 M. L. J. 481 ; (1915) M. W. N. 740 (F. B.).

6. In *Pattatheruvath Pathumma* v. *Mannam Kunnizil Abdulla Haji* (5), the suit property, as I have verified with reference to the original records, had been purchased by a Muhammadan husband in the name of his wife only. The husband had previously given a house to his wife and children, which however, was not part of the property in suit and the question was to whom the property in the suit descended on the wife's death. The High Court held in that case that the intention was that the purchase in the name of the wife was intended for the children also, and followed the *Korath Ammam Kutti* v. *Perungothil Appu Nambiyar* (2) case ; that is, they took it with the incidents of *tarwad* property. There was no question there of apt words in any deed of gift or bequest. The case in *Kalliani Amma* v. *Govinda Menon* (6), as I have also verified from the records, was a case of a gift to a woman only with a recital that " besides the jewels and vessels which I acquired out of my own funds and which I have given to you and your *santanams* for enjoyment permanently and for ever, I have now given properties " of which particulars are given ; and the document goes on to say,

> " I have resolved that you and your *santanams* should be in enjoyment for ever along with me as long as I live and *in proprium* thereafter, that to it my heirs shall have no right."

It was there held that that was really a gift to the woman *and her children* and the *Kunhacha Umma* v. *Kutti Manni Haji* (1) case was followed.

7. Besides the authorised reported cases I have been referred to two cases *Kuyyathil Kandan Kutti* v. *Vayalpath Parkum* (7) and *Paru Amma* v. *Ithicheri Amma* (8) reported in *Kuyyathil Kandan Kutty* v. *Vayalpath Parkum* (7) and *Paru Amma* v. *Ithicheri Amma* (8). The former was a case of gift by a *Marumakkattayam* donor to his nieces with no apt words to express an absolute estate and the *Kunhacha Umma* v. *Kutti Mammi Haji*, (1) case was followed by Kumaraswamy Sastry, J., whose judgment was upheld in

(5) 31 M. 228 ; 18 M. L. J. 16 ; 4 M. L. T. 82.
(6) 12 Ind. Cas. 492 ; 35 M 648 ; 10 M. L. T. 399 ; (1911) 2 M. W. N 487 ; 22 M. L.J.; 23.
(7) 32 Ind. Cas. 107.
(8) 32 Ind.Cas. 459.

CHAUDHARI SHARF-UZ-ZAMAN *v.* DEPUTY COMMISSIONER, BARABANKI

L. P. A. No. 19 of 1216. The other case was one of a bequest in which the words 'with absolute rights of alienation, were used and it was there held that the legatee took an absolute estate.

8. On consideration of these cases I am of opinion that the present document of gift bears most resemblance to that in the *Kalliani Amma* v. *Govinda Menon* (6) case. There are here no apt words conferring absolute rights of alienation. The gift is to the woman only but the enjoyment is to be by her and her *santhanams*, and I do not think any real distinction can be drawn between the present document and that in the *Kalliani Amma* v. *Govinda Menon* (6) case merely on the ground that the donor in the latter case had already given other properties to his wife and *santhanams*. There is nothing in the suit document to take it out of the ordinary category of gift to a woman under *Marumakkathayam* law of property to be enjoyed by her and her *santanams*, that is to say, to be enjoyed with all the incidents of *tarwad* property.

9. I, therefore, agree with the lower Courts that this property is *putravakasam*. I am not prepared to interfere, and I dismiss the appeal with costs of the 1st respondent.

V. N. V.
N. H.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 31 OF 1923.

April 14, 1924.

Present :—Mr. Wazir Hassan, J. C., and Mr. Pullan, A. J. C.

CHAUDHARI SHARF-UZ-ZAMAN—APPELLANT

versus

DEPUTY COMMISSIONER, BARABANKI, RECEIVER, AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V *of* 1920) *ss* 53, 55—"*Purchaser,*" *whether includes trustee*—"*Valuable consideration*", *meaning of*—*Transfer in favour of trustees, whether voidable.*

The word "purchaser" in section 53 of the Provincial Insolvency Act is used in the wider sense given to the term in English Law and not in the mercantile sense of a person who has brought something by a contract of purchase and sale and includes a trustee. [p. 889, col. 2.]

Hance v. *Harding* (1888) 20 Q. B. (D)732; 57 L. J. Q.B. 403; 59 L. T. 659; 36 W. R. 629; *Official Assignee of Trichinoply* v. *Somasundram Chettiar*, 34 Ind. Cas. 602; 30 M. L. J. 415 at p. 416, relied on.

A responsibility to discharge onerous work taken upon himself by a person to whom properties are transferred, in consideration of his taking such responsibility, falls within the expression "valuable consideration" found in sections 53 and 55 of the Provincial Insolvency Act. [p. 889, col. 1.]

A transfer in favour of trustees who undertake to discharge onerous duties is in favour of a "purchaser for valuable consideration" within the meaning of section 53 of the Insolvency Act. Such a transfer, if *bona fide*, cannot be annulled under that section. [p. 890, col. 1.]

Appeal against the decree, dated the 19th March 1923, of the District Judge, Lucknow, in Miscellaneous case No. 346 of 1913.

Messrs. *Hyder Husein*, *E. R. Kidwai* and *Niamat-ullah*, for the Appellant.

Sir *Henry Stanyon*, Mr. *Kamta Nath Sinha* and Mr. *Gokul Parshad*, for the Respondents.

JUDGMENT.—This is an appeal on the miscellaneous side from an order of the District Judge of Lucknow sitting as Insolvency Court. For a proper understanding of the question, which we have to decide, it is necessary to recapitulate briefly the history of the case from which this appeal has arisen. On the 30th of January 1912 one Shafiq-uz-zaman executed a deed which has been described as a deed of trust and also as a deed of gift, by which he made over his whole property to certain trustees in the interest of his son. The object of the deed is, that the son's estate should be saved from the effects of the father's extravagance and that the creditors should be paid in full. For some reasons with which we are not concerned, the arrangement does not appear to have worked satisfactorily. Less than two yars afterwards, on 27th of January 1914, Shafiq-uz-zaman was adjudicated an insolvent on the application of one of

his creditors. A Receiver was appointed but on the 22nd of July 1918 the son of the insolvent appearing through his gaurdian brought a regular suit to assert the deed of trust. The Additional District Judge held that the deed was void under section 36 of the then Insolvency Act and his judgment came in appeal before a Bench of this Court. The Bench decided that the lower Court was incompetent to pass a finding that the deed was void under section 36 of the Insolvency Act, and after a remand for the decision of certain other issues, passed an order in favour of the plaintiff which has the effect of a declaration that the deed in question was a valid transfer. Before the final order of the Bench was passed, the Receiver came before the Insolvency Court for an order to annul the deed of trust under section 53 of the Provincial Insolvency Act corresponding to section 36 of the old Act.

In the course of their order remanding the regular suit reported in, (*Sharf-uz-zaman Chowdhury* v. *Sir Henry Stanyon* (1) the Bench of this Court found *inter alia* that the trustees were not transferees for consideration. Probably on account of this finding both parties fought out the application before the District Judge on the question whether the deed could be held to be for valuable consideration as between the father and the son. This is the prayer made by the Receiver, the last paragraph of which runs as follows :—

"The applicant, therefore, prays that the transaction of 30th January 1912, so far as it purports to be a gift of the Insolvent's estate to his son, should be annulled."

The learned District Judge held that the deed must be regarded as being a trust and the trustees are the transferees and not the son. He has found the deed to be voidable, in that it was made without valuable consideration and he acordingly granted the Receiver's prayer. In appeal, it has been argued before us that this deed is excluded from the provisions of section 53 of the Provincial Insolvency Act. The section runs as follows : —

"Any transfer of property not being a transfer made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudicated insolvent within two years, after the date of the transfer, be voidable as against the Receiver."

It has been argued that the deed in question is a transfer made in favour of the purchaser in good faith and for valuable consideration. This section and the subsequent section 55 which is inserted for the protection of *bona fide* transactions are both copied almost *verbatim* from the English Bankruptcy Act. It is, therefore, natural to assume that the words "purchaser and incumbrancer in good faith" which are taken direct from that Act have the same meaning as they have in the English Courts. It has been ruled in *Hance* v. *Harding* (2), that "'purchaser' in the Bankruptcy Act, is used in the wider sense commonly given to the term in English Law and not in the mercantile sense of a person who has brought something by contract of purchase and sale." It is the view of the Madras High Court in a ruling cited in *Official Assignee of Trichnopoly* v. *Somasundaram Chettiar* (3), that the English interpretation of the word "purchaser" applies also to the Indian Law of Insolvency. In that ruling it was held, that the trustees can be regarded as purchasers whereas in the English ruling referred to, a father was regarded as purchaser from his son, although in neither case was there any question of a contract of sale. Both rulings go on further to consider the question of valuable consideration. In the English Ruling p. 738, it is stated that the father, in good faith, to induce his son to do what he ought for his family, did enter into a dealing with his son, and gave valuable consideration for what he induced the son to do. In the last ruling at page 416, Sadasiva Aiyar, J. held, "that a responsibility taken by a person to whom properties are transferred in consideration of his taking such onerous work seems to me to fall within the expression 'valuable consideration' found in sections 36 and 36 (*c*) and (53 and 55) of the Provincial Insolvency Act. Hence the three creditors who undertook to be trustees of the Insolvency properties for the benefit of all creditors and have admittedly been discharging the duties of trustees do come, in my opinon,

(1) 70 Ind. Cas. 253 ; 25 O. C. 291 ; (1923) A. I. R. (O.) 80 ; 10 O. L. J. 491.

(2) (1888) 20 B. Q. (D) 782 ; 57 L. J. Q. B. 403; 59 L. T. 659 ; 36 W. R. 629.

(3) 34 Ind. Cas. 602 ; 30 M. L. J. 415 at p. 416.

within the protection afforded to transferees for valuable consideration in sections 36 and 38." In the same judgment at p. 421 Moore, J., in agreeing with Aiyar, J., holds "The act or promise in the definition of consideration in section 2, clause (4) of the Contract Act has been described in certain English cases which have been followed in India as something advantageous to a promisor or to a third person or which is onerous or disadvantageous to the promisee." Possibly the broadest definition of consideration which has been given appears in the case of *Currie* v. *Misa*. (4). In the present case Shafiquzzaman made over his whole property to trustees in order that the residue after paying his debts should go to his son. He himself stood to gain by the transaction, an annuity of Rs. 400 a month for himself and a lesser annuity for his wife in addition to freedom from his creditors. The trustees undertook on behalf of the son heavy responsibilities in return for a chance of saving the son's property from the creditors. In either case valuable consideration, was given and received ; and as, in our view, the definition of "purchaser" accepted by the English Courts for the parallel sections of the English law of Insolvency, holds good in India also, we are of opinion that the deed before us was a transfer in favour of the purchasers for valuable consideration.

There remains the question of good faith. This was never contested before the lower Court. In this Court it has been argued that the transaction was in fraud of creditors and was, therefore, not in good faith. But the only plea advanced in favour of this argument is that the wife's dowry was stated to be Rs. 8,000 in the deed and 1 lakh of rupees in the Insolvency proceedings. It is a known fact that the dowry of a Muhammadan lady is frequently overstated and in this case it must be remembered that in addition to the acknowledgment of a dowry of Rs. 8,000 the wife under deed of transfer was entitled to an allowance of Rs. 200 per month. We are not of opinion that this variation as to the dowry between the deed of transfer and the list of debts given in the Insolvency proceedings shows any bad faith. For the rest, the document appears to have stated correctly the debtor's liabilities and there has been a *bona fide* attempt to satisfy the creditors. In our opinion the transfer was one made to the purchaser in good faith, whether they be regarded as the trustees or as the son.

The main argument advanced in reply on behalf of the Receiver is that this Court should follow the opinion of the previous Bench in the order to which we have already referred in *Sharfuzzaman* v. *Sir Henry Stanyon* (1). It is not argued that any part of that order operates as *res judicata* and it is apparent that the Court did not consider the nature of the transfer as between the father and the son. Moreover, they expressly held, that the question, whether the transfer was or was not voidable as against the Receiver, was not one which they were competent to decide. We consider that the paragraph to which we have referred in our judgment was by way of *obiter dictum*. Moreover it is actually in conflict with the final order of the same Bench when they set aside the order of the Additional District Judge dismissing the plaintiff's suit. In fact it was held by another Bench of this Court in proceedings arising out of the same insolvency that the order now passed by the District Judge is in conflict with the final order of this Court declaring that the deed of trust was binding. We refer to the order, dated 25th of May 1923. It cannot then be argued that, by reversing the order of the lower Court we are going against the previous decision of this Court. We are merely differing from an incidental finding of a Bench of this Court to which no effect was given in the ultimate order. We, therefore, allow the appeal with costs and setting aside the order of the District Judge we find that the deed of transfer of the 30th of January 1912 is a transfer made in favour of a purchaser in good faith and for valuable consideration and is not voidable as against the Receiver.

N. H. *Appeal allowed.*

(4) (1875) 10 E. 153, at p. 162 44 L. J. Ex. 94; 32 W. R. 450.

KOTHANDARAMASAMI NAIDU *v.* PAPPAMMAL

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 237 OF 1922.

March 4, 1924.

Present :—Mr. Justice Phillips and
Mr. Justice Odgers.

KOTHANDARAMASAMI NAIDU—
DEFENDANT—APPELLANT
versus
PAPPAMMAL—PLAINTIFF—RESPONDENT.

Execution of Decree— Compromise decree — Decree, wether may be questioned - Civil Procedure Code (Act V of 1908), s. 11—Succession, decision as to—Legal representative, question of, whether res judicata—Trusts—Succession—Hindu widow, position of—Custom—Limitation Act (IX of 1908), Sch. I, Art. 182— Decree providing for management of trust property by turns—Execution, right of, when arises.

In proceedings in execution of a compromise decree, it is not open to a party to question the validity of the decree which is binding on the parties to the suit till it is set aside, juet as much as if it had been passed after contest. (p. 892, col. 1.)

Tiruvambala Desikar v. *Chinna Pandaram*, 74 Ind. Cas. 57 ; 40 M. 177 at p. 189; 30 M. L. J. 274 ; (1916) 2 M. W. N 43 ; 4 L. W. 806 ; *Zemindar of Ettiyapuram* v. *Chidambaram Chetty*, 58 Ind. Cas 871; 43 M. 675 at p. 687 ; (1920) M. W. N. 460 ; 28 M. L. T. 75 ; 12 L. W. 217 ; 39 M. L. J. 203, followed.

Where a Hindu widow after her husband's death is sued by his brother who claims to succeed to the deceased's properties by right of survivorship but fails to establish the right, it is not open to him afterwards in other proceedings to object to the widow being added as legal representative of her husband. (p. 892, col. 1.)

In the absence of a special custom to the contrary succession to trusteeship of property follows the ordinary rules of succession and a Hindu widow is entitled to succeed to it as heir to her husband. (p. 892, col. 1.)

Janakee Debee v. *Gopal Acharyia*, 2 C. 365; 1 Ind. Jur. 737 ; 1 Ind. Dec. (N. S) 523 ; *Janakee Debee* v. *Gopal Acharyia*, 9 C. 766 ; 13 C L. R 30; 10 I. A. 32 ; 4 Sar. P. C. 411 ; 7 Ind. Jur. 218; 4 Ind Dec. (N. S.) 1159, relied on.

A suit relating to a dispute for trusteeship of certain properties was compromised and a decree was passed which provided that plaintiff was to manage the trust properties for two years and the defendant the next two years thereafter, with a further clause that they were to manage alternatively in turns of two years each. An application for execution of the decree for possession and management of the trust properties was filed by the plaintiff more than three years from the date of his previous execution application but within three years of the time when the right to his turn accrued ;

Held, that the right to execute the decree arose in part from time to time and a fresh application for execution was permissible within three years of any of the periods in which the plaintiff was entitled to be in possession and management of the trust properties.

Sabhanatha v. *Lakshmi* 7 M. 80; 2 Ind. Dec. (N.S.) 641 and C. M. S. A. No. 891 of 1879, distinguished.

Appeal against the order, dated the 3rd day of August 1922, of the District Court, Coimbatore, in E. P. R. No. 7 of 1922 in O. S. No. 3 of 1922.

Messrs. *C. S. Venkatachariar* and *D. Ramasami Iyengar*, for the Appellant.

Mr. *T. M. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.

Odgers, J.—One T. M. Narayanaswami Naidu died in 1889 or thereabouts leaving a will whereby he constituted a certain religious trust called 'Ramanujamatam and appointed three trustees to manage it. These trustees died and the appellant before us applied for and obtained on 26th September 1894. Letters of Administration with the will annexed to the estate of Narayanaswami Naidu. From 1894, the appellant was in management of the trust and in 1912 by O. S. 3 of that year, appellant's brother Lakshmiah sued appellant to produce the accounts of the trust and for revocation of the Letters of Administration granted to him. This suit was compromised on 18th December 1912 and a decree passed in pursuance thereof. It provided that plaintiff Lakshmiah should manage the trust properties for 2 years from 1st January 1913 and defendant for the next two years.

> " They shall thus continue to manage the same alternatively in turns of 2 years each. "

Lakshmiah died on 17th March 1917 without apparently recovering possession of the trust properties for his turn 1917 and 1918 from his brother Narayanaswami Naidu. Lakshmiah left a will whereby he bequeathed to his widow and daughters-he had no male issues—the right to his turns in the

management of the trust properties. The present application of 1922 is to execute the compromise decree of 1912 on behalf of the widow of Lakshmiah who claims to come on to the record as legal representative of her deceased husband. This was allowed by the District Judge and the brother-in-law Kothandaramsami Naidu appeals against this order.

Several points are raised. First, it is said that the right of management of trust property is not capable of devise or inheritance. It seems to me that *prima facie* there might be a good deal to be said against both the validity of appellant's original position in 1894 and that of the compromise decree. It is not easy to see how the possession of Letters of Administration to a deceased man's private estate can entitle the holder to become trustee of property which the deceased had alienated in trust. Nor is it obvious, how, assuming that appellant's possession and managemnt as trustee were valid in 1912, he could legally consent to share that possession and management with another. It may be that the compromise decree can be explained as an appointment of the brothers as alternate trustees by the Court. But, however, that may be, this is an application in execution and it is not open to a party to question the validity of the decree which is binding on the parties to the suit till it is set aside, just as much as if it had been passed after contest. *Tiruvambala Desikar* v. *Chinna Pandaram* (1); cf., *Zemindar of Ettiyapuram* v. *Chidambaram Chetty* (2). It must be held then that Lakshmiah was validly in alternate possession and management of the trust properties. In *Janakee Debee* v. *Gopal Acharyia* (3), it was held that the succession to a Shebaitship had not in that case followed the ordinary rules of Hindu Succession and that a Hindu widow could not succeed to the office as heir of her husband without proof of special custom. This was affirmed by the Privy Council in *Janaki Debi* v. *Gopal Acharyia* (4). No special custom has been proved here but the history of this trust so far as it has gone would go to show that ordinary methods of devolution would apply to this office.

Otherwise, it is, as pointed out above, difficult to see how the grant of Letters of Administration carried the possession of the office to the appellant. As stated, it is too late to contest the validity of this point of view and therefore, it must, I think, be held that Narayanaswami Naidu could legitimately leave his alternating right to the trusteeship to his widow. Further the respondent was, after her husband's death, sued by the appellant who claimed to succeed to Lakshmiah's properties by right of survivorship. He failed in the suit and also on appeal. On these grounds the District Judge is right when he says tha objection to the respondent's right to be added as legal representative of Lakshmiah is concluded by that litigation and the question cannot be reopened in execution.

The second point raised by appellant is limitation. The date of the last execution petition was 1st September 1913 or much more than three years prior to the present one in 1922. It will be remembered that Lakshmiah was, under the compromise decree, entitled to possession for the years 1913, 1914, Narayanswami Naidu being entitled for 1915 and 1916. It is stated in the present petition that appellant has been in possession since 1915. Reliance is placed on *Sabhanatha Diksshatar* v. *Subbu Lakshmi Ammal* (5). That case followed an unreported case C.M. S.A. No. 391 of 1879 set out in the footnote to the report. In the latter case the Court observed that in the Act of 1871 those decrees in which the right to execute does not wholly arise immediately but in part from time to time were not provided for. The reference is to the Limitation Act of that date which contained no reference to the corresponding section to the present section 48 C. P. C. which covers payment or delivery at recurring periods and which is expressly referred to in Art. 182 of the present Limitation Act. In C. M. S. A.

(1) 34 Ind. Cas. 57 ; 40 M. 177 at p. 189 ; 30 M. L. J. 274 ; (1916) 2 M. W. N. 43 ; 4 L. W. 306.

(2) 58 Ind. Cas. 871 ; 43 M. 675 at p. 687 ; (1920) M. W. N. 460 ; 28 M. L. T. 75 ; 12 L. W. 217 ; 39 M. L. J. 203.

(3) 2 C. 365 ; 1 Ind. Jur. 737 ; 1 Ind. Dec. (N. S.) 523.

(4) 9 C. 766; 13 C. L. R. 30 ; 10 I. A. 32 ; 4 Sar. P. C. J. 411 ; 7 Ind. Jur. 218 ; 4 Ind. Dec. (N. S.) 1159 (P. C.).

(5) 7 M. 80 ; 2 Ind Dec. (N. S.) 641.

No. 391 of 1879 the decree (for maintenance) provided for annual maintenance and the Court pointed out that in order to avoid limitation decree should declare specific dates on which payments were to be made and should not merely declare generally that payments were to be made annually. The question here is whether the decree directs payment to be made or delivery given at a certain date. I am of opinion that it does. The dates are specified. The first period of management is for 2 years from 1st January 1913, the other brother is to manage for the next two years, and provision is made for alternate terms of 2 years each. The respondent's husband would have been entitled to his turn in 1921 and 1922 and in my opinion a fresh spplication for execution is permissible within 3 years of any of the periods in which he was entitled to be in possession and management of the trust properties. The case in *Subhanatha Dikchat* v. *Subba Lakshimammal* (5), is thus clearly distinguishable. If it be objected that clause 7 of Art. 182 does not apply as it refers only to payment, the answer is that the compromise decree directs *inter alia* payment of the balance of funds in the hands of the outgoing trustee.

In my opinion the appeal fails on both these grounds and should be dismissed with costs.

Phillips, J :—I agree, but would like to add a few words with reference to *Sabhanatha* v. *Lakshmi* (5). The authority relied on there i. e., the decision in C.M.S.A. No. 391 of 1879 was one governed by the Limitation Act of 1871. Art. 182 in Schedule I of the present Limitation Act of 1920 excepts decrees provided for by section 48 of the Code of Civil Procedure whereas in the Act of 1871 there was no reference in the corresponding Art. 167 to any similar provision in the Code of Civil Procedure then in force. On this ground also I think the case may be distinguished from the present case, and that possibly in view of the change in the statute it may not be good law now.

V. N. V.
N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 22 OF 1924.

April 1, 1924.

Present :—Mr. Justice Dalal.

DR. MOTI LAL—PLAINTIFF—APPLICANT
versus
AGENT, O. R. RAILWAY AND OTHERS—DEFENDANTS—OPPOSITE-PARTY.

Raailways Act, (IX of 1890) *sec. 77—Claim for compensation for loss—Notice to Railway—Plaintiff unaware of loss, effect of.*

Plaintiff sued for damages for the loss of a cask of methylated spirit consigned to him from Cawnpore on the 25th July 1921 alleging that it was lost by the railway staff in transit and that in June 1922 a cask was delivered to him which on being opened was found to contain water. The railway pleaded section 77 of the Railways Act, in bar of the suit.

Held, that the fact that no notice was given under section 77 of the Act, was fatal to the suit and the fact that the plaintiff did not discover the substitution of water for methylated spirits till June 1922 more than 7 months after the goods were consigned, did not exclude the case from the operation of the section.

Civil revision against the order of the Judge, Small Cause Court, Saharanpur, dated the 17th August 1923.

Mr. *A. P. Dube*, for the Applicant.

Mr. *L. M. Banerji*, for the Opposite party.

JUDGMENT.—This is an application in revision against a decree dismissing the suit of the plaintiff for damages for the loss of a cask of methylated spirit consigned to him by the Managing Proprietor of the Indian Distillery, Cawnpore. The claim is brought both against the railway and the consignor and has been dismissed against both. The facts set out in the plaint are that the cask in question was consigned from Cawnpore to the plaintiff at Roorkee on 25th July 1921, that it was lost by the railway staff in transit and never reached its destination, and that in June 1922 the plaintiff was given delivery of a cask which, on being opened, was found to contain water. The railway pleaded section 77 of the

Indian Railways Act, in bar of the suit against them. It is admitted that no notice in accordance with the section was given to the Agent of the Railway. The plaintiff urges that the section is not applicable because he did not discover the substitution of the methylated spirit for water till June 1922 more than six months after the goods were consigned. This, however, does not exclude the case from the plain letter of the section. The section is one which, as has been pointed out many times, works hardship in a number of cases. In para. 1 of the plaint the claim is distinctly based on the ground of loss so that it comes definitely within the section. The plaintiff's remedy however, was, when the six months were about to expire and the goods had not been delivered to him, to give notice to the Agent under section 77 and so preserve his right of suit. It is fair to the Railway Company to say that in this case an offer of compensation was made without prejudice during the course of the negotiations and was refused by the plaintiff as being insufficient.

As regards defendant No. 3 the suit has been dismissed on the ground that the plaint contained an admission that methylated spirit was duly consigned by this defendant. Applicant now says that this statement was merely based on the rail receipt and is to be construed as meaning that these goods purported to have been consigned, but no such qualifying words are to be found in the plaint.

The application, therefore, fails, but under the circumstances I make no order as to costs.

K. S. D. *Application dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 164 OF 1922.

October 8, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Odgers.

ANGAVALATHAMMAL—APPELLANT
versus
JANAKI AMMAL AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 50 (2)—Legal Representative of deceased judgment-debtor—when personally liable—Burden of proof.

To justify an order under section 52 (2) of the Code of Civil Procedure making the legal representative of a deceased judgment-debtor personally liable, it must be shown by the person applying for execution that the legal representative has received sufficient property to cover the decree debt and the latter must fail to show that the amount that has come into his hands has been duly disposed of. (p. 897, col. 1.)

Appeal against the order of the Court of the Subordinate Judge, Kumbakonam, in E. P. No. 69 of 1920, in O. S. No. 36 of 1909.

Messrs. *A. Krishnaswamy Aiyar* and *C. A. Seshagiri Sastriar*, for the Appellant.

Messrs. *T. Rangachariar* and *K. S. Jayarama Iyer*, for the Respondents.

JUDGMENT.—This is an appeal that arises in execution of the decree, in O. S. No. 36 of 1909, obtained by one Janaki Ammal against her mother-in-law, one Lakshmi Ammal. As Lakshmi Ammal is now dead, execution is applied for against one Angavalathammal, the legal representative and daughter of Lakshmi Ammal. The decree was for possession of certain immoveable properties and for a certain sum of money, over Rs. 10,000. The decree had been executed, during the life-time of Lakshmi Ammal as regards immoveable properties and possession had been taken away from Lakshmi Ammal a year before her death. Lakshmi Ammal died in April 1916. This application is put in, by the Receiver appointed in O. S. No. 40 of 1916, on the file of the Subordinate Judge's Court of Tanjore, in whom the right to execute the decree has been vested for

the time being, Janaki Ammal, being a party to O. S. No. 40 of 1916. The application prayed for compelling Angavalathammal to pay the decree amount, from the assets of Lakshmi Ammal in her hands, with subsequent interest and costs: Angavalathammal's plea was that Lakshmi Ammal did not have or leave any assets and that no assests of hers came into her hands and that she was not liable to be proceeded against in execution of the decree.

The learned Subordinate Judge has passed an order, apparently under section 50, sub-cl. 2, of the Civil Procedure Code, and this appeal is filed against the said order, directing Angavalathammal to pay the decree amount herself personally. To justify such an order under the Civil Procedure Code, it must be shown by the person applying that the legal representative had received sufficient property to cover the decree debt and the later must have failed to show that the amount that had come into her hands has been duly disposed of. Section 50 (2). Civil Procedure Code says:

> "Where any such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased, as is proved to have come into his possession, the decree may be executed against the judgment-debtor, to the extent of the property in respect of which he has failed so to satisfy the Court, in the same manner as if the decree had been against him personally."

In this case, three issues were framed by the Subordinate Judge to the following effect:

(1) Did Lakshmi have or leave any assets?

(2) If so, did they come into the hands of the respondents?

(3) To what extent, if at all, is the respondent liable?

On the first point, the Subordinate Judge has gone into a calculation of what the possible income of Lakshmi might have been, for the last 9 years. He considers that the lands, which were in her possession, would have yielded 800 or 1000 *kalams* of paddy, that the Rs. 10,000 that was paid to her would have fetched a fair amount of interest and that on the whole, Rs. 2,000 might be taken to be the probable yearly income and that she was enjoying this, for 8 or 9 years. Then taking the probable amount she might have spent out of the income, including the expenses of certain special ceremonies, which the old lady had performed and making some allowance for household expenses, he comes to the conclusion that she must have had and must have left very large assets at her death. Then he proceeds to hold that she did, in fact, leave large assets. Then he goes on to say that, as Angavalathammal is the legal representative of the deceased Lakshmi, she must have got all those assets and as she has not accounted for them, she must have them with her and she is liable to pay the present decree amount in full personally. The defect in this process of reasoning is that it is very problematical and speculative. It is not denied that there is no direct evidence of the old lady having left any assets at all, except perhaps a few *chembus*, in the house, which her legal representative has accounted for, by showing that they were given away in charity.

It was said, by the respondent's Vakil, that the assets of the old lady were partly in the shape of bonds and partly in the shape of cash. As regards the existence of the bonds, one would have expected some better proof as the persons, who were liable under those bonds, could have been easily called as witnesses. But no one was called. As to the existence of such bonds, as a matter of fact, there is no evidence at all, on record, not even of one. As regards the cash also there is no evidence whatsoever that the old lady left anything in the shape of cash. On the other hand, there is on the side of the appellant some evidence to show that the old lady spent large sums of money in charities and in the performance of religious festivals and solemnisations. The evidence of the appellant, if accepted, would show that the old lady could not have left much assets, even if we assume that the estimate of the income by the Subordinate Judge is right. But that estimate is also a matter of speculation. There is no proof exactly as to how much Lakshmi got from the lands, or as interest for the monies she had. The lands, which were the subject-matter of the decree, were removed from her possession a year before her death. It is shown that she had undertaken a costly litigation; and an

eminent Vakil of this Court was taken from here to the lower Court, and was engaged in the case, when it came up to this Court, and the appellant's estimate that the litigation cost, about Rs. 4,000, is not in our opinion an excessive one. Taking all these circumstances into consideration, we cannot hold that it is proved that the old lady had left any assets at all, at the time of her death, except a few *chembus*. It was said that she had been paying income-tax on a sum of Rs. 1,050, said to have been interest derived from Rs. 15,000. There is evidence that she had protested against levy of the tax, but that the income-tax authorities would not relieve her and consequently she had to pay. We do not think it is safe to arrive at any conclusion, from the income-tax assessment, that she had, at the time of her death, any particular sum of money at her disposal.

If we are right in the conclusion that we have come to, that the old lady left no assets, the respondent's case necessarily fails. But apart from that, even if she had left any, there is no proof whatsoever that those assets got into the hands of the appellant before us. It is true that she was the legal representative and it is also true, as pointed out by the respondent before us, that this lady was paying income-tax herself, after the death of her mother, Lakshmi. But the payment of the income-tax is easily explained and does not indicate that she received any money on her mother's death; because she had, as proved by unimpeachable evidence, dealings with her own money, before her mother's death, on which she was getting interest. Two Chetties have been called as witnesses, P. Ws. 1 and 4, to show that during the life-time of Lakshmi Ammal, the appellant before us had a sum of Rs. 8, 500, transferred to her name by her husband. The evidence of these witnesses is supported by entries in their account books, and there can be no doubt that there were such transfers, as is spoken to by them.

Besides that, Angavalathmmal explains that she had a sum of money given to her, by her father and that she got some money by the sale of her jewels. We are not in agreement with the Subordinate Judge, in rejecting all this evidence. We think that this evidence is entitled to consideration. The reason given by the Subordinate Judge, for rejecting the evidence, that her husband gave her some money, is that she and her husband were not on good terms. That may be so; but it really is no reason, to discredit the evidence of the Chetties Admittedly, her husband was a rich man and it is not unlikely that he was persuaded to settle on her, a certain sum of money, after he married a second wife. As regards the jewels, she is likely to have got some from her husband and from her father and it is not pretended that the jewels are now in her hands; the fact that she is not able to state exactly to whom the varrious jewels were sold is no reason for discrediting her evidence that she did sell them. That is the reason given by the Subordinate Judge, for discrediting that part of the evidence, relating to the sale. The payment of income-tax by her, after her mother's death, is of no importance, because she herself ought to have paid income-tax much earlier on her own dealings and when she was called upon to pay income-tax, she had practically no defence but to pay.

It was suggested by the learned Vakil for for the respondent that once it is proved or admitted, that the legal representative, sought to be made liable, has come into possession of assets belonging to the estate of the deceased, however small it might be, the burden of proof is on the legal representative to prove the extent of the assets really received by him and that, if that burden is not discharged by him, he would be made liable for the whole of the debts of the deceased. Three cases have been cited to us on this point, *viz.* *Rajah of Kalahasti* v. *Sree Mahant Prayag Dosjee varu* (1) *Ranchode Das Goverdhan Dass* v. *Krishna Dass* (2) and *Magaluri Garudiah* v. *Narayana Rangiah* (3). These cases no doubt say that, if it is shown that some property had passed into the hands of the legal representative, the extent of the property received by him being peculiarly within his knowledge, he is bound to show that he had not received so much property, as would satisfy the debts. The real meaning seems to be that, if it were

(1) 35 Ind. Cas. 224; 30 M. L. J. 391; (1916) 2 M. W. N. 92.

(2) 12 Ind. Cas. 253; 21 M. L. J .1096; 10 M. L. T. 272; (1911) 2 M. W. N. 271.

(3) 8 M. 359; 6 Ind. Jur 24; 1 Ind. Dec. (N.S.) 805.

shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets, it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what porportion of the assets, proved to have been left by the deceased, really got into his hands. Of course, the burden is upon the legal representative to show that he has utilised the assets that have come into his hands, in the proper administration of the estate; otherwise, he will make himself personally liable for the debts of the deceased to the extent of the assets shown to have been left by the deceased and presumed to have passed into his hands. Whether this statement of the law, as to the burden of proof, is not too wide in itself, need not be considered in this case; for our finding is that no assets have been proved to have been left by the deceased. It would seem from the authorities, cited by Mr. Krishnaswamy Aiyar, and in this matter the English law is more restricted, the burden being upon the person who desires to make the legal representative or the administrator liable, to prove not only the amount of the assets left by the deceased, but also the extent of such assets, which have actually passed into his hands. See the statement in Williams on Executors, 11th Edition, p. 1564, 14 Halbury's Laws of England, 331 and some of the cases cited therein and Bullen and Leake, at page 561. It is not necessary to discuss this question further, in view of our finding that there is no proof in this case, to show affirmatively, that the old lady had left any assets, or that any passed into the hands of the appellant.

In these circumstances, we must set aside the order of the Subordinate Judge and dismiss the execution application with costs in both Courts. Costs to be paid out of the estate of Janki Ammal.

V. N. V. *Application dismissed.*

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 258 OF 1923.

March 31, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

Mt. RESHMA KUARI—DECREE-HOLDER —APPELLANT

versus

RAMESHWAR OJHA AND OTHERS— JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19.—Execution petitions—Acknowledgment—Execution of decree—Execution petition dismissed for default—Second petition—Properties not identical—Continuation of previous petition.

Section 19 of the Limitation Act applies to Execution petitions. [p. 898, col. 2.]

Where a former petition for execution has been dismissed for default of the decree-holder or where the properties sought to be sold in the former petition were different from those in the subsequent petition for execution the latter is not in continuation of the former. [p. 898, col. 1.]

Appeal from an order of the District Judge, Muzaffarpur, dated the 3rd August 1923, confirming an order of the Subordinate Judge, Muzaffarpur, dated the 27th March 1923.

Mr. *B. C. De*, for Mr. *G. C. Pal*, for the Appellant.

Messrs. *Parmeshwar Dayal* and *D. N. Varma*, for the Respondents.

JUDGMENT.

Das, J.—The only question in this appeal is whether the application for execution is barred by limitation. The decree was obtained on the 29th November 1918 and on the 31st July 1919 the decree-holder applied for execution by attachment and sale of 3 specific properties mentioned in the application. On the 21st August 1919 attachment was effected. The judgment-debtor did not appear and on the 16th September 1919 the Court settled the sale proclamation and fixed the 15th November 1919 for sale. On the 12th November the judgment-debtor appeared and

filed an objection petition under O. XXI, r. 66 of the Code. It will be noticed that the time for making the objection had expired and as a matter of fact the sale proclamation was settled before this objection was filed in Court. The Court, however, did not decide the objection on that date but adjourned it to the 15th November 1919. On the 15th November 1919 the decree-holder's pleader appeared in Court and said that he had no instructions and the Court passed the order in these terms; "The execution case is dismissed for decree-holder's default without costs to any party". On the 30th October 1922 the present application for execution was presented and it was at once objected by the judgment-debtor that it was barred by limitation. Both the Courts have given effect to the objection of the judgment-debtor.

It is first contended that the application of the 30th October 1922 should be treated as a continuation of the application of the 31st July 1919. But two difficulties present themselves. In the first place the concurrent finding of the Courts below is that the execution case was dismissed for decree-holder's default and it is well established that a subsequent application for execution can only be regarded as acontinuation of the former one when the latter is dismissed without any fault or laches on the part of the decree-holder in the process of execution. The second difficulty is that the properties now sought to be sold in execution of the decree are not the same as the properties which were attached on the 21st August 1919. It is true that two of the properties are the same, but there is a third property which is sought to be sold and which is different and was not sought to be sold in the application which was initiated on the 31st July 1919. In my opinion, the decision of the Court below on this point must be affirmed.

But then there is another question which has been raised before us by Mr. B. C. De and it is this. I have already stated that on the 12th November 1919 the judgment-debtor presented an objection under O. XXI, r. 66. Section 19 of the Limitation .Act provides: "Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

There was some difference of opinion at one time whether section 19 applied to applications for execution. The Madras High Court answered the question in the negative, whereas all the other High Courts answered the question in the affirmative, but there is no difficulty under the present Limitation Act. Explanation 3 added to section 19 of the Limitation Act of 1908 makes it clear that the provisions of the section are applicable to execution proceedings. It is, therefore, open to the decree-holder to contend that there was an admission of a present liability by the judgment-debtor in his signed petition of the 12th November 1919, but it is not possible for us to decide this question finally. We have not the petition before us and it is impossible to say whether there was in that petition an admission of a present liability to satisfy the decree of the 29th November 1918. The Court below must consider this point.

We allow the appeal, set aside the order passed by the Court below and remand the case to that Court for decision on the point now raised by Mr. B. C. De.

There will be no order as to costs.

Ross, J.—I agree.

P. D.
N. H.

Appeal allowed.

MODADAGU PERAYYA *v.* PEROLI VAIKAYAMMA

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 66 OF 1921.

January 23, 1924.

Present :—Mr. Justice Venkatasubba Rao.

MODADAGU PERAYYA—DEFENDANT—APPELLANT

versus

PEROLI VAIKAYAMMA—PLAINTIFF—RESPONDENT.

Benami Transaction—Burden of proof—Execution sale—Claim petition by alleged benamidar*—Dismissal of claim—Suit to establish title—Absolute title, onus of, whether on plaintiff.*

Ordinarily it is for the person who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him. But when the alleged *benamidar* has, in execution proceeding, preferred a claim petition which has been dismissed and he brings a regular suit, it is for the plaintiff in that suit, *i.e.*, the defeated claimant, to establish that he is the owner of the property and it is not sufficient for him to merely rely upon the deed which shows his ostensible title. [p. 899, col. 2.]

Jamahar Kumari Bibi v. *Askaram Boid*, 30 Ind. Cas. 855 ; 22 C. L. J. 27, followed.

Second appeal against the decree of the Court of the 2nd Additional Subordinate Judge, Guntur, in A S. No. 24 of 1920 (A. S. No. 81 of 1920, on the file of the District Court) preferred against the decree of the Court of the Principal District Munsif of Bapatla, in O. S. No. 1017 of 18.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *K. S. Ganapathy Aiyar*, for the Respondent.

JUDGMENT.—The plaintiff is the wife of one Narayana Rao, against whom the defendant obtained a decree. In execution proceedings, the plaintiff intervened with a claim alleging that the property attached was not her husband's but her absolute property. The claim having been dismissed, the plaintiff has filed this regular suit, which the District Munsif has dismissed on the ground that the sale in favour of the plaintiff was *benami* for her husband. On appeal the Subordinate Judge has reversed the finding of the District Munsif. He in effect has held that the plaintiff is not merely the ostensible but also the real owner of the property ; but unfortunately he has thrown the onus wrongly upon the defendant, and this is what he observes on the point :

> " The burden was on the defendant to establish that Ex. A which stands in plaintiff's name was *benami* for her husband, and, in my opinion, it was not discharged at all."

Ordinarily it will be for the party who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him. But it has been pointed out in the decisions to which my attention has been drawn that, after the dismissal of a claim, where a regular suit is instituted to set aside the order made on the claim-petition, it is for the plaintiff in that suit *i.e.*, the defeated claimant to establish that he is the owner of the property, and that it is not sufficient for him to merely rely upon the deed which shows his ostensible title see *Jamahar Kumari Bibi* v. *Askaram Boid* (1), *Govind Atmaram* v. *Santai* (2), and *Nanhi Jan* v. *Bhuri* (3). It is quite possible that, if the Subordinate Judge had considered the evidence without applying the rule of evidence which he has, he might still have come to the same conlcusion after consideration of the probabilities and the documentary and oral evidence in the case. He, however, having considered the evidence from a wrong standpoint, his decision must be reversed. I accordingly set aside the decision of the lower Appellate Court and remand the appeal for fresh disposal.

In the circumstances I direct that the costs of this appeal do abide the result of the suit. Refund of the Court-fee paid for this appeal is ordered.

V. N. V. *Appeal accepted.*
N. H. *Case remanded.*

(1) 30 Ind. Cas. 855 ; 22 C. L. J. 27.
(2) 12 B. 270; 6 Ind. Dec. (N.S.) 665.
(3) 30 A. 321; 5 A. L. J. 601; A. W. N. (1908) 125.

RAMCHARUN SINGH *v.* JANG BAHADUR SINGH

PATNA HIGH COURT.

CIVIL REVISION NO. 233 OF 1923.

April 10, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

RAMCHARUN SINGH AND OTHERS—PETITIONERS

versus

JANG BAHADUR SINGH AND OTHERS—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. XX, r. 8, O. XXI, r. 53 (6)—Judgment signed—Alteration of order—Court, inherent power of—Attachment of decree—Adjustment out of Court.

The Court has, in view of O. XX, r. 3 of the Civil Procedure Code no inherent power to re-call an order signed by it except under section 152 of the Code or on review. [p. 901, col. 1.]

There is no inherent power in the Court to do anything which is expressly prohibited by the Civil Procedure Code. [p. 901, col. 1.]

Where a person attaches a decree obtained by his judgment-debtor as against a third party there is nothing in law to prohibit the adjustment out of Court between the decree-holder who attaches the decree and the judgment-debtor of the decree attached. [p. 902, col. 1.]

Revision from an order of the Subordinate Judge, Gaya, dated the 31st December 1922, an appeal against which was dismissed by an order of the District Judge, Gaya, dated the 21st March 1923.

Mr. *Nirsu Narain Sinha*, for the Petitioners.

Mr. *Sambhu Saran*, for the Opposite Party.

JUDGMENT.

Das, J.—On the 10th of May 1919 the plaintiffs obtained a decree as against defendants Nos. 1 to 8 for Rs. 659-6-8. Two and half years before that, that is to say, on the 14th of December 1916, Bhuban Gope who was cited in the action as defendant No. 9 obtained a decree as against the present plaintiffs for Rs. 10-8-9. Bhuban Gope who was, cited in the action as defendant No. 9 obtained a decree as against the present plaintiffs for Rs. 10-8-9. Bhuban Gope attached in execution of his decree the decree obtained by the plaintiffs against the defendants and proceeded to execute that decree under the provisions of O. XXI, r. 53. On the 21st of June 1919 a petition of satisfaction was filed in the Executing Court apparently under the provisions of O. XXI, r. 2, in which it was stated that the whole of the money due by the defendants to the plaintiffs upon the decree of the 10th of May 1919 was paid to Bhuban Gope. On the 14th of August 1919, the plaintiffs proceeded to execute their decree of the 10th of May 1919. It was brought to the notice of the Court that there was a petition of satisfaction and the Court came to the conclusion that the plaintiffs' decree had been satisfied and dismissed the execution case. On the 11th of May 1920, the suit out of which the present appeal has arisen was instituted by the plaintiffs as against their judgment-debtors, defendants Nos. 1 to 8, as also against Bhuban Gope. They stated in their plaint all the relevant facts in connection with the case and asserted that there was a fraudulent conspiracy between their judgment-debtors and Bhuban Gope as a consequence of which they have suffered damages to the extent of Rs. 676-10-11. The Courts below had to decide two questions first, whether the suit was barred by the provisions of Section 47 of the Civil Procedure Code ; and, secondly, whether the conspiracy had been established entitling the plaintiffs to the reliefs claimed by them. The Court of first instance came to the conclusion that section 47 did not constitute a bar to the plaintiffs' suit ; but held on the evidence that the fraudulent conspiracy was not established by the plaintiffs ; and, in that view dismissed the plaintiffs' suit as against defendants Nos. 1 to 8, but decreed the suit as against Bhuban Gope. Bhuban Gope did not appeal but the plaintiffs appealed to the lower Appellate Court, their view being that they should have got a decree not only as against Bhuban Gopes but also as against defendants Nos 1 to 8. The learned Judge in the Court below came to the conclusion that section 47 of the Civil Procedure Code was a complete bar to the plaintiffs' suit, and he expressed an opinion that as the plaintiffs' decree was still an operative decree, the plaintiffs might even at

RAMCHARUN SINGH *v.* JANG BAHADUR SINGH

that stage apply for execution of their decree. He declined to go into the question of fraud raised by the plaintiffs; and, in the view that section 47 constituted a bar to the plaintiffs' suit, dismissed the appeal. The plaintiffs then applied to the executing Court asking that Court to vacate the order of the 3rd of September 1919 under the provisions of Section 151 of the Code and to allow execution of their decree. The Courts below, in the exercise of their inherent jurisdiction, have recalled the order of the 3rd of September 1919 and have allowed execution to proceed. The defendants in the suit have moved this Court, under the provisions of section 115 of the Code. This application is Civil Revision No. 233 of 1923. The plaintiffs, dissatisfied with the decree passed by the lower Appellate Court, holding that their suit is barred under the provisions of section 147 of the Code, have appealed to this Court and the appeal is Second Appeal No. 302 of 1922.

The question raised in Civil Revision No. 233 of 1923 is a short one and may be disposed of at once. The order of the 3rd of September 1919 was dated and signed by the Judge. That being so, there was no power, in my opinion, in the Court in the exercise of its inherent jurisdiction to recall that order. O. XX, r. 3 is perfectly clear on this point. That rule runs as follows : "The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review". It has been urged by the learned Vakil appearing for the opposite party that the Court has inherent power to do justice between the parties especially where there has been an abuse of the process of the Court. In my opinion there is no inherent power in the Court to do that which is prohibited by the Code. Order XX, r. 3 constitutes a distinct prohibition on the part of the Court to recall an order except under section 152 or on review. In my opinion there was no power in the Court to recall the order of the 3rd of September 1919. Civil Revision No. 233 of 1923 must accordingly be allowed and the orders of the Courts below must be set aside. The petitioners are entitled to their costs. Hearing fee two gold mohurs.

I now come to the appeal. In my opinion the decision of the learned Judge is erroneous and ought to be set aside. There is no challenge in this suit upon the order of the 3rd of September 1919 and as a matter of fact no challenge could possibly be thrown on that order. Bhuban Gope had undoubtedly attached the decree obtained by the plaintiffs as against the defendants. They were entitled to proceed under the provisions of O. XXI, r. 53 of the Code and they did proceed under the provisions of that order. In my opinion there was nothing to prohibit the adjustment between them out of Court. It was stated in the Executing Court that the matter had been adjusted between them. That being so there was no option in the Court but to pass the order which it did on the 21st of June 1919. It was suggested to us by the learned Vakil appearing for the appellants that there is a distinct prohibition upon the judgment-debtors adjusting the decree out of Court and he relied upon O.XXI, r. 53, clause (6) of the Code. In my opinion the argument is unsustainable. R. 53 provides that, when a decree-holder attaches a decree obtained by his judgment-debtor against a third party, the attachment shall be made by a notice by the Court which passed the decree sought to be executed to the holder of the decree sought to be attached prohibiting him from transferring it or charging the same in any way. This is the notice upon the holder of the decree sought to be attached ; and after receiving the notice, it is impossible for the holder of the decree sought to be attached to transfer or charge the decree in any way. In the case before us the holders of the decree sought to be attached are the plaintiffs. Paragraph 6 authorizes the Court to give notice of the attachment of the decree to the judgment-debtor bound by the decree attached and it provides that "No payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt ofnotice thereof either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force." The object of paragraph 6 is to prevent any adjustment of the decree between the holder of the decree sought to be attached and the judgment-debtor to the prejudice of the holder of the decree sought to be executed. Now the holders of the decree sought to

be attached in this case, as I have mentioned, are the plaintiffs and the judgment-debtors are defendants Nos. 1 to 8; and clause (6) of O. XXI, r. 53 would only prevent an adjustment of the decree as between the plaintiffs and defendants Nos. 1 to 8 to the prejudice of Bhuban Gope who is the holder of the decree sought to be executed. That being so, paragraph 6 does not assist the argument of the learned Vakil for the appellants. In my opinion, the decree obtained by the plaintiffs as against defendants Nos. 1 to 8 having been attached by Bhuban Gope and that decree having been put into execution by Bhuban Gope there was no option in the Executing Court but to pass the order which it did on the 21st of June 1919.

How then does the matter stand? Obviously the question now raised by the plaintiffs could not have been agitated in a proceeding under the provisions of section 47 of the Code. The plaintiffs' cause of action is that his decree has been satisfied by reason of a fraudulent conspiracy between defendants Nos. 1 to 8 and Bhuban Gope. This obviously is a matter which could not have been agitated under the provisions of section 47 of the Code. In my opinion, provided the plaintiffs establish that there was a conspiracy between defendants Nos. 1 to 8 and Bhuban Gope, they are entitled to succeed in the action. The learned Judge in the Court below has not expressed any opinion on the question of fact raised by the plaintiffs in the plaint. Obviously we cannot express any opinion on this question because this question must, in my opinion, be decided by the learned Judge.

In my opinion the decision of the learned Judge is erroneous and ought to be set aside. I allow the appeal, set aside the decree passed by the Court below and remand the case to that Court for decision according to law. The appellants are entitled to the costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by the learned Judge.

Ross, J.—I agree.

P. D. *Appeal allowed.*
N. H.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 937 OF 1921 AND CIVIL REVISION PETITION NO. 612 OF 1921.

February 6, 1924.

Present:—Mr. Justice Venkatasubba Rao.

IN S. A. NO. 937 OF 1921.

NIDADAVOLU ACHUTAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

VEERINA SURAYYA—PLAINTIFF—RESPONDENT.

IN C. R. P. NO. 612 OF 1921.

NIDADAVOLU ACHUTARAMAYYA—AND ANOTHER—DEFENDANTS—PETITIONERS

versus

NAVVAJI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pleadings—New case in Appeal—Hindu joint family—Father and sons—Suit for recovery of money—Actual partition, plea of—Separation in eye of law, whether may be pleaded in appeal.

Where, in a oreditors's suit for recovery of money against a Hindu father and sons in respect of certain business debts, a plea of the sons of an actual out and out partition before suit between the father and themselves is negatived, it is not open to them in appeal to set up a fresh case of division of status on the basis of a notice by one of the sons to the father. [p. 903, col. 1.]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Rajahmundry, in A. S. No. 7 of 1921 (A. S. No. 294 of 1920, on the file of the District Court, Godavari) preferred against the decree of the Court of the Principal District Munsif, Rajahmundry, in O. S. No. 316 of 1919.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the decree of the Court of the Additional Subordinate Judge of Rajahmundry, in A. S. No. 31 of 1921 (A. S. No. 348 of 1920, on the file of the District Court of Godavari) preferred against the decree of the Court of the Principal District Munsif of Rajahmundry, in O. S. No. 222 of 1919.

VITHAL SINGH *v.* AGARCHAND

Mr. *T. M. Krishnaswamy Aiyar*, for the Appellants.

Messrs. *G. Lakshmanna* and *A. Satyanarayana*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted for the recovery of a certain sum of money from the 1st defendant and defendants Nos. 2 to 4 who are his sons. The 1st defendant carried on business in brass utensils and in the course of that business, became indebted to the plaintiff. The debt was disputed by the 1st defendant, but the first Court found that his plea was false. Defendants Nos. 2 to 4 pleaded that before suit there was an out and out division between their father, the 1st defendant and themselves. The learned District Munsif held in favour of the partition. In consequence of that finding, he dismissed the suit against the the sons giving effect to the rule enunciated in *Peda Venkanna* v. *Srinivasa Deekshatulu* (1). The learned Subordinate Judge on appeal disagreed with the District Munsif and found that there was in fact no partition. It was argued on behalf of defendants Nos. 2 to 4 that there was at any rate a division in *status*, and to prove it, they relied upon Ex. I, a notice which was sent by the 2nd defendant to the 1st defendant. The Lower Appellate Court did, I think, give a finding that there was no *bona fide* severance at all effected. But I am not going to base my decision upon that circumstance alone. Defendants Nos. 2 to 4 did not plead a division in status, and I do not think that, in a case of this nature, they should be permitted to advance that plea for the first time in appeal. The claim was obviously a just claim as the debt was incurred in the course of trade and it was not tainted with illegality or immorality and nevertheless the defendants might rely on any legal defence if it had been properly pleaded and thus defeat the claim. But when the plea specifically set up was found to be false, they should not be permitted in the circumstances to put forward in appeal a case not suggested in the written statement nor even at the trial. The difficulty that may arise by the new plea being permitted to be advanced will become apparent by a perusal of the notice Ex. I. One of the questions that may arise is, was Ex. I intended to be given on behalf of the 2nd defendant alone or on behalf of the 2nd defendant and his minor brothers? Secondly, if it was intended to be also on behalf of the minor brothers, would it be operative so far as the shares of the minors are concerned? Then a question of fact may arise, was the severance in status effected *bona fide* or was the object to defraud the plaintiff and other creditors? These are considerations which would become relevant if the plea of division in status should be admitted. The defence taken by the defendants Nos. 2 to 4 having been found to be false, the plaintiff must have a decree. I, therefore, confirm the decision of the Subordinate Judge and dismiss the Second Appeal with costs.

It follows that C. R. P. No. 612 of 1921 is also dismissed but, in the circumstances, without costs.

V. N. V.
N. H.

Appeal and petition dismissed.

(1) 48 Ind. Cas. 225 ; 41 M. 186 ; 22 M. L. T. 344 ; 33 M. L. J. 519; 6 L. W. 649 ; (1918) M. W. N. 55.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 204-B OF 1923.

February 22, 1924.

Present :—Mr. Kinkhede, A. J. C.

VITHAL SINGH—APPLICANT

versus

AGARCHAND AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89, scope of—Application to set aside auction sale—Interest of applicant not disclosed—Dismissal of application, whether justified—Revision—Other remedy open—High Court, powers of

The plain meaning of the wording of r. 89 of O. 21 of Civil Procedure Code is that the right to apply to have the sale set aside on making a deposit is exercisable by a person, who has acquired an interest in the property before the date of sale. The rule does not

VITHAL SINGH *v.* AGARCHAND

say that no such application shall be entertained unless it discloses the nature of the interest which entitles the applicant to make the application. If the application therefore omits to disclose the interest, it is not such an omission as could prevent the Court from calling upon the applicant to disclose facts on which he bases his right to apply. [p. 905, col. 1.]

Though section 115 of the Civil Procedure Code prohibits revision in cases in which an appeal lies, and revisions should not be granted ordinarily where some other remedy has been provided, still, as the exercise of the power of revisions is discretionary, it must be adapted to the circumstances of each particular case. There are cases in which justice requires interference in revision even though another remedy is open to an aggrieved party. [p. 905, cols. 1 & 2.]

Nilkanth v. *Ksubai*, 63 Ind. Cas. 46, relied on.

Revision against the order of the Munsif, Jalgaon, dated the 10th October 1923, in Miscellaneous Judicial case No. 52 of 1923.

Mr *M. B. Niyogi*, for the Applicant.

Messrs. *A. V. Khare* and *W. R. Puranik*, for the Non-Applicants.

ORDER.—This is a typical instance of how the ends of justice can be defeated by resorting to technicalities of procedure and how the interests of judgment-debtors are jeopardised by their ignorance of their legal rights and by their failure to take the right step in the right direction and at the right time. The facts are sufficiently clear from the order under revision and need not be recapitulated here. One Motiram, who was a lessee of the fields put to auction on 4th July 1923, made an application accompanied by deposit of full amount of the decree, plus 5 per cent. commission payable to the auction-purchaser, and prayed that the auction be set aside. He mentioned in the application that he was making the deposit on behalf of the judgment-debtor. Apparently his application was one under O. XXI, r. 89, of the Civil Procedure Code. He, however, omitted to mention in his petition that he was a person holding an interest in the property sold by virtue of a title acquired before such sale. This omission is at the root of all the evil which has put the judgment-debtor to a loss. This application bears an order to Naib Nazir to receive the deposit for payment to plaintiff under the initials of the Munsif, which is dated 4th July 1923. The 14th July 1923 was fixed as the date for confirmation of the sale. On that day neither the judgment-debtor nor his lessee Motiram nor the auction-purchaser appeared in Court. Consequently the Court had not the means of ascertaining the capacity in which Motiram made the deposit and applied for setting aside the sale. The Court, therefore, proceeded to dismiss the application in the absence of Motiram, after recording, in the order-sheet, that the application did not mention, either, the authority under which, or, the interest in virtue of which, Motiram made the application. The sale was accordingly confirmed under O. XXI, r. 92 of the Civil Procedure Code. Motiram, therefore, made an application on 19th July 1923. Mr. Shekdar, who was acting as the pleader for the judgment-debtor also signed the application but that application was summarily disposed of on 15th August 1923. It was framed as an application under section 151 of the Civil Procedure Code. On 20th August 1923 a joint petition was made by the judgment-debtor and Motiram for setting aside 'the previous orders confirming the sale, and for reviewing the orders rejecting the petitions. In this petition it was stated that Motiram made the deposit and the application, dated 4th July 1923 in his capacity of a lessee of the judgment-debtor in order to protect his interest as such lessee. An inquiry into the facts was also prayed for. This application was strenuously opposed by the other party. The Court, therefore, after hearing all the parties passed orders on 10th October 1923 refusing to reconsider the orders already passed and to set aside the sale. It is against this order, dated 10th October 1923, that the judgment-debtor has filed this revision, and, as against the order dated 25th August 1923, Motiram has filed Civil Revision No. 205-B of 1923. Both the applications have been heard together and this order will govern both of them.

It is argued before me that I should not entertain these revisions as the applicants have omitted to avail themselves of the remedy of appeal as provided by O. XLIII, r. 1 (j) of the Civil Procedure Code, and further because the applicants were negligent in the assertion of their rights and cannot take shelter under the plea of ignorance of law and procedure. I would certainly have upheld this contention had

VITHAL SINGH *v.* AGARCHAND

it not been for the fact, that grave injustice has been done to the defendant, Vithalsing in the matter of confirming the sale, even though the Court had accepted a deposit of the decretal amount on 4th July 1923, and that the Court declined to investigate into the causes which led to the mistake or omission in drawing up the first petition dated 4th July 1923. I think that the plain meaning of the wording of r. 89 of O. XXI of Civil Procedure Code is that the right to apply to have the sale set aside on making a deposit is exercisable by a person, who has acquired an interest in the property before the date of sale. The rule does not say that no such application shall be entertained unless it discloses the nature of the interest which entitles the applicant to make the application. If the application therefore, omits to disclose, the interest, it is not such an omission as could prevent the Court from calling upon the applicant to disclose facts on which he bases his right to apply. I think, therefore, that applying the analogy of a plaint which is defective in some particulars, to this application, the Court ought to have ordered it to be amended and not rejected it in the manner done by it on 14th July 1923. When, on 19th July 1923 the Court's inherent jurisdiction was invoked the Court ought to have at least examined Motiram with a view to ascertain from him how far his application, dated 4th July 1923 fell within the category of the application which could be made under O. XXI, r. 89 of Civil Procedure Code. Instead of doing so, the Court threw out the application on a technical point. The failure to exercise its jurisdiction under section 151 of the Civil Procedure Code has worked great hardship on the judgment-debtor and his lessee. This naturally led the judgment-debtor and his lessee to again move the Court to reconsider its previous orders and to hold an investigation. But even then the Court was slow to permit, the omision to be supplied, or, the mistake corrected. I am, therefore, of opinion that following the precedent of *Nilkanth* v. *Kasubai* (1) (Civil Revision No. 41 of 1920) which lays down that though section 115 of the Civil Procedure Code prohibits revision in cases in which an appeal lies, and revisions should not be granted ordinarily where some other remedy has been provided, still, as the exercise of the power of revision is discretionary, it must be adapted to the circumstances of each particular case and that I must interfere where necessary. There are cases in which justice requires interference in revision even though another remedy is open to an aggrieved party ; much more so would the ends of justice nacessitate such interference where no other remedy is available to the judgment-debtor in view of the express prohibition contained in Sub-rule 3 of r. 92, of O. XXI of (Civil Procedure Code) as is the case here, as held in *Gajrajmati Teorain* v. *Saiyid Akbar Husain* (2) I, therefore, set aside the orders dated 10th October 1923 and 15th August 1923 respectively and direct the lower Court to enquire into the allegations, and dispose of the applications dated 4th July 1923, 19th July 1923, and 20th August 1923 according to law. The latter two applications may be treated as supplying the defects that may be existing in the main position dated 4th July 1923. The auction purchaser as also the decree-holder should be given opportunity to answer the allegations of the applicants. If the Court finds, after full investigation, that Motiram was, at the date of his application, a lessee whose interest as such lessee was created prior to the date of auction sale, the sale will have to be set aside, and the case struck off as fully satisfied by virtue of the deposit made into Court. The subsequent applications dated 19th July 1923 and 20th August 1923 not being made within 30 days of the date of sale would not by themselves help the judgment-debtor to have the sale set aside under O. XXI, r. 89, Civil Procedure Code. There is, however, nothing to prevent, the Court from treating them as applications for recording and certifying the payment under O. XXI r. 1, Civil Procedure Code, of money due under the decree already deposited into Court on 4th July 1923 and the applicants from asking the Court to set aside the order confirming the sale as having been passed without jurisdiction, on the ground that the decree was satisfied, and

(1) 63 Ind. Cas. 46.

(2) 20 A. 196 ; 2 M. L. T. 47 ; 9 Bom. L. R. 83 ; 17 M. L. J. 112 ; 5 C. L. J. 138 ; 11 C. W. N. 393 (P. C.).

consequently the very foundation of the power of the executing Court to confirm the sale had disappeared, as held in *Nilkanth* v. *Yeshwant* (3). With these remarks I allow the applications and remand the case for decision according to law. I allow Rs. 20 as pleader's fee in each case.

N. N. *Revision allowed.*

(3) 65 Ind. Cas. 331 ; 18 N. L. R. 134 (1922) A. I. R. (N) 248.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 62 OF 1921.

March 10, 1921.

Present :—Mr. Justice Jwala Prasad.

MULLIK MOKHTAR AHMED—APPELLANT

versus

MUSAMMAT BIBI RAHIMUNNISA BEGUM—RESPONDENT.

*Court-Fees Act (VII of 1887) s. 6—Appeal against mesne profits—*Advalorem *Court-fee paid in main appeal—Court-fee payable.*

Ad valorem Court fee is payable in an appeal against the amount of mesne profits fixed in execution proceedings even though the appellant has already paid *Ad valorem* Court-fee in an appeal in the main case which has been decided against him. [p. 906, col. 2 & p. 907, col. 1.]

Mr. *Hasan Jan* for the Appellant —

ORDER—This is an appeal from an order passed in execution after overruling the objections of the judgment-debtor under section 47 of the Code of Civil Procedure. The appellant has paid Rs. 2 on the memorandum of appeal, whereas according to the Stamp Reporter he ought to pay Rs. 195 more calculated on the amount involved in this appeal. The appellant disputes the correctness of the amount fixed by the Court below as due under the decree sought to be executed. He objects to the payment of the additional sum demanded by the Stamp Reporter and the matter has, therefore, been referred to me as Taxing Judge under section 5 of the Court-Fees Act.

The appellant questions the liability to pay the additional Court fee on two grounds : (1) that he had already paid in Miscellaneous Appeal No. 241 of 1920 a Court-fee of Rs. 215 calculated on Rs. 3,762-6-0, the amount of interest which was objected to by him in that appeal, and (2) that it being a Miscellaneous Appeal from an order under Section 47 of the Code of Civil Procedure a Court-fee of Rs. 2 is sufficient in accordance with the Government of India Notification No. 4344 S. R. dated the 6th October 1893.

As to the first, the matter was complicated in argument by reference to the decision of the Taxing Judge in First Appeal No. 117 of 117 and the case reported in *Kanchan Mandar* v. *Kamala Prosad Chowdhury* (1) which was followed in the former case. None of these cases seem to apply to the present case inasmuch as the Miscellaneous Appeal No. 241 of 1920 has been disposed of and is no longer pending. Whatever relief the appellant claimed in that appeal has been set at rest by the decision therein. He now wants a fresh decision arising out of the judgment of the Court below. He cannot possibly contend that the decision of this Court with respect to the amount of interest involved therein operates as *res judicata* with regard to the same amount in the present case, for then his appeal will be incompetent. In respect of that decision he contends in the present appeal that the Court below is wrong in fixing the amount due under the decree. He, therefore, questions in the present appeal the correctness of the decision of the Court below as regards the said amount and to that extent he must pay the Court-fee. He wants another decision of the Court. The time of the Court spent in the former appeal is now long passed and, therefore, the appellant is liable to pay the Court-fee now demanded of him in order to enable him to invoke the assistance of the Court to adjudicate upon the dispute raised by him in the present appeal.

As to the second objection, it is sufficient to refer to the Government of India Notification No. 4344 S. R., dated the 6th October 1893, relied upon by the appellant, in order

(1) 15 Ind. Cas. 572 ; 16 C. L. J. 564.

to show that it has no application to the case of mesne profits or interest fixed in execution proceedings and an appeal from an order fixing the amount of interest or mesne profits must bear *Ad valorem* Court-fee. The matter has been set at rest by the decision of this Court in *Tarapada Mitra* v. *Jagadamba Kumari* (2).

The question referred to me by the Taxing Officer is "whether the appellant is absolved from payment of Court fee of Rs. 195 on this appeal by reason of his payment of the Court-fee of Rs. 215 in Miscellaneous Appeal No. 241 of 1920, decided on the 16th December 1920." I would answer this question in the negative and hold that the appellant is liable to pay the additional Court-fee demanded.

N. H. *Reference answered in the negative.*

(2) 52 Ind. Cas. 802 ; 5 P. L. J. 235.

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL NO. 1516 OF 1922

February 28, 1924.

Present :—Mr. Justice Mukerji.

MST. ZAITUN AND ANOTHER—DEFENDANTS APPELLANTS

versus

SHAIKH KOMMAL AND ANOTHER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Mohammadan Law—Shia *Law*—*Females*—*Marriage*—*Majority*—*Puberty*.

Under the *Shia* Mohammadan law a female is considered to have attained majority for the purpose of giving consent to marriage on attaining puberty and in the absence of evidence the age has to be considered. [p. 968, col. 1.]

Second Appeal from the decree of Subordinate Judge, Jaunpur, dated the 26th September 1922.

Mr. *J. M. Banerji*, for the Appellants.

Mr. *S. A. Haider*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for restitution of conjugal rights. The respondent No. 1 was the plaintiff in the Court of first instance and the defendants were three; the defendant No. 1 *Musammat* Zaitun was the alleged wife, the defendant No. 2 her paternal uncle and the defendant No. 3 her paternal grandfather. The father of the girl is dead. The plaintiffs' case was that he married the girl on the 21st of September 1918, and went away to Calcutta. On coming back, he wanted that his wife should come and live with him but her uncle and grandfather prevented her from coming to him.

The uncle of the girl did not enter appearance. The defendant No. 1 was described in the plaint as a major and her age was given as 19 years. It was objected to on her behalf that, she was a minor and thereupon, the plaintiff obtained the appointment of her grandfather as her guardian for this suit. Two written statements were filed, one on behalf of the defendant No. 1 and the other on behalf of her grandfather. In both the written statements it was denied that there was any marriage and it was further stated that the plaintiff was in collusion with the girl's uncle who wanted that the girl should marry the plaintiff. The Court of first instance dismissed the suit holding that the marriage had not been proved.

There was an appeal and it was heard by the learned Subordinate Judge of Jaunpur. It appears that evidence was led on behalf of the plaintiff to show that, the girl also had consented to the marriage, besides evidence showing that the marriage had taken place with the consent of her grandfather. The learned Subordinate Judge remarked that, in most cases, the taking of consent was really a matter of form and this formality had been gone through, whether or not the consent was required under the law. He further found that the girl was of 12 years of age at the time of the marriage and that, the marriage had been performed with the consent of her grandfather. He also found that the story of the girl having consented to the marriage was not established.

In this Court only one plea has been urged and it is this. Under the Shia Law a girl is supposed to have attained puberty or majority for the purpose of marriage, at the age of 9 and that, therefore, as the finding of the Court below was that the girl did not consent to the marriage and she was 12, the marriage was

invalid. On the question as to what is the Shia Law on the point, two authorities have been relied upon, namely, Baillie's Digest, Volume II, page 96 and Tyabji's Muhammadan Law, 2nd edition, page 99.

On behalf of the respondent it has been urged that, according to the written statements of the defendants No. 1 and her grandfather she was only 10 at the date of the filing of the written statements and that, therefore, she must have been below 9 at the date of the marriage. Reliance has also been placed on the evidence of the Assistant Surgeon who examined the girl and stated that she was 12 in March 1922. That gentleman, it appears, also said, that the signs of puberty were just coming out. The learned Counsel for the respondent relies on the statement of law to be found in Amir Ali's Muhammadan Law page 323, 4th edition, Volume II. There, it is stated that, both among the Hanafis and Shias alike, the girls attain majority on the completion of 15th year, unless there is any evidence to show that puberty has been attained earlier.

It appears to me that, it is not necessary for me to deicide which of the two kinds of opinion is the more authoritative on the point. It appears to me that the rule relates to 'presumption' and nothing more. All authorities are agreed that it is really the appearance of signs of puberty that is the determining factor and, in the absence of evidence to the contrary, the presumption of law has to be given effect to. In Baillie's Digest the footnote says "Puberty is established by natural signs, which it is unnecessary to mention, or by age, which is fifteen years in males, and nine in females." As I have said, the determining factor is puberty and in the absence of evidence, the age has to be considered. The Assistant Surgeon found in 1922 that, the signs of puberty were *just appearing*. This would clearly mean that three years earlier the girl had not attained puberty. This is something which is very very definite and can be acted upon. There is no finding by the learned Subordinate Judge that, the girl had or not attained puberty. It is open to me to come to a conclusion on the point, on evidence, under section 103 of the Code of Civil Procedure. When you have got a solid fact no question of presumption arises. It follows that *Musammat* Zaitam had not attained puberty when she was married and, therefore, the question of her consent was immaterial.

I hold that the marriage is valid according to Shia Law. The appeal, therefore, fails and is hereby dismissed with costs which will include Counsel's fee on the higher scale.

N. H. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 308 OF 1924.

April 9, 1924.

Present :—Mr. Justice Das and
Mr. Justice Ross.

BABU RAM MANDAR —DEFENDANT—APPELLANT

versus

MAHARANI NAWLAKHBATI—PLAINTIFF RESPONDENT

Court-Fees Act—VII of (1887) *S.* 6—*Appeal against mesne profits*-Ad valorem *Court-fees already paid in main appeal—Court-fee payable.*

Where the appellant has already paid *ad valorem* Court-fee on mesne profits claimed by the plaintiff against him in the appeal in the main case, he is not liable to pay *ad valorem* Court-fee again in an appeal against an order ascertaining and decreeing ascertained mesne profits against him. [p. 909, col. 2.]

Mr. *S. K. Mitter*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.

Ross, J.—The facts of this case are these. The plaintiff brought a suit for possession and mesne profits valuing the land at Rs 775 and the mesne profits at Rs. 4,696-8-3. The suit was decreed for possession and it was directed that the amount of mesne profits should be ascertained. Against this decree an appeal was made to the High Court on which full Court-fee was paid. That appeal was dismissed. Then the mesne profits were ascertained to be Rs. 1,604-10-3. The defendant appealled against

that decree to the District Judge and has preferred a second appeal to the High Court.

The Stamp Reporter is of opinion that the memorandum of the appeal to the District Judge, which bore a Court-fee of 8 annas was under-stamped and should have been stamped with a Court-fee of Rs. 130.

The question is whether that opinion is correct.

The learned Counsel for the appellant contends that full Court fee on the claim for mesne profits had already been paid and that he should not be required to pay again. He relies on the decision in *Kanchan Mandar* v. *Kamala Prosad Chowdhury* (1) where the facts were similar to the facts of the present case; and it was decided that the defendant could not be called upon to pay Court fees a second time.

The learned Government Pleader refers to section 6 of the Court Fees Act and contends that on this memorandum of appeal the proper Court fee must be paid. But the question for decision is whether the Court fee demandable has not in fact been paid already by the Court fee on the original memorandum of appeal; and it was that question which was decided in Kanchan Mandal's case. The ground of the decision was that the Court fee had been paid and that it should not be paid a second time. Section 6, therefore, does not help towards a decision. The decison in *Kanchan Mandar* v. *Kamala Prosad chowdhury* (1), was sought to be distinguished on the ground that, in that case, the first appeal was still pending before the Court when the second appeal was tiled' andd that appears to have been adopted as a ground of distinction by the learned Taxing Judge in Miscellaneous Appeal No. 62 of 1921, *Mullik Mukhtar Ahmad* v. Musammat *Bibi Rahimunnisa Begum*, decided on the 10th March 1921. Now that was not the ground on which the decision in *Kanchan Mandar* v. *Kamala Prosad Chowdhury* (1), proceeded and when it is examined it does not appear to be a valid ground of distinction. Whether the two appeals are pending simultaneously or one has been disposed of before the second is filed, cannot, in my opinion, make any difference. If, as has been suggested, the Court fee is paid for *the Court's time*, then the time of the Court must be devoted to the question, whether the two cases are heard at the same time or one after the other. The amount of mesne profits is a separate question which must be separately dealt with, and it can make no difference whether the question of the amount of mesne profits is debat d at the hearing of the main appeal or at a later date. The time of the Court must be devoted to it equally in either case. I am unable to find any valid ground of distinction between the facts in the present case and the facts in *Kanchan Mandar* v. *Kamala Prosad Chowdhury* (1). The appellant had paid the Court fee, and in fact more than the Court fee, payable on the amount of the decree for mesne prfits against which he appeals, and I can see no reason why he should be required to pay again. When he first appealed, the amount of mesne profits had not been ascertained but had only been only been ordered to be ascertained. The fee was paid on the amount at which the plaintiff estimated the mesne profits. This turns out to be much more than the mesne profits actually awarded. Therefore, the appellant has really paid more than the decree that has now been made against him would have necessitated.

There is a further reason against requiring the appellant to pay an additional Court fee on the memorandum of appeal before the District Judge. That appeal was incompetent. The District Judge had no jurisdiction; the appeal lay to the High Court. The memorandum of appeal ought to have been returned to the appellant by the District Judge, and if he had done so, the appellant would have been able to file the appeal here on the same Court fee. In my opinion, therefore, no further Court fee should be required from the appellant.

The appellant is entitled to the costs of this hearing: hearing fee two gold *mohurs*.

Das, J.—I agree.

N. H.

(1) 15 Ind. Cas. 572; 16 C. L. J. 564.

THE OFFICIAL ASSIGNEE OF MADRAS *v.* THE OFFICIAL ASSIGNEE OF RANGOON

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 3033 OF 1923.

December 13, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Ramesam.

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER—PETITIONERS

versus

THE OFFICIAL ASSIGNEE OF RANGOON—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 7, 36—Official Assignee, fraudulent transfer by—Insolvency Court, power of, to order reconveyance.

An Insolvency Court has, under sections 7 and 36 of the Presidency Towns Insolvency Act, power to order the purchaser of the insolvent's property by means of a fraudulent conveyance from the Official Assignee to reconvey and revert in a substituted Assignee the property so fraudulently acquired. [p. 910, col. 2.]

In re Motion Mark v. *Davis*, (1874) 9 Ch. App. 192 at p. 210; 43 L. J. B. K. 59; 29 L. T. 757; 22 W. R. 225, followed.

Petition praying that in the circumstances stated therein the High Court will be pleased to issue an order directing that O. S. Appeal No. 27 of 1918 preferred to the High Court, Appellate Jurisdiction against the judgment and order of the Honourable Mr. Justice Bakewell, dated 23rd April 1918 made in I. P. No. 83 of 1917, on the file of the High Court in its insolvency Jurisdiction may be revived and reheard, (2) that the agreement to sell and the sale-deed executed by the Official Assignee of Rangoon, the respondent herein in favour of M. Guruswamy Naidu, be adjudged as void, and that M. Guruswami Naidu be directed to deliver up the sale-deed, dated 29th May 19 9, duly cancelled and to deliver possession of the properties to the Official Assignee of Madras, the 1st petitioner herein.

Messrs. *G. Krishnaswamy Aiyar* and *R. Swaminatha Aiyar*, for the Petitioners.

Messrs. *T. R. Venkatarama Sastry, L. S. Veeraraghava Aiyar and K. S. Sankara Aiyar*, for the Respondent.

ORDER.

Schwabe, C. J.—This is an application to review and rehear O. S. A. Nos. 27 and 28 of 1918 and further to declare that the agreement to sell certain properties of the insolvent by the Official Assignee of Rangoon, dated the 25th February 1918 and the sale of the 29th May 1919 in favour of the *zemindar* of Naikarapathi are void as against the creditors. This Court has in C. M. P. No. 3032 of 1922 passed orders with the result that the insolvency in Madras which had previously been annulled has revived. The orders to which O. S. A. Nos. 27 and 28 of 1918 referred were orders of Bakewell, J., refusing in effect to stay the sale of this property, and they were passed and confirmed by this Court in order that the whole matter might go to Rangoon and be decided there as the whole insolvency was in effect then transferred to Rangoon. Under the circumstances, the right order is that those two appeals be revived and that the application dated the 14th March 1918 be remanded to the Insolvency Court here at the same time. The real question in issue is whether or not this sale is void as against the Official Assignee in Insolvency. It is alleged that the properties sold were grossly under-valued ; it is alleged that the sale is fraudulent and it is alleged that the Official Assignee who effected the sale himself acted fraudulently in the matter. All those matters will be questions to be considered by the Court that hears this petition. It is not possible for us to hear and determine these matters, because we are sitting as an Appellate Court and we have at persent no order of the Original Court in Insovency expressing the views of that Court as to whether this sale is good or bad, and when sitting as an Appellate Court in Insolvency we do not as a rule hear matters except by way of appeal from the Original Side sitting in insolvency. Now it is argued that the Insolvency Court here has no jurisdiction to hear and determine this matter and that it is necessary that the matter should be determined by a suit and not on motion in insolvency. I do not agree with that view. I think that it has jurisdiction under the combined effect of sections 7 and 36 of the Presidency Towns Insolvency Act ; and the rule in England, though there has been some diver-

gence of opinion on this point there, is to be found clearly stated in reference to cases of this kind in *In re Motion Mark* v. *Davis* (1) thus.

> "If a Court of Bankruptcy finds property of the bankrupt in the hands of a purchaser with notice of fraud, to whom it has come by a fraudlent conveyance from an assignee in bankruptcy, it may well hold that it has power to order such purchaser to reconvey and revert in a substituted assignee the property so fraudulently acquired."

It will be a saving of costs to everybody concerned to refer, except so far as we have disposed of it, this C. M. P. No. 3033 to the Insolvency Court. As far as I understand the case is quite ready for trial and in fact it was proposed to proceed with the matter here today. It will open to the Judge sitting in insolvency to make any order which he may think fit as to the date of the trial or production of documents or anything of that kind. The costs of this application will be costs in the motion in the Insolvency Court. The Official Assignee's costs of this C. M. P. No. 3033 will, in the first instance, come out of the estate, and the rest will follow the event in the Insolvency Court.

No order on the other petitions filed with this *viz.*, 1868, 1933, 1943, 2016, 2185 and 1930 of 1923 without prejudice to any orders that may be passed on them on the Original Side.

I sanction the receipt by the Bench Clerk who is in charge of this case any remuneration that the Official Assignee may think proper for work done by him out of Office hours. If all parties agree that they prefer this matter to be determined by a suit on the Original Side rather than by *garnishee* proceedings in Insolvency it is open to them to apply.

Ramesam, J. —I agree.

K. S. D.

(1) (1874) 9 Ch. App. 192 at p. 210; 43 L. J. B. K. 69; 29 L. T. 757; 22 W. R. 225.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 207, B OF 1922.

April 14, 1923.

Present :— Mr. Prideaux, A. J. C.

ANWAR KHAN—APPLICANT

versus

YAKUBKHAN AND 2 OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115, O. VI r. 17—Amendment of plaint — Interlocutory order — Revision—General rule.

Order VI, r. 17, Civil Procedure Code gives the Court great powers to permit either party to alter or amend his pleadings at any stage of the proceedings and the matter of amendment is within the discretion of the presiding Judge. [p, 912, col. 2.]

An order allowing an amendment of plaint is not, therefore, open to revision under section 115 of the Civil Procedure Code. [p 912, col. 2.]

It is not usual to interfere in revision with interlocutory orders because though there may be no immediate appeal against such orders, a remedy is supplied by section 105, Civil Procedure Code, which provides that such orders may be made a ground of objection in the appeal against the final decree. [p. 912, col. 2.]

Application for revision of the order of the Additional District Judge, Akola, dated the 16th November 1922, in Civil Suit No 2 of 1921.

Dr. *Gour* and Mr. *G. V. Deshmukh*, for the Applicant.

Messrs. *V. Bose*, *P. N. Rudra*, *A. V. Khare* and *M. R. Babde*, for the Non-Applicants.

ORDER.—This is the sixth application in revision made by the applicant Anwar Khan during the trial of suit No. 2 of 1921 in the Court of the Additional District Judge, Akola. The facts are these. As the son of Mahomed Khan the brother of Anwar Khan's father Hussain Khan, the plaintiff claimed a half share in the property mentioned in Schedules A and B attached to the plaint, and asked for a declaration that he has that share and wants partition of that half share. He also asked for payment of Rs. 10, 500 on account of his half share of profits of the joint property for years prior to the institution of the suit, for income falling to his share accruing from the date of suit until delivery of possession, for

costs and any other relief the Court deemed proper.

Defendant No. 1 in a written statement dated 22nd June 1920 pleaded *inter alia* that without prejudice to other defences "if the Court were to hold that the change in the name of the shop on the books of 1874 indicates partnership, then the capital being nothing but Hussen Khan's concern from 1862 to 1873, this Court be pleased to make an account of the capital with reasonable interest at annual rates (rests ?) and to order payment of the same to defendant No. 1 before the estate be divided. Partnership even if any having been terminated in 1891 on the death of Hussen Khan, the present suit of plaintiff is barred by limitation.

This question of partnership is referred to in issues Nos. 4, 6, 7, 14 and 15. After the case had been closed for argument the plaintiff put in an application asking for amendment claiming in the alternative the following reliefs:—

"1. It should be declared that the plaintiff has half share in the several partnership concerns of the shop in question which was originally styled 'Hussen Khan Mahammad Khan' and which was owned after the deaths of Husen Khan and Mahammad Khan by their heirs.

"2. The partnership should be declared by the Court as dissolved on the date to be fixed by it, and a receiver should be appointed to realise outstanding debts of the shop.

"3. An account should be taken of the partnership assets and property, and possession of the plaintiff's half share of the property should be delivered to him."

The lower Court has allowed this amendment holding that the alternative pleas now raised involve merely a matter of construction of the facts set out in para. 1 of the plaint and the amendment did not involve the introduction of any new allegation of facts. The Court held the proposed amendment did not in any way change the character of the suit as even after the amendment it continues to be a suit for plaintiff's half share in the property. It held that under O. VI, r. 17, an amendment can be allowed at any stage of the suit and further the amendment did not work injustice to the other side as it was necessary to determine the real question in controversy between the parties. The amendment was granted and against that order the present application has been filed.

A preliminary objection has been raised to the hearing of this application. It is contended for the non-applicants that a revision can only be granted for the reasons enunciated in section 115, Civil Procedure Code, and in the present case the subordinate Court cannot be said to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity. There seems to be some force in this argument. Order VI, r. 17, gives a Court great powers to permit either party to alter or amend his pleadings at any stage of the proceedings and, therefore, the matter of amendment is one within the discretion of the presiding Judge and it cannot be said that the Judge in this case exercised jurisdiction not vested in him by law or failed to exercise a jurisdiction so vested, nor can it be justly said that in allowing the amendment the Judge of the lower Court has acted in the exercise of his jurisdiction illegally or with material irregularity.

Another point is, it is not usual to interfere in revision in the case of interlocutory orders because though there may be no immediate appeal against such an order a remedy is supplied by section 105, Civil Procedure Code, which provides that such orders may be made a ground of objection in the appeal against the final decree. If this question of partnership is decided in favour of the present applicant there will be no need in any appeal against the final decree to enter into the correctness of the amendment. It seems to me that the amendment followed what had already been raised in the suit and, therefore, there is nothing wrong in allowing it.

It is further contended for the applicant that he should have been given costs up to date if this amendment was to be allowed. I cannot see the justice of this. He has been given Rs. 40 for the hearing which the entertainment of the application necessitated. The final arguments in the case have yet to come and in any case the costs of that and the costs that went

before would be governed by the result of the suit.

I dismiss this application for revision with costs fixing pleader's fee at Rs. 15.

G. R. D. *Application dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 271 OF 1924.

March 27, 1924.

Present :—Mr. Justice Das and
Mr. Justice Ross.

BASUKI BEHARY PANDEY AND OTHERS—APPELLANTS

versus

CHATTER PANDEY AND OTHERS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7—Hindu joint family—Suit for partition—Court-fee payable.

A suit for partition of Hindu joint family property even where the properties stand in the name of different members of the joint family does not require *ad valorem* Court-fee.

In the case of a Hindu joint family, the possession of one member is the possession of all.

Stamp Refernce.

ORDER.—We are unable to agree with the view taken by the Stamp Reporter.

The suit was a simple suit for partition and so far as the schedule 2 properties are concerned they stand in the name of the different members of the joint family. The Stamp Reporter says as follows :—" But the Courts below have concurrently found that the schedule 2 properties were acquired in the name of various defendants and the lower Appellate Court has further found as a fact that the schedule 2 properties were shown in the names of defendants in the revisional Settlement Record." That may be so ; but the Settlement Record does not decide any question of title between the parties, although it does show that the properties were in the possession of different members of the joint family. But it is the case of the plaintiffs in the plaint that the family is joint, and it is well settled that where the family is joint the possession of one is the possession of all. I know of no authority which entitled the Stamp Reporter to determine the question of Court-fees by reference to what is afterwards decided by the Court. If the plaintiffs' case is untrue, it must fail, but I know of no authority which entitles the Court to compel the plaintiff to pay Court-fees, not on the footing of the plaint, but on the footing of what is afterwards decided by the Court.

The Stamp Reporter refers to an order of this Court, dated the 2nd May 1923 in F. A. 64 of 1923, to which I was a party. That order does not support the view presented before us by the Stamp Reporter. In that case the properties entered in schedule 1 stood in the name of the different members of the joint family. We came to the conclusion that no *ad valorem* fee was payable in respect of the plaintiffs' claim for those properties. So far as schedule 2 properties were concerned, we came to the conclusion that as those properties stood in the name of strangers it was necessary for the plaintiffs to displace the apparent title of strangers, and it was, therefore, obligatory on them to pay an *ad valorem* Court-fee. But in this case so far as schedule 2 properties are concerned, they stand in the name of the different members of the joint family. As I have said before, the possession of a member of the joint family is the possession of all the members of the joint family.

We hold that correct fee was paid by the plaintiffs on the plaint and on the memorandum of appeal in the Court below.

P. D.

N. H.

SINDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 13 OF 1923.

February 27, 1924.

Present :—Mr. B. C. Kennedy, A. J. C. and Mr. Rupchand Bilaram, A. J. C.

RALLIARAM SHEWARAM—
PLAINTIFF—APPELLANT
versus
FIRM OF BUDHURAM PARMANAND—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code, (Act V of 1908) O. I, r. 10, Limitation Act (IX of 1908), ss. 19 and 22—Suit by one of joint promissees, maintainability of—Non-joinder of parties—Subsequent joinder by order of Court—Limitation—Acknowledgment, essentials of.

It is not competent to one only of the partners of a firm or to one of the joint promissees to maintain a suit in respect of a cause of action which has accrued to all jointly.

Dular Chand v. *Balram Das*, 1 A. 453; 1 Ind. Dec. (N. S.) 211; *Imamudin* v. *Liladhar*, 14 A. 524, A. W. N. (1892) 104; 7 Ind. Dec. (N. S.) 705, followed.

A Court may, under O. I, r. 10 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by section 22 of the Limitation Act to dismiss the suit after such party has been added. That section applies though a party is joined by an order of the Court.

Imamudin v. *Liladhar*, 14 A. 524 A. W. N. (1892) 104; 7 Ind. Dec. (N. S.) 705; *Ram Kinker Biswas* v. *Akhil Chandra Chaudhuri*, 11 C. W. N. 950; 5 C. L. J. 242; 2 M. L. T. 187; 35 C. 519 (F. B.), followed.

Grish Chandar v. *Dwarkanath*, 24 C. 640; 2 Ind. Dec. (N. S.) 1096; *Fukera Pashan* v. *Bibi Azima Nissa*, 27 C. 540; 4 C. W. N. 459; 14 Ind. Dec. (N. S.) 355, not followed.

An acknowledgment under section 19 of the Limitation Act, must be a conscious admission of an existing liability in respect of the property or right which is claimed in the suit and must show an existing jural relationship between the parties at the time when the admission was made. If an acknowledgment is not express it may be by implication but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal.

Dhanmur v. *Govind*, 8 B. 99 at p. 102; 8 Ind. Jur. 261; 4 Ind. Dec. (N. S.) 439; *Venkataramanayya* v. *Srinivasa Rao*, 6 M. 182; 2 Ind. Dec. (N. S.) 406; *Benode Behari Mookerjee* v. *Raj Narain Mitter*, 30 C. 699; 7 C. W. N. 651; *Bibi Sahibzadi* v. *Syed Mir Mahomed*, 32 Ind. Cas. 548; 9 S. L. R. 143; *Fillip* v. *Mahomedally*, 55 Ind. Cas. 822; 18 S. L. R. 188, relied upon.

Appeal against the judgment and decree of Additional Judicial Commissioner in Suit No. 656 of 1918.

Mr. *Ishardas Oodharam*, for the Appellant.

Mr. *Kalumal Pahlumal*, for the Respondents.

JUDGMENT.—This is an appeal against the decision of Raymond, A. J. C. dismissing the plaintiff's suit as barred by limitation.

The plaintiff and one Isardas consigned wool in partnership for sale through the defendants No. 1 as their commission agents. On the 12th of August 1918 the plaintiff instituted this suit against defendants No. 1 for accounts of this wool consignment business and for payment to him of his half share therein, without impleading Isardas and alleging that defendant No. 1 had promised to account to him for his half share separately. On the 3rd February 1922 this Court ordered that Isardas should be joined as a necessary party to the suit, and subsequently on a plea being taken that at the date on which Isardas was so joined the plaintiff's cause of action, if any, was barred by limitation non-suited the plaintiff.

The first point taken in appeal is that Isardas though a proper party was not a necessary party to the suit.

It is urged that the defendants No. 1 had agreed to render accounts to each partner separately. Reliance has been placed on letters sent by defendant No. 1 in which they stated that they will settle up the account of profit and loss when the account sales are received from Europe and pay half of the profit to Isardas. There are similar admissions contained in other letters. These admissions, however, do not amount to a promise to render the accounts to each partner separately : or to render such accounts in respect of half of each consignment with each partner but only a promise to pay half the amount of any sum found due to each partner on a settlement of accounts made with both of them jointly or with their duly authorize

agent. The present suit is not a suit for a half share of the amount due on a settlement of the accounts but for rendition of the accounts of the agency business. Both the plaintiff and Isardas jointly were the principals and joint promissees to whom this account was to be rendered. To the suit as constituted Isardas was a necessary party before a preliminary decree for accounts could be passed by the Court. A suit cannot be maintained by one only of the partners of a firm or by one of the joint promissees in respect of a cause of action which has accrued to all jointly *Dular Chand* v. *Balram Das* (1), *Imma-ud-din* v. *Liladhar* (2). The suit was liable to be dismissed for his non-joinder and Isardas was ordered to be joined as a necessary and not as a proper party to the suit.

The second point urged is that the joinder having been made under O. I, r. 10, Civil Procedure Code by order of the Court, the suit must be deemed to have been properly instituted on the date on which the plaint was first presented and that the provisions of section 22 Limitation Act, have no application. There is no substance in this contention either The plea of non-joinder was taken by the defendants No. 1 at the earliest opportunity. The Court could not pass a preliminary decree for accounts until Isardas was brought on the record. The order of the Court which amounts under the circumstances, to nothing more than a permission to the plaintiff to join him as a party cannot confer any better rights on the plaintiff than he possessed at the date of such order or render the provisions of section 22 Limitation Act, inapplicable. In *Imam ud-din* v. *Liladhar* (2), it was held that a Court may under section 32 of the old Code corresponding to O. I, r. 10 add a party necessary to a suit, though it may be obliged to dismiss the suit after such party has been added. In *Ram Kinkar Biswas* v. *Akhil Chandra Chowdhuri* (3) a Full Bench of the Calcutta High Court held overruling the previous rulings of that Court reported in *Grish Chunder* v. *Dwarka Nath* (4) and *Fukera Pasban* v. *Bibi Azima-un-Nissa* (5), that a Court acting under the 2nd paragraph of section 32 of the old Civil Procedure Code makes the order subject to the provisions of section 22 Limitation Act. Section 22 Limitation Act, provides that if a new plaintiff or defendant is substituted or added the suit shall as regards him be deemed to have been instituted when he was so made a party.

As regards Isardas the suit must be deemed to have been instituted when he was joined as a party. Till he was joined, the suit had not been properly constituted and there was no liability on the defendants No. 1 to account to the plaintiff. The suit must be deemed to have been instituted against the defendant No. 1, so far as Isardas and *ipso facto* so far as Isar das and the plaintiff are jointly concerned when Isardas was brought on the record.

The learned Counsel has further relied on the alleged acknowledgments contained in the written statement filed in this suit and certain recitals contained in a suit filed by the defendants No. 1 against Isardas for recovery of half of the sum of Rs. 1,641-0 0 credited by the defendants No. 1 to Isardas in his account.

The defendant No. 1's case is that they had to render accounts to Isardas alone and not to the plaintiff, and that they did render the account to Isardas and paid him the whole sum due except Rs. 11-6-6.

In the reply to the notice sent by them before the institution of this suit they have expressly denied their liability to render an account to the plaintiff. In the written statement filed in this suit again they have expressly denied their liability to render an account to the plaintiff, and have pleaded that the account was as a matter of fact settled with Isardas. They contend that so far as they were concerned that had to obey the instructions of Isardas alone and to render accounts to him and assert that "Isardas had settled all accounts and recovered payment of all moneys except Rs. 11-6-6."

It can not be contended that the written statement contains an admission to render an account to the plaintiff or to the plaintiff and Isardas jointly. An acknowledgment under section 19, Limitation Act,

(1) 1 A. 453; 1 Ind Dec., (N. S) 311.
(2) 14 A. 524; A. W. N. (1892) 104; 7 Ind. Dec. (N.S.) 705
(3) 35 C. 519 ; 11 C. W. N. 350 ; 5 C. L. J. 242 ; 2 M. L. T. 187.
(4) 24 C. 640 ; 12 Ind. Dec. (N.S.) 1096.
(5) 27 C. 540 ; 4 C. W. N. 459 ; 14 Ind. Dec. (N.S.) 355.

must be a conscious admission of the existing liability in respect of the property or right which is claimed in the suit and must show an existing jural relationship between the parties at the time when the admission was made. If an acknowledgment is not express it may be by implication but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal *Dharma* v. *Govind* (6), *Venkataramanayya* v. *Srinivasa Rao* (7), *Benode Behari* v. *Raj Narain* (8), *Gopalarao Manohar Tambekar* v. *Hari Lal Subrai* (9), *Bibi Sahibzadi* v. *Mir Mahomed* (10), *Fillip & Co.* v. *Mahomed Ali Esaji* (11).

Not only is there no conscious admission to render an account which is the right claimed in this suit but a denial of such right. The written statement cannot, therefore, be relied on as an acknowledgment.

Again in the suit filed by the defendant No. 1 against Isardas they do not admit that they have to render any accounts, but aver that they had paid Rs. 1,671-14-6 to Isardas on the representation that he had authority to receive half of this amount on behalf of the plaintiff and sue to recover this amount back from him. This again is no admission of liability to render an account to the plaintiff.

The learned A. J. C. was right in holding that the defendants No. 1 had not acknowledged their liability to render an account to the plaintiff.

At the close of the case the plaintiff's Counsel applied to us for permission to amend the plaint as one for recovery of his half share found due on a settlement of accounts. This application is not only made at a very late stage of the proceedings but it is made five years after the alleged acknowledgment contained in the plaint filed by the defendants No. 1 against Isardas. A suit now filed on this acknowledgment would be barred by law. To allow this amendment at this stage would be to allow the plaintiff to substitute a fresh and new cause of action against the defendants No. 1 after the period of limitation in respect of such cause of action has expired and thereby cause injustice to the defendant No. 1.

There are no equities in favour of the plaintiff. He was ill advised to institute his suit without joining Isardas and to lie on his oars though the plea of joinder was expressly raised by the defendant No. 1. Such an application can not therefore be permitted.

This appeal, therefore, fails and is dismissed with costs.

P. B. A. *Appeal dismissed.*

(6) 8 B 99 at p. 102 ; 8 Ind. Jur. 261 ; 4 Ind. Dec. (N. S.) 439.
(7) 6 M. 182 : 2 Ind. Dec. (N. S.) 406.
(8) 30 C. 630 ; 7 C. W. N. 651.
(9) 9 Bom. L. R 715.
(10) 32 Ind. Cas. 548 ; 9 S. L. R. 143.
(11) 55 Ind. Cas. 822 ; 18 S. L. R. 183.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 149 OF 1923.

March 24, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Dalal.

RAGHUNANDAN PRASAD *alias* NAND RAM—DECREE HOLDER—APPELLANT
versus
GHULAM ALAUDDIN BEG—JUDGMENT-DEBTOR—DEFENDANT.

Contract Act (IX of 1872), s. 74, applicability of —Execution of decree—Court executing decree, powers of—Interest, whether can be reduced.

The Court executing the decree must take the decree as it stands and has no power to go behind it or entertain an objection to the legality of the decree.

Kalipada Sarkar v. *Hari Mohum Dalal*, 85 Ind. Cas 856 ; 44 C. 627 ; 24 C. L. J. 375 ; 21 C. W. N. 1104, followed.

The terms of section 74 of the Contract Act, are not applicable to a decree, and the Court executing the decree cannot grant relief in respect of interest mentioned therein on the ground that it is penal.

Execution first appeal from the decree of the Subordinate Judge of Bareilly, dated the 8th March 1923.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by the Court of the Subordinate

Judge of Bareilly in execution proceedings. The plaintiff decree-holder had brought a suit for damages for Rs. 5, 346 for failure on the part of the defendant to deliver sugar-cane juice. A decree was passed in terms of a compromise arrived at between the parties. The terms of the decree were that the defendant was to pay Rs. 2,600 to the plaintiff within one month of the date of decree and on his failure to do so he was to be liable to pay simple interest at 3 per cent. per mensem from the date of the decree. Payment was not made by the judgment-debtor within the time stipulated so the decree-holder applied for execution for the principal sum of Rs. 2,600 with interest at the stipulated rate. The judgment-debtor objected that the contract was penal and that he should be relieved from the burden thereof. The learned Subordinate Judge held that though the contract was embodied in a decree the executing Court was entitled to interfere and granted relief to the judgment-debtor by ordering interest to be recovered at the rate of 1 per cent. per mensem.

We are of opinion that the view of law taken by the lower Court was not correct. The executing Court cannot go behind the decree. As laid down in *Kalipada Sarkar* v *Hari Mohan Dalal*(1), the Court executing the decree must take the decree as it stands and has no power to go behind it or entertain an objection to the legality of the decree. The terms of section 74 of the Contract Act are not applicable to a decree. We think that the decree-holder is entitled to recover the interest at the rate prescribed in the decree. We, therefore, set aside the order of the lower Court, decree this appeal and direct execution to take place as applied for by the decree-holder. The appellant shall receive costs of this Court on the higher scale.

K. S. D. *Appeal allowed.*

(1) 35 Ind. Cas. 856 ; 44 C. 627 ; 24 C. L. J. 375 ; 21 C. W. N. 1104.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 884 AND 885 OF 1920.

September 28, 1923.

Present :—Mr. Justice Krishnan and Mr. Justice Ramesam.

SECOND APPEAL NO. 884 OF 1920.

VELLAYAN ASARI—DEFENDANT —APPELLANT
versus
SIVAGNANAM ASARI AND OTHERS —PLAINTIFFS—RESPONDENTS.

SECOND APPEAL NO. 885 OF 1920.

A. SANKARANARAYANA AIYAR —PLAINTIFF—APPELLANT
versus
MUTHURAMALINGA ASARI AND OTHERS— DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *sch. I, art.* 11—*Attachment before judgment—Order for sale—Claim-petition—Limitation.*

An attachment made before judgment assumes the character of an attachment in execution when an order is passed for the sale of the attached property.

Arunachellam Chetty v. *Periasami Servai* 70 Ind. Cas. 439 ; 44 M. 902 ; (1921 M. W. N. 569; 41 M. L. J. 252 ; 14 L. W. 645, followed.

Therefore a claim-petition arising out of proceedings in execution in respect of property originally attached before judgment is governed by Art. 11 of the Limitation Act.

Yarlagadda Mallikarjuna Prasad Naidu v. *Mallapalli Virayya*, 47 Ind. Cas. 1000; 35 M. L. J. 231; 41 M. 849 ; 24 M. L. T. 134 ; 8 L. W. 197; (1918) M. W. N. 699 (F. B.), dissented from.

Second appeals from the decrees of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Appeal Suits Nos. 54 and 55 of 1918 (A. S. Nos. 440 and 441 of 1918 on the file of the District Court, Ramnad) respectively, preferred against the decrees of the Court of the Principal District Munsif of Sivaganga in O. S. Nos. 291 of 1915 and 579 of 1916, respectively.

Messrs. *K. Rajah Aiyar* and *V. Ramaswamy Iyer*, for the Appellant.

Mr. *Jagannadha Iyer*, for the Respondents.

VELLAYAN ASARI *v.* SIVAGNANAM ASARI

JUDGMENT.—In this Second Appeal two points have been argued before us. It is urged first that the Lower Appellate Court erred in its application of article 120 of the Limitation Act to the plaintiff's suit, in so far as it is concerned with item I. It applied article 120, relying on *Yarlagadda Mallikajuna Prasada Naidu* v. *Matlopalli Virayya* (1). Since the Lower Appellate Court gave judgment, the limitation applicable to a claim-petition, when the claim is in respect of property originally attached before judgment, has been dealt with in *Arunachalam Chetty* v. *Periasami Servai* (2). According to that decision, the attachment originally made before judgment would assume the character of an attachment in execution, certainly when an order is passed for the sale of the attached property, possibly also on the date when an aplication for execution after decree was made. We cannot find in the record any materials for the determination of the dates, on which those stages in the proceedings were reached. We must accordingly call on the Lower Appellate Court to submit a finding on the issues. "On what date was the sale which took place on 1st October 1921 ordered ? and, on what date was the sale applied for?" "In returning its findings on these issues, the Lower Appellate Court will submit the records in connection with the execution of the decree in O. S No. 111 of 1910 on the file of the District Munsif's Court of Sivaganga (O. S. No. 126 of 1911 on the file on the District Munsif's Court of Manamadura).

The other point dealt with in the Lower Appellate Court's judgment will arise only in case the defendant fails in respect of limitation It is whether the hypothecation bond, Exhibit A, was a sham transaction or a fraudulent transaction intended to defeat creditors. The Lower Appellate Court has already found that Exhibit A was not a sham transaction. It held it unnecessary to consider whether it was intended to defeat creditors with reference to *Palaniandi Chetty* v. *Appavu Chettiar* (3) and *Subramania Aiyar* v. *Muthiah Chettiar* (4) Those decisions have, however, now been overruled by *Ramaswami Chettiar* v. *Mallappa Reddiar* (5). We must, therefore, call on the Lower Appellate Court to submit a finding on that issue, whether Exhibit A was intended to defeat creditors.

Fresh evidence may be taken in regard to the history of the execution proceedings referred to in the earlier portion of this judgment. The finding as regards the character of Exhibit A will be returned on the evidence already on record. These findings are due in two months. Seven days for objections.

In Second Appeal No. 885 of 1920 as in Second Appeal No. 884 of 1920 it is necessary to call for a finding as to whether Exhibit A was intended to defeat creditors. We call on the Lower Appellate Court to find on that question on the evidence on record. The finding is due in two months. Seven days for objections.

In compliance with the order contained in the above judgment the Additional Subordinate Judge of Ramnad at Madura submitted the following

Findings :—In these two suits the High Court has called for findings on the following two issues, namely,

1. On what date was the sale which took place on 1—10—1912 ordered and on what date was the sale applied for.

2. Whether Exhibit A was intended to defeat creditors.

2. As regards the first issue permission is granted by the High Court to adduce fresh evidence, but as regards the second issue no such permission is given and the finding is to be recorded on the evidence already on record. After the case was remanded Exhibits XI to XIII (*a*) were filed for the defendant. These relate to the execution proceedings in O. S. No. 126 of 1911 on the file of the Manamadura Court (O. S. No. 111 of 1910, on the file of the Sivaganga Court).

3. *Issue* 1.—The decree in O. S. No. 126 of 1911 (O. S. No. 111 of 1910, on

(1) 47 Ind. Cas. 1000 ; 35 M. L. J. 231; 41 M. 849; 24 M. L. T. 134 ; 8 L. W. 197 ; (1918) M. W.N. 699 (F.B.)

(2) 17 Ind. Cas. 439 ; 44 M. 902; (1921) M. W. N. 569 ; 41 M. L. J. 252; 14 L. W. 645.

(3) 34 Ind. Cas. 778 ; 30 M. L. J. 565 19 M. L. T. 390.

(4) 43 Ind. Cas. 651; 41 M. 612 ; 33 M. L. J. 705 ; 6 L. W. 750.

(5) 59 Ind. Cas. 947 ; 43 M. 760.

VELLAYAN ASARI *v.* SIVAGNANAM ASARI

the file of Sivaganga Court) was ordered to be transmitted to the Sivaganga Court by the Manamadura Court on 24th January 1912 (Exhibit XI). Execution proceedings were taken in the Sivaganga Court on 3rd April 1912 (Exhibit XII). The order for attachment was passed on 10th April 1912 and order for sale was passed on 27th April 1912, the date of sale being fixed for 1st October 1912 (Exhibit XII). The claim-petition was filed by Gopala Asari (deceased 1st plaintiff) on 23rd August 1912 (Exhibit XIII). The defendant filed the counter on 10th September 1912 (Exhibit XIII-*a*). From these proceedings it is seen that the sale was applied for on 3rd April 1912, that the sale was ordered on 27th April 1912 and that the sale date was fixed on 8th August 1912. I find the sale was ordered on 27th April 1912 and the sale was applied for on 3rd April 1912.

4. *Issue No.* 2.—As regards this issue the facts are already stated in detail in the judgment of this Court. It is already found that Exhibit A is not a sham transaction. Now the question is whether Exhibit A was executed in fraud of creditors. Exhibit A is for a consideration of Rs. 1,500, made up of (1) Rs. 500, due to 1st plaintiff himself; (2) Rs 694, directed to be paid to other subscribers in the chit and (3) Rs. 306, received in cash for litigation and income-tax expenses. It is defendant's case that 1st plaintiff was not a subscriber to the chit at all and that no money is due to 1st plaintiff. This question is already found in favour of the plaintiffs by this Court. (*Vide* paragraph 13 of this Court's judgment). There is the evidence of P. Ws. 1 and 2 to show that 1st plaintiff was a subscriber to the chit. There is no reason why that evidence should be rejected. We must take it then that Rs. 500 was really due to the 1st plaintiff on the date of Exhibit A.

5. As regards the amount of Rs. 694 directed to be paid to other subscribers, it will be seen from Exhibit B series that many of those creditors have been really paid. P. W. 6 was the agent of the mortgagor Krishnan Asari. He is the writer of Exhibits A, B(1), B(4), B(5) and B(6). He has attested B(2) and B(3). He swears that the persons to whom Exhibits B series were granted are subscribers to the chit and that these amounts were really paid to them under the receipts. There is the evidence of P. W. 2 in support of Exhibit B. There is also the evidence of P. W. 5 in support of Exhibit B (3). There is absolutely no reason suggested why the evidence of all these witnesses should be discarded. It is not seriously urged that the persons to whom Exhibits B series are granted are not subscribers to the chit. In these circumstances it must be found that the amount of Rs. 694 was also really paid by the 1st plaintiff on behalf of the mortgagor to the several chit subscribers.

6. Then the only other item of consideration is the ready cash payment of Rs. 306. No doubt there is no clear evidence that any litigation was pending on the date of Exhibit A. But the evidence of P. Ws. 1 and 6 shows that the amount was wanted to meet the expenses of certain litigations that are to be started thereafter. In the circumstances I think that evidence also may be accepted as true.

7. The result is there is evidence to show that *Exhibit A is really supported by real consideration.*

8. The question then is—

Whether it was executed in fraud of creditors including the defendant in O. S. No. 291 of 1915 and the plaintiff's assignor in O. S. No. 579 of 1916.

9. The main grievance of the defendant in O. S. No. 291 of 1915 and plaintiff in O. S. No. 579 of 1916 is that the 1st plaintiff Gopala Asari took Exhibit A from Krishnan Asari knowing that there are other creditors of Krishnan Asari to whom amounts are due. There is no evidence to show that the 1st plaintiff was aware that defendant in O. S. Nos. 291 and plaintiff in O. S. No. 579 were creditors of Krishnan Asari. No doubt there is some evidence to show that defendant in O. S. No. 291 of 1915 was pressing for payment of his dues on 11th January 1910 (Exhibits I and IV) and Exhibit A came into existence on 22nd February 1910. But that circumstance cannot import knowledge to 1st plaintiff regarding the debt due to Vellayan. Assuming that 1st plaintiff had notice of the fact that Krishnan Asari owed debts to other persons also, that would not vitiate Exhibit A as being got up to defeat creditors. The law on this point is stated by their Lordships of

the Privy Council in the case reported in *Mina Kumari Bebi* v. *Raja Bijoy Singh* (6).

"It may be that the judgment-debtor preferred the plaintiff * * * and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases and prefer any creditor he chooses."

In the case reported in *Mal Kanchi Kuar* v. *Bulaki Mal* (7), it was held that "A transfer of property in favour of a creditor for valuable consideration cannot be void merely because its obvious effect is to defeat or delay the claim of a less vigilent creditor."

The ruling in *V. R. M. A. V. Chetty Firm* v. *Maung Po Sin* (8), is to the same effect.

10. It is only seen from the evidence in this case that the 1st plaintiff was a little more vigilent than the other creditors of the mortgagor. The evidence shows that Exhibit A is supported by consideration. In these circumstances I find that *Exhibit A was not intended to defeat creditors.*

These appeals coming on for final hearing after the return of the findings from the lower Appellate Court the Court delivered the following

Second Appeal No. 884 *of* 1920.

JUDGMENT.—Accepting the finding as to the date of the order the plaintiff's suit is barred by limitation. The second appeal is therefore allowed and plaintiff's suit is dismissed with costs throughout.

Second Appeal No. 885 *of* 1920.

Accepting the finding the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(6) 40 Ind. Cas. 242 ; 32 M. L J. 425 at p. 431 ; 1 P. L. W. 425 ; 5 L W. 711 ; 21 C. W. N. 585 ; 21 M. L. T. 344 ; 15 A. L. J. 882 ; 25 C. L. J. 508 ; 19 Bom. L. R 424 ; (1917) M. W. N. 473 ; 44 C. 662 ; 44 I. A. 72 (P. C.).

(7) 9 Ind. Cas. 1037 ; 83 P. W. R. 1911 ; 124 P. L. R. 1911.

(8) 28 Ind. Cas. 341 ; 7 Bur. L. T. 257.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 37 OF 1922.

April 6, 1922.

Present :—Mr. Kincaid, J. C., and Kennedy, A. J. C.

MESSRS. G. P. GUNNIS & CO. LTD.,—APPELLANTS

versus

MESSRS. AMANMAL TULSIDAS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104—Arbitration Act (IX of 1899), s. 14—Order setting aside award—Appeal, whether competent.

No appeal lies against an order under the Arbitration Act, setting aside an award.

Ghumanmal Pessumal v. *Dayal Kanji*, 1 S. L. R. 86 : *Kewalram Ghanshamdas* v. *Donald Graham*, 10 Ind. Cas. 211 ; 5 S. L. R. 61, followed.

Abdul Shakur v. *Mahomed Yusuf*, 62 Ind. Cas. 456 ; 43 A. 456, not followed.

Kodumal Kalumal v. *Messrs. Volkart Brothers*, 48 Ind. Cas. 434 ; 12 S. L. R 34, distinguished.

Revision against the order of the Additional Judicial Commissioner, dated the 14th February 1922 refusing to file an award under the Indian Arbitration Act.

Mr. *T. G. Elphinston*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondents.

JUDGMENT.—The facts of this case are simple.

The firm of Tulsidas Amanmal agreed to purchase from Messrs. G. P. Gunnis & Co. Ltd., some piece goods, which the latter were to import ; clause 17 of the contract between the parties ran as follows :—

"If the goods are bought at a sterling price, the purchaser shall accept the Bank Demand rate of exchange ruling on the due date of goods, unless exchange has been previously secured."

When the goods arrived, a dispute arose between the contracting parties as to the rate of exchange. Messrs. Gunnis & Co. contended that the goods should be paid for according to

G. P. GUNNIS CO., LTD. *v.* AMANMAL TULASIDAS

the rate prevailing on the date of payment. Tulsidas Amanmal contended that the rate had already been fixed in respect of a portion of the goods and that the remainder should be paid for at the rate that prevailed when the goods arrived. As they could not agree, both parties referred the question to arbitration. Tulsidas Amanmal appointed Mr. Brachi as his arbitrator and Messrs. Gunnis & Co. appointed Mr. Houghton. The arbitrators passed an award in favour of Messrs. Gunnis & Co. and held that the goods should be paid for at the bank demand rate of exchange on the date of payment. The arbitrators applied to the Court of Mr. Raymond, A. J. C. to file the award. On the 13th December 1921 Tulsidas Amanmal filed a number of objections. After issuing notice to Messrs. Gunnis & Co. and hearing both parties, Mr. Raymond A.J.C. on the 14th February 1922 set aside the award.

Against that order Messrs. Gunnis & Co. have appealed.

Mr. Elphinstone appeared for the appellants. Mr. Rupchand appeared for the respondents.

Mr. Rupchand raised the preliminary objection that no appeal lay. He relied on the case of *Kewalram Ghanshamdas* v. *Donald Graham & Co.* (1).

A number of cases have been quoted before us, but very few of them are pertinent to the present inquiry owing to the different procedure in vogue in the High Courts of India. Here the practice of the Court is guided by the arbitration rules at p. 137 of the Rules of the Court: Rule 1 runs as follows.—

"All applications under the Indian Arbitration Act 1899, hereinafter called the Act, shall be made by petition, and for the purposes of these Rules, the person making any application shall be the petitioner and the person served therewith the respondent."

The arbitrators make an application to file the award and make the litigating parties the opponents. Thereafter by Rule 7 the Judge directs notice of the petition to issue to the opponents and requires them to show cause within a specified time why the award should not be filed. After hearing the objections if any, of the parties the Judge either files the award or sets it aside.

(1) 10 Ind. Cas. 211 ; 5 S. L. R. 61.

The procedure in the Bombay High Court which resembles that of the Calcutta High Court, is laid down in Rule 408 at p. 165 in Rules and Forms of the Bombay High Court,

"The arbitrators or Umpire shall cause the award or a signed copy thereof to be filed in Court in accordance with section 11 (2) of the Indian Arbitration Act 1899 by forwarding the same under a sealed cover addressed to the Prothonotary of the High Court with a letter requesting that the same be filed. The arbitrators or Umpire shall also send together with the award a copy of the evidence on the reference and the minutes of proceedings and also a copy of the notice given to the parties".

The award is then filed, unless one of the litigating parties can convince the Court that it is not a proper award.

The only High Court of which the decisions would be of a value is that of Allahabad. Yet even there the conditions are not exactly similar. The Arbitration Act of 1899 is not applicable to Allahabad. It is, however, in force in Cawnpore, which is within the appellate jurisdiction of the Allahabad High Court but not within its original jurisdiction. On the other hand the Arbitration Act is applicable to Karachi, a town within the original jurisdiction of this Court. In the case of *Abdus Shakur* v. *Muhammed Yusuf* (2) the High Court of Allahabad allowed an appeal from the District Judge of Cawnpore, refusing to file an award. Were the question therefore, *res integra* we might possibly have been guided by the decision in that case. But the question before us is not *res integra*. In the case of *Ghumanmal Pessumal* v. *Dayal Kanji* (3) a Full Bench of this Court held that no appeal lay against an order passed under the Indian Arbitration Act, refusing to set aside an award. That decision was no doubt given before the Civil Procedure Code of 1908 came into force. But in *Kewalram Ganshamdas* v. *Donald Graham and* Co. (1) decided in 1911 a division Bench of this Court took the same view. The words of Pratt, J. C. are so pertinent that I quote them at length.

"In the first place as pointed out in the judgment in *Ghumanmal Pessumal* v. *Dayal*

(2) 62 Ind. Cas. 426 ; 43 A. 456.
(3) 1 S. L. R. 86.

Kanji (3) the Arbitration Act does not provide for the Court making an order filing or refusing to file an award. The award is filed by the arbitrators under section 11 of the Act and unless it is remitted to the arbitrators under section 13 (1) or set aside under section 14 it becomes enforceable as if it were a decree of the Court". The order of the Court in whatever terms it may be expressed is under the Act one either setting aside or refusing to set aside the award. There is no provision under section 104, Civil Procedure Code, for an appeal against such an order ; nor does it fall within the scope of section 104 (f) which deals with an order filing or refusing to file an award.

" Paras (a) to (f) of section 104, Civil Procedure Code, dealing with appeals from orders made in arbitration clearly and exactly follow the various paras. of schedule II, dealing with arbitration under the Civil Procedure Code. Section 104 (1) (a) refers to an order made under para. 5 (2)—(b) to an order under para. 11—(c) to an order under para. 12—(d) to an order under para. 17 (4)—(e) to an order under para. 18 and (f) to an order under para. 21. It is, we think, clear, that the appeals there provided are appeals from orders made under schedule II."

" Again proceedings under the schedule either begin with a plaint in a suit or with an application which is numbered or registered as a suit. That is, for the purposes of the Code the proceedings are suits and end in a decree. The appeal provided by section 104 would under section 106 lie to the Court to which an appeal would lie from that decree. But a proceeding under the Arbitration Act is not a suit and does not end in a decree. This distinction was pointed out in Ghumanmal's case. The award is, no doubt " enforceable as if it were a decree ", but these very words make it clear that it is not a decree, though it may be executed as though it were a decree. It therefore appears clear that no appeal from an order under the Arbitration Act was contemplated under sections 104 and 106, Civil Procedure Code.

The learned Counsel for the appellant has drawn our attention to the case of *Kodumal* v. *Messrs. Volkart Brothers* (4). But that was an appeal from an order staying a suit under section 19 of the Indian Arbitration Act. It is true that the learned Judicial Commissioner observed, " There is no ground for the suggestion that the word " order " in section 104 is limited to an order under the Civil Procedure Code" But the question before him was not as in this case whether an appeal lay under section 104 (f) but whether it lay under section 104 (c) : and so far as his remarks went outside the question before him they must be deemed to be *obiter dicta*. There is; moreover, nothing in the judgment to show that the case of *Kewalram Ghanshamdas* v. *Donald Graham & Co.* (1) was brought to the court's notice.

Feeling ourselves bound by the latter decision we hold that no appeal lies in the present case.

P. B. A. *Appeal dismissed.*

(4) 48 Ind. Cas. 434 ; 12 S. L. R. 34.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 1 OF 1924.

April 4, 1924.

Present :—Mr. Neave, A. J. C., and Mr. Kendall, A. J. C.

MUHAMMAD ISMAIL —PLAINTIFF—APPLICANT

versus

KARAM ALI —DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5—Inquiry into pauperism—Plaint allegations, whether enough—Refusal of permission to sue as pauper—Revision.

In cases of inquiry into pauperism under O. XXXIII, r. 5 of the Civil Procedure Code, it is the duty of the Court not merely to read through the plaint but to make a very extensive enquiry as to the facts on which the plaint is based.

No revision lies against the order of the Court refusing permission to sue as a pauper, where the Court has properly exercised its jurisdiction, whether the conclusions arrived at by the Court are right or wrong.

MOTIOMAL *v.* MOLAP BAI

Application against an order of the Subordinate Judge, Partabgarh, dated the 6th September 1923.

Messrs. *S. M. Ahmad* and *Wasi Hasan*, for the Applicant.

Mr. *M. Wasim* for Mr. *Niamat Ullah*, for the Opposite Party.

ORDER.—This is an application for revision of an order refusing permission to sue as a pauper and the learned Subordinate Judge inquired into the matter under O. XXXIII, r. 5, Civil Procedure Code and came to the conclusion under sub-clause (*d*) of that rule that the allegations in the plaint did not disclose a cause of action. For the applicant it is contended that the learned Subordinate Judge was wrong in making so elaborate an inquiry as he did into the circumstances of the case, and in taking into consideration the recitals in the mortgage deed which was attached to the plaint. The argument is, that the Court's duty in making such an inquiry is to be no more than to read through the plaint and see whether as drafted it appears *prima facie* to disclose a cause of action. In support of this contention, the learned Counsel for the applicant relies on a ruling in *Govindasami Pillai* v. *The Municipal Council, Kumbakonam* (1).

On the other side it is pointed out that this is an application for revision under section 115, Civil Procedure Code and that the provisions of this section do not extend to determining whether the conclusions arrived at by the lower Court are right or wrong but only to ascertaining whether that Court has properly exercised the jurisdiction vested in it or not. In the present case there can be no question that the Court had jurisdiction to inquire whether the plaint disclosed a cause of action or not. Further there are rulings of other High Courts including Allahabad and the Calcutta High Courts, and the Chief Court of Punjab to the effect that in cases under O. XXXIII, r. 5 it is the duty of the Court not merely to read through the plaint but to make a very extensive inquiry as to the facts on which the plaint is based. In the present case the plaint as drafted suppressed many essential facts of the case.

(1) 45 Ind. Cas. 95, 41 M. 620; 34 M. L.J. 399.

Without going into the merits of this case we are content to say that in our opinion it is not one to which section 115 of the Code of Civil Procedure applies and we accordingly reject the application with costs.

G. H. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 36 OF 1918.

April 21, 1920.

Present:—Mr. B. C. Kennedy, J. C. and Mr. E. Raymond, A. J. C.

MOTIOMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOLAP BAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, Cl. 4—Suit for settlement of accounts—Preliminary decree—Appeal by defendant against whole decree—Court-fee payable.

Where in a suit for settlement of accounts the plaintiff has valued the relief prayed for under Cl. 4 of s. 7 of the Court Fees Act and has obtained a preliminary decree and the defendant appeals against the whole of the said decree he is bound by the valuation in the plaint and must stamp the memorandum of appeal accordingly.

Samiya Mavali v. *Minammal*, 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N.S.) 744; *Dhanpati Srinivasacharlu* v. *A. Perindevamma*, 33 Ind. Cas. 602; 39 M. 725; 30 M. L. J. 402; (F. B.); *Kanjimal* v. *Pannalal*, 28 Ind. Cas. 262; 7 P. R 1915; 15 P. L. R. 1916, followed.

Appeal against the judgment and decree of the District Judge, Hyderabad, Sind.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Motiram Ramchand*, for the Respondents.

JUDGMENT.—This was a suit by the respondents for settlement of partnership account alleging that the partnership ended on the 7th of May 1905. The first Court passed a preliminary decree on the basis of the partnership having come to an end on the 7th

of May 1905. The appellants appeal against the preliminary decree alleging that the partnership continued to a date later than the one up to which the accounts are ordered to be taken.

In the plaint the plaintiffs valued their suit at Rs. 500. The appellant paid Rs. 10 stamp on the memo. of appeal alleging at first that the case fell under Art. 17 of the Court Fees Act and subsequently asserting that he values his relief at Rs. 130. The Appellate Court decided that he must stamp on Rs. 500. On his failure to do so, the Court dismissed the appeal. The appeal is here on the ground that this finding is erroneous.

The matter rests on the interpretation of section 7, clause 4 of the Court Fees Act which directs that an account suit should be stamped according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. At first sight, it would appear that this would allow the appellant to estimate in his memorandum of appeal the relief sought. But the section goes on to say that " in all suits the plaintiff shall state amount at which he values the relief sought." This seems to take away from the appellant if he is not the plaintiff the right which is conferred on him in the earlier part of the section. The only authorities which bear on this case are those of *Kanji Mal* v. *Panna Lal* (1) which is the decision of Punjab Chief Court, *Dhupati Srinivasacharlu* v *A. Perindevamma* (2) which after some hesitation upheld the previous case of *Samiya Mavalli* v. *Minammal* (3). In both these cases it is laid down that where the plaintiff had valued the relief prayed under Clause 4, section 7 of the Court Fees Act and has obtained the decree and the defendant appeals against the whole decree he is bound by the valuation in the plaint. We do not think that we ought to differ from these authorities. The question, therefore, is whether this is an appeal against the whole decree. It is true that to a certain extent defendant has accepted the decree because he has admitted that there was a partnership. But it is clear if the appeal is successful, the Court will rescind the whole decree as it stands and substitute a different one for it. The order is that accounts be taken up to a certain date but the defendant contends that it should be taken at a later date. This may obviously have the effect of turning the liability of the defendant declared by the decree into a liability of the plaintiff. It must, therefore, be held that this is an attempt by the appellant to set aside the whole preliminary decree and in that case under the authorities quoted he is bound by the valuation of the plaint. That is to say that he should pay stamp on Rs. 500; not having done so, his appeal ought to be dismissed.

The next question is whether we should grant the appellant any further time to pay the stamp. We do not think that we should do so. The authorities vary against the contention of the appellant and he had no less than four opportunities to comply with the order of the Court which was after all not a very heavy demand on his purse. He has chosen to take the risk of delaying in the hope of getting the Appellate Court to upset the finding of the lower Court, and he has failed to do so. The suit is also an old one being filed in 1908 and we are very reluctant to give the appellant any further opportunity to delay matters.

On the whole, we dismiss the appeal with costs.

P. B. A. *Appeal dismissed.*

(1) 28 Ind. Cas. 262; 7 P. R. 1915; 15 P. L. R. 1916.

(2) 33 Ind. Cas. 602; 39 M. 725; 30 M. L. J. 402.

(3) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 298 OF 1920.

March 11, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

ELAHINEWAZ KHAN—PETITIONER—APPELLANT

versus

BISESWAR BAISYA AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Limitation Act (IX of 1908) s. 5—Extension of time—Sufficient Cause—Mistake—Illness in family—Discretion of Court.

ELAHINEWAZ KHAN *v.* BÏSESWAR BAISYA

In cases where an application for extension of time under section 5 of the Limitation Act is presented a rule is generally issued on the respondent to show cause why an extension of time should not be granted. This procedure has been insisted upon by the Judicial Committee.

Krishna Swamy v. *Rama Swamy*, 43 Ind. Cas. 493 ; 45 I. A. 25 ; 41 M. 412 ; 22 C. W. N. 481 ; 34 M. L. J. 63 ; 4 P. L. W. 54 ; 16 A. L. J. 57 ; 7 L. W. 156 ; 23 M. L. T. 101 ; 27 C. L. J. 253 ; 2 P. L. R. 1918 ; 20 Bom. L. R. 541 ; 11 Bur. L. T. 121 ; (1918) M. W. N. 906 (P. C.), followed.

If the applicant succeeds in establishing due diligence, good faith and the absence of neglect he is entitled to persuade the Court to extend the time for presentation of the memorandum of appeal.

There is no authority for the broad proposition that when there is a chance of mistake the Court should in every case excuse the delay.

Serious illness in the family or that some time was required for making arrangements for filing the appeal are not sufficient reasons for extension of time.

Appeal against the order of the Subordinate Judge, 1st Court, Zillah Mymensingh, dated the 29th of April 1919.

Babu *Gopal Chandra Das* and Babu *Nalin Chandra Pal*, for the Appellant.

Babu *Brojo Lal Chakerbutt*, Babu *Birendra Kumar Dey* and Babu *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—The first question which we are called upon to determine in this case is whether the appellant has made out a case for the exercise of the discretion vested in the Court under section 5 of the Limitation Act to admit the appeal which was presented after the period of limitation. In order to determine this question it is necessary to refer to the relevant dates. There were three suits brought by the decree-holders on several mortgages. The suits were number 945, 699 and 698 of 1916. They were decreed on the 30th January 1917. The decree passed in these suits was rather peculiar. The suits were tried together and were disposed of by one judgment and the decree following the judgment was a joint decree, a copy of which was ordered to be placed in the record of each of these suits. It ordered that certain properties were to be sold first and out of the sale proceeds the decrees in suits 945 and 699 were to be first paid off and surplus would go to satisfy the decree in suit No. 698 from which the present appeal has arisen. In execution of that decree several properties were sold and the decretal amounts in the first two suits were paid off. Subsequently the property which is described as property No. 2 of Schedule No. 2 (Taluk No. 13165) was sold for Rs. 7,000 on the 25th June 1918. The appellant was one of the judgment-debtors in suit No. 698 ; but he was no party to suit No. 699. He filed an application for setting aside the sale under O. XXI, r. 90. This application was heard by the Subordinate Judge and was dismissed on the 29th April 1919. The appellant thereafter filed an appeal against that order in the Court of the District Judge of Mymensingh on the 30th May 1919. At the hearing of the appeal an objection was taken by the respondent to the effect that the appeal did not lie to that Court but to the High Court and the learned Judge in a considered judgment upheld the objection and on the 11th June 1920 returned the Memorandum of appeal for presentation to the proper Court. The Memorandum of appeal was presented to this Court on the 9th August 1920 and an application was made to this Court on the 16th August 1920 for an extension of time for presentation of the appeal to this Court under section 5 of the Limitation Act. In such cases a rule is usually issued on the respondent to show cause why an extension of time should not be granted ; and this procedure has been insisted upon by their Lordships of the Judicial Committee in the case of *Krishnaswami* v. *Ramaswamy Chettiar* (1). It is no doubt very desirable that matters relating to the admission of appeals and similar preliminary questions should be decided before the appeal is placed on the list for hearing. The learned Judge before whom the application was made, however, passed the following order "Let the appeal be registered subject to such objection, if any, that may be taken at the hearing of the appeal." They further added that they followed this course as the learned Vakil for the appellant urged that he would prefer it rather than that a Rule should be issued. It is evident therefore that the learned Judges would not have made this order but for the request of the learned Vakil for the appellant. This appeal

(1) 43 Ind. Cas. 493 ; 45 I. A. 25 ; 41 M. 412 ; 22 C. W. N. 481 ; 34 M. L. J. 63 ; 4 P. L. W. 54 ; 16 A. L. J. 57 ; 7 L. W. 156 ; 23 M. L. T. 101 ; 27 C. L. J. 253 ; 2 P. L. R. 1918 ; 20 Bom. L. R. 541 ; 11 Bur. L. T. 121 ; (1918) M. W N. 906 (P. C.).

has come up before us for hearing after 4 years and the respondent takes the preliminary objection that it was filed out of time and is barred by limitation.

It is submitted on behalf of the appellant that it was through a *bona fide* mistake that he presented the appeal in the Court of the District Judge and that the time that was occupied in prosecuting the appeal with due diligence and in good faith in the District Judge's Court should be deducted and if this is done, the appeal is within time, because it will have been presented in this Court within 90 days from the date of the order of the Subordinate Judge. There is no doubt that if the appellant succeeds in establishing due deligence, good faith and the absence of neglect he is entitled to argue that it will be sufficient cause within the meaning of section 5 of the Indian Limitation Act, so as to persuade us to extend the time for presentation of the memorandum of appeal in this Court. In order to determine this question it is necessary to consider the facts of this case. As we have observed, there were three suits brought on different mortgages which were consolidated and tried together by consent of parties. The learned District Judge in his judgment observes, and rightly observes, that the composite decree that was passed by the Subordinate Judge in three cases was passed with the consent of all the parties concerned and the order in which the properties were directed to be sold was intended to be beneficial to the parties inasmuch as the appellant had expected that the sale of the properties which consisted of his town residence and other valuable pieces of land would satisfy the three decrees and thus save the taluk which is the subject-matter of the present appeal. No complaint on the ground that the decree was misleading could be urged by the appellant. It appears, further, that some properties were sold and according to the order recorded by the Execution Court on the 10th August 1918 the decrees in suit No. 945 giving rise to execution case No. 56 of 1918 and in suit No. 699 giving rise to execution case No. 57 of 1918 were fully satisfied. The balance left over went towards the satisfaction of the decree passed in suit No. 698 from which arose execution case No. 58 of 1918. It is clear that on that date the decrees in the other two suits were satisfied and that the decree in the last mentioned suit No. 698 of 1916 was satisfied in part. As the three suits were tried together and, as one consolidated decree was made the three execution proceedings to be likewise consolidated and the order in all the execution cases was recorded in the order-sheet in execution case No. 57 of 1918. It is to be noticed that the suits Nos. 699 and 945 were valued at sums below Rs. 5,000 and the suit No. 698 was valued at Rs. 9,613 and that when the execution of the decree in that suit was sought it amounted to Rs. 11,818. This property namely, the taluk No. 13165 was one of the properties involved in suits Nos. 698 and 945; but, as above stated, the decrees in 699 and 945 having been satisfied by the sale proceeds of other properties, the sale of the taluk in dispute was held in execution of the decree passed in suit No. 698. In the bid-sheet which is headed as bid-sheet in execution cases Nos. 56, 57 and 58 of 1918, dated from the 20th June 1918 to the 25th June 1918 there is an order that the last bid of Rs. 14,500 in respect of other properties was accepted by the Court and the Nazir was directed to sell the remaining property that is property No. 2 of Schedule No. 2. for the realization of the balance due in suit No. 698 of 1916. In the petition which the appellant presented in the Court below under O. XXI, r. 90 he states "for the realization of the decretal amount in suit No. 698 of 1916 of this Court between the aforesaid decree-holders and judgment-debtors; the decree was executed in case No. 58 of 1918 and the following moveable properties owned and held by the judgment-debtor petitoner was sold by auction on the 25th June 1918 in execution case No. 57 of 1918 for the realization of the amount under the said decree." This shows that the appellant was aware on that date of the true state of things, namely, that the decree in suit No. 698 was executed and the property was sold for realization of the amount due under that decree in Execution Case No. 57. Then again the memorandum of appeal presented to the District Judge is headed as " In execution cases Nos. 57 and 58 of 1918 of the Court of the First Subordinate Judge of Mymensingh between the aforesaid parties, the property of the judgment-debtor having been sold on the 25th June 1918; the petitioner made an application for the said sale being set aside under O. XXI, r. 90 Civil Procedure Code." We also notice that the pro-

clamation of sale issued by the execution Court on the 2nd May 1918 for the sale of the properties one of which was the disputed property is headed "mortgage execution case No. 58 of 1918" The learned Vakil for the appellant, however, argues that the appellant was misled by execution being taken in execution No. 57 in which the suit was valued at less than Rs. 5,000 he honestly believed that the appeal lay to the District Judge. We are unable to accept this contention. We do not find any circumstances which might reasonably be supposed to have misled the appellant. He was one of the parties to the suit, he knew the valuation of the different suits, he was aware that the decree which was executed in execution case No. 57 was fully satisfied and he was further aware that the amount of the sale proceeds of the disputed taluk went towards the satisfaction of the decree in suit Nos. 945 and 698 of 1916. We may also remark that the appellant is a pleader by profession. He attempted to give some explanations of his apparent negligence in an affidavit which was filed in this Court at the time when the order was obtained for the registration of the appeal. In the affidavit he does not say how he was led to think that the appeal would lie to the District Judge except that orders were passed in Execution Case No. 57 which arose from a suit which was valued at less than Rs. 5,000. This in our opinion, is not sufficient. There are other circumstances which clearly point to a knowledge of the appellant that he was aware or would have been aware with slight diligence that though execution was taken in one of the Execution Cases, all the three cases were in process of execution.

In our judgment the question whether the time should be extended under section 5 of the Limitation Act, should be answered in the light of the peculiar circumstances of each case. The learned Vakil for the appellant has referred us to certain decisions of the Judicial Committee in order to help us to ascertain the principle to be applied in this case. The case of *Brij Inder Singh* v. *Kanshi Ram* (2) simply reiterates what section 14 has laid down, namely that the period occupied in prosecuting with due diligence and in good faith a proceeding in another Court is to be deducted in computing the period within which an appeal should be presented. The case of *Sheimant Sunderabai* v. *Collector of Belgaum* (3) shows the reluctance of their Lordships of the Judicial Committee to interfere with the discretion vested in the Judges of this Court in either admitting or refusing to admit an appeal presented beyond time. They affirmed the views taken in the case of *Krishnaswami* v. *Ramaswami* (1). In *Sundarbai's case*, (3) the defendant had sufficient cause for not presenting the appeal in the District Judge's Court within the period of limitation. The learned Judges of the High Court when admitting the appeal had made the following observation. "We have no doubt that the mistake under which the appeal was filed originally in the High Court arose from the difficulty relating to valuation of suits in this country. We are satisfied as to *bonafides* and diligence of the appellant in this case and we, therefore, think that the appellant had sufficient reason within the meaning of section 5, Limitation Act for not presenting the appeal to the District Court." These cases, therefore, are no authorities for the broad proposition that where there is a chance of mistake the Court should in every case excuse the delay.

There is a further difficulty in the way of the appellant. The memorandum of appeal was returned by the District Judge on the 11th June 1920 but was not presented to this Court before the 9th August 1920, *i. e.* after an interval of about two months. It is, therefore, necessary that the plaintiff should give a satisfactory explanation of this delay. The only explanation offered is contained in his affidavit to which we have already referred. He says therein that 'there was serious illness in the petitioner's family and some time was required in making arrangement in the High Court.' This, in our opinion, is not sufficient explanation of the delay. Under section 14, Limitation Act, the appellant who seeks to deduct the period must prove that he carried on the litigation with due diligence.

(2) 42 Ind. Cas. 43 ; 45 C. 91 ; 38 M. L. J. 486; 22 M. L. T. 362 ; 6 L. W. 592 ; 126 P. W. R. 1917 ; 18 A. L. J. 777 ; 19 Bom L. R. 866 ; 3 P. L. W. 318 ; 26 C. L. J. 572 ; 104 P. R. 1917 ; (1917) M. W. N. 811 ; 22 C. W. N. 169 ; 127 P. L. R 1917 ; 44 I. A. 218 (P. C.).

(3) 52 Ind. Cas. 897 ; 28 C. W. N. 753 ; (1919) M. W. N. 254 ; 43 B. 876 ; 21 Bom. L. R. 1148 ; 46 I. A. 15 (P. C.).

BEST & CO, LTD. *v.* THE CORPORATION OF MADRAS

In the case of *Ram Narain Joshi* v. *Parmeshwar Narain Mahto* (4), this Court refused to extend the time for presentation of an appeal under section 5 of the Limitation Act and the Judicial Committee declined to interfere with the order. In that case the delay was one of six weeks; and their Lordships of the Judicial Committee said that the delay which had occurred since the rejection of the appeal by the High Court and which was not accounted for militates against interference by their Lordships, with the order of the High Court. In the case of *Sarat Chandra Bose* v. *Saraswati Debi* (5), the delay was for one month in presenting an appeal to this Court after the District Judge had held that he had not jurisdiction to hear the appeal. Their Lordships (Mookerjee and Holmwood, JJ.) refused to accept the explanation and one of the facts which weighed with them was that the appellant in that case as in this case was a pleader.

Considering all the circumstances of the case we are of opinion that this is not a fit case in which we should be justified in exercising the discretion vested in us under section 5 of the Indian Limitation Act in excusing the delay in presenting the appeal to this Court.

The result is that this appeal is dismissed with costs. We assess the hearing fee at three gold mohurs.

M. B. *Appeal dismissed.*

(4) 30 C. 309 : 30 I. A. 20 : 8 Sar. P. C. J. 431 (P.C.).
(5) 34 C. 216 : 5 C. L. J. 380.

MADRAS HIGH COURT.
FULL BENCH.

REFERRED CASE NO. 1 OF 1923.
October 19, 1923.

Present :— Sir Walter Salis Schwabe, Kt., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

BEST & CO., LTD., AGENTS OF THE NOBEL'S EXPLOSIVES CO., LTD.—APPELLANT
versus
THE CORPORATION OF MADRAS—RESPONDENT.

Madras City Municipal Act (IV of 1919), s. 110, sch. IV, r. 7—Incorporated Company with paid up capital in foreign currency whether liable to company tax—Interpretation of Statutes—Taxing Statutes.

All incorporated companies which transact business in the City of Madras are liable to be assessed to the tax on Companies under section 10, and r.7 of the Taxation Rules in Schedule IV of the Madras City Municipal Act 1919 irrespective of their paid up capital being in British Indian currency or any other currency.

The maxim that clear words are necessary in order to tax the subject does not mean that words are to be unduly restricted against the taxing authority. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

Case stated under r. 17, schedule IV of the Madras City Municipal Act, in M. T. Appeal No. 4 of 1922, on the file of the Court of Small Causes at Madras.

This case coming on for hearing, on the 11th July 1923, upon hearing the arguments of Mr. R. N. Aingar, Counsel, instructed by Messrs. King and Partridge, Solicitors for the Appellant, and of Mr. P. Duraiswami Ayyangar, for the Respondent, and the case having stood over for consideration till the 30th July 1923, the Court (Spencer and Devadoss, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Spencer, J.—I have perused the Judgment of my learned brother and I regret that I am unable to agree with his conclusions.

I agree with the opinion of the learned Chief Judge of the Court of Small Causes that Madras Act IV of 1919 does not either expressly or by implication confer on the Commissioner of the Corporation power to determine the value in the currency of British India of any sum expressed in any currency other than that of British India and that under Rule 7 he can only impose assessment under section 110 in respect of those companies the paid-up capital of which is expressed in rupees. In this view the first two questions of the case stated for the opinion of the High Court under Rule 17 of Schedule IV will have to be answered in the negative and it becomes unnecessary to express an opinion on the third question.

On three points I am constrained to differ from my learned brother. In the first place I do not consider that it is legitimate for us to hazard a conjecture as to what the legislature may have intended when they framed the Act and the rules in this manner. For it probably did not occur to anybody at the time that some day a difficulty might arise from the omission to provide means for converting capital stated in foreign currency into rupees and as Rowlatt, J., observed in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1) "In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Next it has been suggested that the Commissioner in a particular case might estimate whether the capital of a foreign company would, if calculated in rupees, amount to more than twenty lakhs of rupees or less than one, and that it would always be open to the company to show that his estimate was wrong. But if the rate of exchange is not fixed and if the date when the calculation is to be made is not given, with a varying exchange, who is to say whether the Commissioner was right or wrong? In cases on the border line a company might be liable to taxation on one day and not liable the next day.

Then lastly my learned brother finds that section 110 is very clear and, if I understand him rightly, he thinks that the Madras City Municipal Act as compared with the Madras District Municipalities Act gains in clearness by the omission in the City Act to define the meaning of "Company" in the definition clauses. I do not appreciate the suggestion that the omission to define a technical expression makes the matter more clear. But I agree that the important question here is to decide what is meant by the words in section 110 "every incorporated company transacting business within the city." In the absence of any definition I do not see why we should not give the word "company" the same meaning as it has in the Indian Companies Act, section 2 (2) *viz.*, a company formed and registered under that Act or an existing company. Section 15 of that Act provides for the registration of companies and section 23 for the certifying of incorporation; and it is, therefore, only reasonable to suppose that by an "incorporated company" in section 110 of Madras Act IV of 1919 a Company registered under section 15 of the Indian companies Act and incorporated under section 23 is intended. Section 253 declares what companies are authorized to be registered. Section 277 deals with the requirements of the Act as to companies established outside British India which proceed to establish a place of business within British India. As under section 22 only the Registrar of a province, in which the registered office of the company is situated, can register a company and as the Schedules to the Act apply only to companies whose capital is in rupees, I conceive that a Registrar would find considerable difficulty, if not inability, in dealing with the application for registration of a company whose registered office was not in India and whose capital was not stated in rupees.

By section 20 of the Indian Stamp Act the legislature provided that *ad valorem* duty expressed in a foreign currency should be calculated according to the current rate of exchange on the day of the date of the instrument. But the Indian Companies Act and the Madras City Municipal Act contain no provision for converting foreign currencies into rupees. If the machinery for conversion of currency is lacking, it becomes impossible to say what the provisions of the Act including the schedules (for the rules must always be read in conjunction with the body of an Act, see *Mani Mohan Mandal* v. *Ramtaran Mandal* (2), mean when they speak of rupees in relation to companies whose capital is not expressed in rupees.

I am, therefore of opinion that the Indian Companies Act and the Madras City Municipal Act cannot be applied to companies which have not a place of business situate in British India, as they cannot get themselves registered in British India until they open a place of business in this country, and so they cannot become "incorporated companies" within the meaning of section 110 of Act IV of 1919.

Mr. Aingar conceded that as "persons" include "companies" under section 3, clause

(1) (1921) 1 K. B. 64; 90 L. J. K. B. 118.

(2) 33 Ind. Cas. 329; 43 C. 148.

(39), of the General Clauses Act, such companies are liable to pay taxes under section 111. Therefore, the result of my conclusion will not be that they will escape making any contribution whatever to the revenues of the Corporation, and the equity of the claim made by the assessed company has thus no bearing on the decision of the question that has been raised and referred to us.

Devadoss, J.—The Chief Judge of the Small Cause Court, Madras, has submitted the following questions of law for the opinion of the High Court:—

1. Whether or not incorporated companies which transact business in the City of Madras and whose paid-up capital is in a currency other than that of British India are liable to be assessed to the tax on companies under section 110 and rule 7 of the taxation rules in schedule IV of the Madras City Municipal Act, 1919?

2. Does the proviso to rule 7 apply to all companies transacting business within the city irrespective of their capital being in British Indian currency or any other currency?

3. What is the meaning of expressions "gross income", and "gross income received in or from the city" in the proviso to rule 7? Does the latter expression include income arising out of business transacted outside Madras, the proceeds whereof are transmitted to and received by the agents of the incorporated company in Madras where they have their head office?

This reference arises out of an appeal presented by Messrs. Best & Co., Agents of the Nobel's Explosives Company, Limited, against the levy of companies' tax by the Commissioner of the Madras Corporation on the grounds (1) that the paid-up capital of the Nobel's Explosives Company, Limited, being in sterling and not in rupees the scale of assessment under rule 7 of schedule IV of the Act, does not apply and the Company is not, therefore, liable to the tax on companies under the aforesaid rule; (2) if contrary to the above contention it is held that the Company can be assessed under rule 7, this assessment can be made under the proviso to that rule and the proper assessment to be imposed for the half-year in question is Rs. 25 only as the gross annual income of the company did not exceed Rs. 5,000. The learned Chief Judge held that the Nobel's Explosives Company, Limited, was not liable to be assessed under section 110 and rule 7 of schedule IV and allowed the appeal. He is "of opinion that the power to determine the value in currency of British India of any sum expressed in any currency other than that of British India has not either expressly or by implication been conferred on the Commissioner and that under rule 7, the Commissioner can impose assessment in respect of those companies only, the paid-up capital of which is expressed in rupees."

The first question submitted for the opinion of the High Court has been argued at considerable length. The contention of Messrs. Best & Co., Agents of Nobel's Explosives Company, Limited, is that only companies whose share capital is expressed in terms of Indian currency are liable to assessment under rule 7 of schedule IV of the Madras City Municipal Act and the Nobel's Explosives Company, Limited, being an English Company whose share capital is expressed in terms of British currency cannot be brought within the operation of rule 7 of schedule IV. The Nobel's Explosives Company, Limited, has a paid-up capital of £2,793,412. It was incorporated in England and it carries on a world-wide business. The question is whether an English Company such as the Nobel's Explosives Company, Limited, is not liable to be assessed under the Madras City Municipal Act, section 110, by reason of its share capital being expressed in terms of English Currency and not in terms of the currency in India. Section 110 is under the heading "Tax on Companies" and is in the following terms:—

Every incorporated company transacting business within the city for profit or as a benefit society shall pay by way of licence fee in addition to any other licence fee that may be leviable under this Act, a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in schedule IV; but in no case exceeding one thousand rupees, if and as soon as it has transacted business in the city for the period prescribed in section 113.

Explanation.—Whenever a company has an office, agent or firm to represent it for purpos of transacting business in the city, such company shall be deemed to transact business in

the city and such office, agent or firm shall be liable for the tax in respect of the company's business, whether or not such office, agent or firm has power to make binding contracts on behalf of the company." Rule 7 of schedule IV is headed "Part 2—Assessment of Companies—section 110" and is in the following terms :—"Companies shall be assessed by the Commissioner on the following scale." It has two sub-headings, "paid-up capital" and "half-yearly tax," then another heading.

Lakhs of rupees and a scale.

	Rs.	
A. More than twenty ...	1,000	
B. More than ten, less than twenty	500	
C. More than five, less than ten ...	250	
D. More than three, less than five ...	150,	etc.,
G. Less than one ...	30	

There is also a proviso to the effect "Provided that any company, the head office or a branch or principal office of which is not in the city and which shows that its gross income received in or from the city has not in the year immediately preceding the year of taxation exceeded

(*a*) Rs. 25,000—shall pay only Rs. 125.
(*b*) Rs. 15,000—shall pay only Rs. 75.
(*c*) Rs. 5,000 —shall pay only Rs. 25.

It has been conceded, and I think very rightly, by Mr. R. N. Aingar who appeared for Messrs. Best & Co., that if section 110 stood alone, Nobel's Expolsives Company, Limited, would be liable to pay the tax on companies, but he contended that inasmuch as rule 7 had referred only to paid-up capital in lakhs of rupees, the scope of section 110 had been narrowed by rule 7. He further contended that there was no provision in the Act, for converting Capital expressed in terms of foreign currency into the British Indian currency such as that contained in section 20 of the Stamp Act, and it must, therefore, be taken that the legislaure intend that only companies whose capital was expressed in rupees should be assessed. He further contended that it would be very inconvenient to assess companies under rule 7, when the exchange is fluctuating as it is now and a German Company with a capital of two million Marks may at the present rate of exchange not have a capital of more than a few rupees.

The real question is whether a company not registered in British India and whose capital is not expressed in terms of Indian currency is outside the scope of section 110. Section 110 is very clear in its terms. It makes every incorporated company transacting business within the city for profit or as benefit society liable to pay by way of licence fee a half-yearly tax on its paid-up capital on the scale shown in schedule IV. The scope of section 110 being wide and the provisions being so clear, can it be said that the scope of that section has been narrowed by rule 7? Rule 7 does not contain any expression to the effect that the paid-up capital should be in rupees. All that it says is that if the paid-up capital is more than twenty lakhs, a certain amount of tax is payable and if it is more than ten and less than twenty, a certain other amount is payable and it gives a scale. Can it be said that Nobel's Explosives Company, Limited, has not got a capital of twenty lakhs of rupees? The Commissioner has authority to assess the tax and in his opinion, if a company has a capital of more than twenty lakhs, that company is liable to pay a certain amount half-yearly. Any foreign company whose capital in foreign currency is known, can be easily said to possess a capital of more than twenty lakhs or less than twenty lakhs or any other sum. Looking at the history of this legislation it cannot be reasonably contended that the legislature intended only to assess companies registered in India. In the City of Madras Municipal Act, 1884, provision was made for levying professional tax in section 103 in these terms: "If the Commissioners determine to levy a tax on arts, professions, trades and callings (not being a military profession or calling), and on offices or appointments, every person who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments, specified in schedule A, shall pay in respect thereof the sum specified in the said schedule as payable by persons of the class in which such person is placed." The relevant portion of schedule A is as follows :—"Joint stock companies and other companies carrying on any trade or business having gain for its object, or as benefit societies, and the capital of which exceeds twenty lakhs of rupees . . . 500 rupees." In the Madras City Municipal Act of 1904, section 115 was enacted for the levy of taxes and tolls. Section 120 of that Act is in the

following terms :—"If the corporation determine to levy the tax specified under clause A of section 115, every person who within the city exercises any profession, art, trade, or calling or holds any office or appointment bringing him within one or more of the classes of persons specified in schedule V shall pay the sum specified in the said schedule as payable by persons of the class in which such person is placed." In schedule V (A) the wording of the Act of 1884 is reproduced. In the present Act, the same wording is used with a slight modification. Instead of repeating under the headings of A, B, C, etc., the provisions as to companies, an abbreviated form is introduced with a heading "lakhs of rupees" and the abbreviated forms, more than twenty, more than ten and less than twenty, more than five and less than ten, etc. It is clear from this that the legislature did not intend to alter the law as it stood both under the Act of 1884 and under the Act of 1904. It is to be remembered in this connection that the tax on companies levied by the Corporation seems to have been paid without demur, and it is only now that objection is raised against the assessment under section 110 and rule 7 of the present Act. Though the conduct of the assessees does not estop them from or stand in the way of raising a legal objection, yet it shows how both the Corporation and the companies understood the provisions of the Acts of 1884 and 1904. It is true that if the amout of tax be small the companies may not take the trouble of objecting to the assessment. But where the half-yearly tax is such a large sum as rupees one thousand, the companies naturally try to escape taxation if they could.

Under the District Municipalities Act, companies not registered in British India or in the British Dominions are not liable to pay the companies' tax. The provisions of that Act are different from those of the Madras City Municipal Act. In the District Municipalities Act of 1884, tax on arts, professions, trades and callings was levied by reason of the provisions contained in section 53. Schedule A, class 1, begins thus:—"Every person holding any office or appointment, public or private, or employed in any capacity, whose pay, salary or pension amounts to Rs. 2,000 a month or upwards, and every person falling under any of the following denominations whose income is estimated to amount to Rs. 2,000 a month or upwards: carrying on business as a company, etc., etc." The word "Company" is defined in the Act as meaning "a company registered under the Indian Companies Act, 1882, or under the Acts of Parliament known under the collective title of the Companies Acts, or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent." This Act was amended by Act III of 1897. The Amendment Act made no change in the law as regards professional tax. The Madras District Municipalities Act of 1920 was passed to consolidate and amend the law relating to District Municipalities. Section 92 of the Act is in these terms: "If the Chairman publishes a notification under section 80 that a companies' tax shall be levied every company transacting business within the municipality for profit or as a benefit society shall after the date specified in the said notification pay a half-yearly tax on its paid-up capital on the scale shown in schedule IV, if and as soon as it has transacted business in the municipality for the period laid down in section 95. Schedule IV, rule 16 has the heading of "Assessment of companies." Companies shall be assessed by the Chairman on the following scale :—

Paid-up capital	Half-yearly tax.
	Rs.
A. More than ten lakhs of rupees ...	250.

and the wording is almost similar to the wording in the Madras City Municipality Act of 1919. In section 92 of the Act, the expression is "every company transacting the business" and the word company is defined as meaning "a company registered under the Indian Companies Act, 1913, or under the Acts of Parliament known under the collective title of the Companies Acts or incorporated by an Act of Parliament or of the Governor-General in Council or by a Royal Charter or Letters Patent." It is quite clear, therefore, that companies which do not come within the definition of the wording as given in the Act, are not liable to pay tax on companies. It has been held by KUMARASWAMI SASTI, J., in C.S. Nos. 796 and 1055 of 1921, that companies like the Singer Sewing Machine Company and the Standard Oil Company of

New York are not liable to assessment under section 92 of the District Municipalities Act in respect of business carried on within the limits of a municipality. In the Madras City Municipal Act there is no definition of company and as section 110 speaks only of Incorporated Company transacting business within the city, I think that the intention of the Legislature is quite clear and that is to bring within the operation of section 110 all Incorporated Campanies transacting business within the city whether they be incorporated in British India or in the British Isles or anywhere else. The conditions necessary are, they should be incorporated and they should transact business within the city for profit or as a benefit society and should carry on business as required by section 113, in order to make them liable to the tax on companies. When section 110 is so clear in its terms, can it be said that its scope has been narrowed by implication only by reason of the expression "lakhs of rupees" being used as regards the paid-up capital in r. 7. The Commissioner is empowered to tax companies and he has to determine what the capital of a company is. I do not think that there is any insuperable difficulty in the Commissioner arriving at a satisfactory decision as regards the amount of the capital of a company in rupees when that capital is expressed not in terms of Indian currency but of English or foreign currency. Considering the wide margin that is given in the rule, it is not right to hold that companies which have not got a capital expressed in Indian currency are outside the scope of r. 7. Suppose a company is formed and registered in Travancore and its capital is expressed in the currency of the State, viz., Chakrams, or a company is formed and registered in the Native State of Hyderabad and its capital is expressed in terms of Sicca rupees, could not the Commissioner easily ascertain whether such a company carrying on business in the city of Madras has or has not capital of more than twenty lakhs or less than ten lakhs of rupees or any other sum? It is urged that the Madras City Municipal Act is a taxing statute and should be construed strictly. It is a well established principle of construction that all penal statutes, statutes which impose a penalty, and taxing statutes should be construed strictly :—that is, where it is not quite clear that a subject is liable to a tax or penalty, he should not be made liable by any extended or loose construction of the statute. But this principle does not stand in the way of considering whether a taxing statute embraces within its operation certain classes of persons. Mr. Aingar referred to the observations of Rowlatt. J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1), "It is urged by Sir William Finlay that in a Taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." Appling the observations of the learned Judge to the present case, can it be said that an incorporated company carrying on business within the city of Madras does not come within the operation of section 110 and r. 7? What is there in the rule to indicate either expressly or impliedly that the expression "incorporated company" should be held to mean incorporated only in British India? The words of the statute are clear and when there is nothing in it to imply an intendment to exclude any person or class coming within the clear language of the section, it would be doing violence to that language by importing something not warranted by anything in it or in any other portion of the enactment. The mere fact that the liability of the companies'-tax is on its having a capital of certain number of lakhs is no justification for holding that the company should have its capital expressed in terms of Indian currency.

In *Corporation of Calcutta* v. *Standard Marine Insurance Company* (3), an argument was put forward that a company not registered in British India was not liable to be assessed. The learned Advocate-General of the day, Sir

(3) 22 C. 581 ; 11 Ind. Dec. (N.S.) 387.

Charles Paul, urged this argument:—In the 2nd schedule the words used are, 'the paid-up capital of which amounts to 10 lakhs of rupees or upwards.' The words "amounts" has been advisedly used. It means 'is equivalent to.' Companies with capital in foreign coin are intended to be included." But the point was not decided and it is urged that the Bengal Act was subsequently amended by the introduction of the words "equivalent to." In my view it is unnecessary to use the words "equivalent to," for all that the rule says is that if the capital is more than twenty lakhs a certain amount is payable, and if less than twenty lakhs of rupees, some other amount is payable. The case of *Charles James Partington* v. The *Attorney-General* (4), was relied upon by Mr. Aingar in support of his contention. The observations of Lord Cairns as to the interpretation of fiscal statutes is entitled to the greatest weight. "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." A careful perusal of the judgment of the case shows that the House of Lords upheld the contention of the Crown that if two administrations are taken out, stamp duty is payable in respect of both. The facts of the case are: One Mary Shard died intestate in England in 1819. No one appeared to administer her estate and Mr. Maule, the then Solicitor to the Treasury, took out letters of administration for that purpose. The next of kin to the deceased was Mrs. Isabel Cook, the wife of Mr. Ellis Cook, both of whom had always been domiciled in the United States. Mrs. Isabel Cook died in 1825. She had not taken out letters of administration to Mrs. Shard. Her husband died in 1830. After his death his children applied to Mr. Partington, to take proceedings against the Solicitor to the Treasury, to recover from him the property which had belonged to Mrs. Shard and which they claimed under their mother. Mr. Partington took out separate letters of administration to the estate. . . first of Ellis Cook and then of Isabel Cook. Each grant was dated the 22nd July 1855 and the form of each was as follows:—"We do grant full power and authority to you to administer and faithfully dispose of the said goods, etc., which belong to his estate." In the grant relating to the mother's estate the concluding words were "For the use, etc., of James Cook now residing in Vermont in North America one of the natural and lawful children of the said Isabel Cook deceased, etc., etc." Mr. Partington then instituted a suit in Chancery against Mr. Reynolds (who had in the meantime succeeded Mr. Maule as Solicitor to the Treasury) and the Court having found James Cook to be the next of kin declared Mr Reynolds to be chargeable with the principal sums of the assets. The Commissioners of Inland Revenue claimed that stamp duty should be calculated on a value including all accretions from the death of Isabel Cook to the date of the administration, namely, the 23rd July 1855, and also claimed that the grant of the administration for the effects of the late Ellis Cook, who survived his wife, should be stamped at the same rate. The Court of Exchequer Chamber held that duty was payable in respect of both the estates. The House of Lords affirmed the judgment of the Court of Exchequer Chamber; when two administrations are granted stamp duty is payable on both. Whether the devolution of the estate of one deceased person has been reduced to possession or not, when administration is sought for the estate of a person on whom some other estate has devolved stamp duty is payable on the values of the estate of the person who died intestate as well as for the administration of the estate of the person on whom the previous estate devolved though he had not taken out letters of administration. Their Lordships construed the provisions of the statute strictly and upon the strict construction both the estates were liable to pay stamp duty. Lord Chelmsford agreed with the Lord Chancellor in the order proposed and

(4) 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370.

observed, " with respect to the liability to the full duty upon both the administrations taken out by the appellant, it was admitted by his learned Counsel that if the question had arisen with respect to subjects of this country no doubt would have existed as to the double duty being payable. But it was contended, that as Isabel Cook and her husband Ellis Cook were domiciled Amercians, it was not necessary to take out administration to Ellis Cook in order to obtain administration to Isabel Cook ; that the husband was not an interested party ; that the wife's administrator might give a sufficient receipt and discharge; and that the whole of the duty of the administrator was to remit the money received by him under the administration to America to be distributed there to the person entitled. I must confess my inability to follow this reasoning, or to understand how the question of domicile can enter into the consideration of the grant of letters of administration in this country."

Mani Mohan Mandal v. *Ramtaran Mandal* (2), was relied upon as authority for the contention that r. 7 controlled the scope of section 110. In that case, the question was whether a Court had the power of remand not expressly given to it under O. XLI, r. 23, of the Civil Procedure Code. Section 107 begins thus: 'Subject to such conditions and limitations as may be prescribed an Appellate Court shall have power (*a*) to determine a case finally and, (*b*) to remand a case, etc." 'As prescribed ' means as prescribed by the rules to be framed hereunder. Under O. XLI, r. 23, the power to remand a case is limited. Sir Lawrence Jenkins makes the following observations at page 152 :—" The body of the Code is fundamental and is unalterable except by the legislature ; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules." Section 110 of the Madras City Municipal Act is not subject to the rules prescribed under that rule or any other provisions of the Act. It simply says that the tax shall be on the scale shown in the taxation rule in schedule IV. The liability to pay tax is imposed by section 110; the amount of the tax is to be determined according to the scale given in the schedule. So, the rules in schedule IV cannot take away the liability to pay the tax and a reasonable construction should be placed both upon section 110 and upon rule 7 in order to avoid a construction, which is repugnant to the object of the section and the rule.

As a good deal of argument has been addressed to us upon the construction of taxing statutes, I shall deal briefly with a few cases which bear on the point. In Maxwell's Interpretation of Statutes there is this passage at page 410 "When one section enacted that if the plaintiff recovered a sum 'not exceeding' £5 he should have no costs, and another, that if he recovered 'less than ' £5 the Judge certified, he should have his costs ; the literal meaning of the last clause leaving it inoperative where the sum recovered was exactly £ 5, it was held, to avoid imputing so incongruous and improbable an intention to the legislature, that the words 'less than' should be read as equivalent to 'not exceeding' the general principle being that Acts of Parliament should be construed with a candid mind and with an intention to understand them— *Garby* v. *Harris* (5). At page 420 there is this following passage :—"So, the XXXV, Geo. III, c. 101, section 2, which empowered Justices to suspend in case of sickness the order of removal of any pauper who should be 'brought before them for the purpose of being removed,' was construed as authorizing such suspension without the actual bringing up of the pauper before the Justices : as the literal construction would have defeated the humane object of the enactment." In these cases the Court departed from the strict language of the enactment in order to give full effect to the intention of the legislature as expressed in the section and in order to avoid absurd construction, or to prevent anything which is against humane practice.

I have referred to these cases only for the purpose of showing that the Court is not debarred from giving a reasonable construction

(5) (1852) 21 L. J. Ex. 160; 7 Ex. 591 : 16 Jur. 456 ; 155 E. R. 1084.

to a statute. I am not overlooking the principle that taxing statutes should not receive an equitable construction. In Halsbury's Laws of England, Vol. 27, page 148, the law is summed up thus:—"It is the duty of Judges to give fair and full effect to statutes without regard to the particular consequence in the special case and not to indulge in conjecture as to what Parliament would have done if a particular case had been presented to its notice, for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence."

It has been urged that there is no provision in the Act for converting the foreign currency into Indian currency as is contained in the Stamp Act, as the legislature did not intend to tax companies whose capital is not in rupees. By section 20 of the Stamp Act, an arbitrary date is fixed for conversion of foreign currency into Indian currency. The Stamp Act imposes an *ad valorem* duty on certain classes of documents and it is necessary to calculate the duty as exactly as could be done, and for that purpose, the legislature has fixed a certain date for such calculation. Under the Madras City Municipal Act, section 113, the tax becomes payable if the company carries on business for 60 days, and on the expiry of the 60th day the tax could be demanded, and the Commissioner could after that date assess the company under section 110, rule 7. It is not likely that there could be any great fluctuations in the course of a month or two, and the extraordinary conditions prevailing in Germany and in Austria now should not be taken to be the ordinary conditions prevailing in the exchange market. Owing to extraordinary circumstances the mark has depreciated very much and similarly the Austrian and Russian currency. But till two years ago, there were not such abnormal conditions prevailing and there would be no hardship if there is a slight fluctuation in the value of the foreign currency in relation to the Indian currency, between the dates on which the company becomes liable to pay the tax and the date on which it is assessed. In *Hyde* v. *Johnson* (6), the facts were "The plaintiff in order to recover a debt barred by the statute of limitation, offered in evidence at the trial before the Under-Sheriff a letter written by the defendant's wife, in her husband's name at his request, offering to pay the duty by instalments and sent by him to the plaintiff. The evidence was objected to as not signed by the party 'chargeable thereby' within the meaning of 9 Geo. IV, C. 14, section I." Tindal, C. J., upheld the contention and observed as follows:—"The question turns entirely on the construction of the statute and it amounts in other words to this: does the Statute 9 Geo. IV, C. 14, extend to a writing signed by an agent of the party or is it confined in terms to a writing 'signed by the party chargeable thereby?' Looking at the words of the statute, it is confined in terms to a writing 'signed by the party chargeable thereby' * * * * Some inconveniences have been pressed in the course of the argument upon our attention in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute is such as to make it almost impossible to suppose a case in which a party could not make such a signature as would satisfy the statute. And after all, in construing a statute we must not look to cases of very rare and singular occurrence but to those of every day experience, and whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it. In *Re Hall* (7), Cave, J., observes with regard to section 19, of the Patents, Designs and Trade Marks Act of 1883 "I am unable to see in what way our interpretation of the language of the section can work injustice. A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out before the Court will construe a section in a way contrary to the natural meaning of the language used; and it will be no injustice if the result of our decision be to deprive the person who infringes a patent of the right to set up a defence which does not go to the merits."

Earl Cairns gives the reason for a strict construction of Taxing Acts in the following

(6) (1836) 2 Bing (N.C.) 776; 3 Scott 289; 2 Hadges 94; 5 L. J. (N. S.) C. P. 201; 132 E. R. 299; 42 R. R. 787.

(7) (1888) 21 Q. B. D. 137; 57 L. J. Q. B. 491; 59 L. T. 37; 36 W. R. 892.

terms in *Pryce* v. *Monmouthshire Canal and Railway Companies* (8): "My Lords, the cases which have decided that Taxing Acts are to be construed with strictness and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and, therefore, the tax-payer had a right to stand upon a literal construction of the words used, whatever may be the consequence." It is contended by Mr. Duraiswami Ayyangar on behalf of the Corporation that for the privilege of trading within the city, the tax is payable. It is unnecessary to consider whether the amenities of the city are a sufficient *quid pro quo* for the tax payable by the Company. In this connection it may be instructive to see how American Courts construe legislation of this kind. "In America, Revenue Laws are not regarded as penal laws in the sense that it requires them to be construed with strictness in favour of the defendant. They are regarded rather in their remedial character as intended to prevent fraud, suppress public wrong and promote public good and so construed as to most effectually accomplish those objects." Maxwell's Interpretation of Statutes, 6th Edition, page 509. Without subscribing to the doctrine embodied in the above passage, I think a reasonable construction should always be adopted without straining the language either in favour of one party or the other.

An argument has been advanced by Mr. Aingar that the Registrar of Joint Stock Companies would refuse to register the Memorandum of a Company in which the capital is expressed in terms not of British Indian currency but of some other currency on the ground that there is no machinery by which he could convert the Foreign currency into Indian currency and that the forms appended to the Act contain words and expressions which are applicable only to the Indian currency. Whether the Registrar would refuse to register a Company whose share capital is expressed in a Foreign currency or not is a question which need not be considered here.

In the year 1884, there could not have been many Companies registered under the Indian Companies Act, trading within the City of Madras and the Legislature could not be said to have overlooked the fact that there were a number of English and American Companies trading within the City of Madras, and that it intended that the scope of the enactment in 1884 should be limited to the Indian Companies only. Considering the long time that has elapsed since the Act of 1884 was passed, and considering the fact that no attempt was ever made so far as it was brought to our notice, to dispute the liability of the Company to pay Companies' tax, is it reasonable to suppose that the intention of the Legislature was not to tax all incorporated Companies? The inconvenience that may be felt in one or two cases in converting Foreign currency into Indian currency for the purpose of assessment need not stand in the way of a reasonable construction of the Statute. There may be Companies incorporated according to the law of Brazil or Japan or any other country, but if it is an incorporated Company, it is liable to pay the tax if it comes within one of the classes mentioned in rule 7. It is always open to the Company to show that the estimate of the Commissioner is wrong, and there is an appeal provided to the Standing Committee against the decision of the Commissioner. I think the Legislature used the expression "Incorporated Company" in section 110 of the Act advisedly while it used the word "Company" in the corresponding provision of the District Municipalities Act, 1920. In the City of Madras Municipal Act, 1884, and in the Madras City Municipal Act, 1904, the expression used is "Joint Stock Companies and other Companies." In the District Municipalities Acts of 1884, of 1897, and of 1920 the Legislature used the word "Company" in the Act and gave a definition to it. To uphold the contention of Messrs. Best & Co., would be to impute to the Legislature an intention to tax Companies incorporated in England if they carry on business within the limits of any Municipality in the mufassil and not to tax them if they carry on business in the city.

(8) (1879) 4 A. C. 197 ; 49 L. J. Ex. 130 ; 40 L. T. 680 ; 27 W. R. 666.

Surely such an intention cannot be imputed to the Legislature when it is remembered that more British and Foreign Companies carry on business in the city than in any Municipality in the mufassil.

After an anxious consideration of the question I am of opinion that an Incorporated Company in order to be liable to taxation under section 110 and rule 7 of the Madras City Municipal Act need not have its capital expressed in terms of the Indian Currency and that all Incorporated Companies are liable to assessment under section 110 and rule 7. In the view I hold, it is unnecessary to express an opinion as regards points 2 and 3.

The Court.—As we have come to different conclusions and the matter falls within rule 2, clause (3) (*a*) of the Appellate Side Rules, we refer the first of the questions referred to us to a Full Bench for decision.

Messrs. *Nugent Grant* and *R. N. Aingar*, for the Appellant.

Mr. *P. Duraiswami Ayyangar*, for the Respondent.

OPINION.

Schwabe, C. J.—The question for decision is whether an English company with sterling capital is liable to assessment under the heading "Tax on Companies" under the Madras City Municipal Act IV, of 1919. This depends on the proper interpretation of section 110 and of rule (7) of schedule IV which must be read together. That section runs: "Every incorporated company transacting business within the City for profit . . . shall pay by way of licence fee . . . a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in Schedule IV but in no case exceeding rupees one thousand, if and as soon as it has transacted business in the city for the period prescribed in section 113." Turning to rule (7) of schedule IV it runs: 'Companies shall be assessed by the Commissioner on the following scale:—

Paid-up capital—lakhs of rupees.	Half-yearly tax Rs.
A. More than twenty	1,000
B. More than ten, less than twenty	500

etcetera." That has been slightly amended by the Madras Act VII of 1922, which substituted "twenty and more than twenty" and "Ten and more than ten" for the words under (*A*) and (*B*), the object being to bring in to tax companies whose capital was exactly twenty or ten lakhs which might have been excluded by the use of the words "more than" and "less than."

The principle of construction to be applied to taxing statutes is that, if the words of the statute are capable of two otherwise equally opposite constructions, the construction to be adopted is that in favour of the taxpayer: but, to ascertain whether the two possible constructions are equally opposite, the ordinary rules of construction of statutes are to be applied. As pointed out by ROWLATT, J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1), the maxim that clear words are necessary in order to tax the subject does not mean, as often contended, "that words are to be unduly restricted against the taxing authority. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." That was enunciating no new principle, and I think the matter was clearly stated by LORD RUSSEL, C.J., in *Attorney-General* v. *Carlton Bank* (9), when he said, "I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a Taxing Act is to be construed differently from any other Act. The duty of the Court is in my opinion, in all cases, the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must, no doubt, ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming con-

(9) (1899) 2 Q. B. 158 at p. 164; 68 L. J. Q. B. 783; 81 L. T. 115; 47 W. R. 660; 63 J. P. 629.

siderations of hardship or of business convenience or the like. Courts have to give effect to what the legislature has said." Now, in this case, we have to see what was the intention of the legislature to be deduced from the words used and the surrounding circumstances. The Act purports to impose a tax on every incorporated company (which words it is admitted includes English companies) carrying on business within the City, and in terms imposed on its paid up capital a tax on the scale shown in the rules in the schedule. So far the language clearly indicates an intention to tax all incorporated companies. Turning to the rule in the schedule, we find that the company has to pay licence fee at a varying rate in rupees according as its capital is more or less in lakhs of rupees, or, in cases where the capital is an exact amount reckoned in lakhs, then, by the Amended Act, on that amount. It is contended that that limits the application of the tax to companies whose capital is in shares of a rupee denomination. I do not think that that is the plain meaning of the words of the statute, or the proper interpretation to be put upon those words, even though they are capable of bearing that construction. I think it is merely stating the scale in the terms of the currency of this country and I see no difficulty at all in answering the question, how many lakhs of rupees is the capital of an English company with a capital, say of a million pounds sterling? Given the rate of exchange, it merely provides a simple sum in arithmetic. I entirely fail to see how, in stating the scale by reference to the capital in the currency of the taxing country, it can be properly construed to exclude all companies whose nominal capital is usually expressed in the currency of some other country. I am not sure that there would be anything illegal or impossible in an Indian Company registering itself under the Act with its capital in pounds or francs, and if it could do so, it would, under the construction contended for, escape the tax. If it had been intended by the Legislature to tax only Indian Companies with a rupee denomination of capital, the natural place for such limitation would have been in the section itself and the words would have been "Every Incorporated Company with a capital in rupees, etc.," or at the very least, if such exclusion was intended, one would expect to find it when it is not in the section, then in the schedule by a definite explanation or proviso that Companies with capital denominated in foreign currency should not be liable to the tax. Nor is it, in my view, an irrelevant consideration that the construction contended for would involve the intention of the Legislature having been to give a preference in trade to foreign over local Companies: if it has done so by clear words, that 'consideration might be irrelevant: but in my view, so far from being clear in that direction, the words used are capable of, and indeed properly bear, the opposite construction.

The answer to the question referred to us must be in the affirmative and the Company is liable to be assessed to the tax.

Coutts-Trotter, J.—I do not think anybody could have any doubt as to what was the intention of the section and the rule which we are asked to construe. To my mind, to hold that the legislative body which passed this Act could have intended to discriminate against indigenous Companies in favour of foreign Companies, because that would be the inevitable result of the construction contended for, is one that is incapable of argument. Mr. Grant has, I think, very wisely put his case upon the ground that the draftsman of the Act, owing to his carelessness, had in fact defeated the intention of the framers of the Act. How great that carelessness was it is almost impossible to imagine. There was a case in *Corporation of Calcutta* v. *Standard Marine Insurance Company*, (3) which was under the Calcutta Municipality Act of 1888 in which exactly the same point was argued, though not decided, as has been raised before us. That was in 1895, and in 1899 a new Act was passed for the Calcutta Municipality and in that Act *ex majori cautela* words were inserted to prevent the opportunity for an argument, such as we have heard to-day. That the draftsman of the Madras Act should not have taken the trouble to cast a glance over the Acts of other big Municipalities before he set his hand to his task is to my mind almost incredible; but so it appears to be and we are, therefore, left with a problem which ought never to have arisen had the Act been drafted with reasonable care. I do not accede to Mr. Grant's argument because I think that the utmost that you find is the absence, so to speak, of a table for the commutation of foreign coinage into the coinage of the

country, and it seems to me that that failure is not enough to defeat the plain intention of the governing section 110, because it appears to me that the Act might well contemplate that any taxing authority in any country can always by a not very difficult feat turn the coinage of one country into the terms of the coinage of the country where the Act is passed and where the tax is received. It appears to me, therefore, that, just as I should be prepared to hold in England that where an Act expresses the capital in pounds a French Company with capital in francs could be assessed, so here in India, where the rupee is the standard basis, the taxing authorities are not prevented, in the absence of an express provision to the contrary, from performing the feat of converting the coinage into different terms. I may add that, having regard to the rates of exchange as they have been in later years, it is almost inconceivable to imagine an Act fixing anything in the nature of a table except by reference to some date on which the rate of exchange is to be fixed. It appears to me that it is quite clear that the Act supplies that omission by giving a definite date, the date at which the tax falls due. For the purpose of rule 7 of Sch. IV, I take it that the rate of exchange at the date when the tax falls due must be taken into consideration. I may add that I entirely sympathise with the greviance of the Company with regard to the method of imposing the tax, for a more unjust method of taxing than to tax a Company upon the whole of its subscribed capital in every place where it carries on trade is, to my mind, difficult to imagine. It is really a very great hardship but one that can only be set right by the Legislature. I may add that, though there is a mitigation of the hardship in part by the maxima fixed by rule (7) nevertheless those maxima do not apply to a very large class of cases as Mr. Grant has pointed out.

I agree with the answer proposed by my Lord.

Ramesam, J.—I agree with the judgments just pronounced and that the answer to the question referred to us must be in the affirmative.

V. N. V. *Answered in the affirmative.*

PRIVY COUNCIL

APPEAL FROM THE UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

November 22, 1923.

Present :— Lord Dunedin, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

BAIJNATH SINGH AND OTHERS— APPELLANTS

versus

JAMAL BROTHERS AND COMPANY LTD., AND ANOTHER—RESPONDENTS.

Burma Regulation II of 1897, *rules framed under rr.* 5, 7—*Registration — Presentation of document— Signature of person presenting document, whether necessary—Endorsement, correctness of—Presumption— Note as to absence of party, omission of, effect of.*

There is no provision in Burma Regulation II of 1897 or in the rules framed thereunder that requires the signature of the person presenting a document for registration. Rule 7 prescribes the mode of registration and the contents of the endorsement to be made by the registering officer, and the correctness of this official endorsement must be presumed.

Rule 5 of the rules framed under Burma Regulation II of 1897, requires that where any party to a document is unable or refuses to appear, a note of the circumstance should be made by the registering officer. The omission to make such a note, however, is one for which the person presenting the document cannot be held responsible: it is at most a defect in procedure which does not vitiate a registration made on a proper presentation.

Appeal from the judgment of the Upper Burma Judicial Commissioner's Court reversing the judgment of the Additional District Judge, Yenangyaung.

Messrs. *De Gruyther, K. C.*, and *Parikh*, for the Appellants.

Messrs. *Macklean, K. C.*, and *Dube*, for the Respondents.

JUDGMENT.—This is an appeal from a decree, dated the 10th January 1921, of the Court of the Judicial Commissioner of Upper Burma, which reversed a decree, dated the 31st July 1916, of the Court of the Additional District Judge of Yenangyaung.

The suit is to enforce a mortgage of the 16th August 1904, for Rs. 25,000 advanced by the firm of Abdul Shakoor Jamal Brothers and Company to the defendants Baijnath Singh and Fateh Bahadur Singh. The mortgage was taken in the name of Suna Ravana Mona Vengarachellum Chetty, but as *benamidar* for the firm of Jamal Brothers and Company.

The present plaintiffs are Jamal Brothers and Company, Limited, who claim to be transferees from the firm of Jamal Brothers and Company and their *benamidars* of the mortgage-debt and the security.

The suit was dismissed in the 1st Court but was decreed on appeal. From the Appeal Court's decree the present appeal is preferred.

Though numerous pleas in defence were urged in the early stages of the suit which has been needlessly and lamentably prolonged, the only pleas that now survive are by way of objection to the execution and registration of the mortgage and the transfer.

The mortgage purports to be signed by both the mortgagors and its execution is admitted by them.

But then it is contended that there has been no valid registration of the document. The law applicable is at that date to be found in Regulation II of 1897, and the rules made in exercise of the powers conferred by it. By the 4th rule "every document to be registered under the rules must be presented by some person executing or claiming under the same . . . or by the agent of such person . . . duly authorized by power of attorney."

It is urged that the mortgage was presented for registration by an agent, and to comply with the terms of the rule it was incumbent on the plaintiffs to produce a duly authenticated power of attorney authorizing the agent's presentation. In support of this contention reliance was placed on the decision of this Board in *Jambu Parshad* v. *Muhammad Aftab Ali Khan* (1).

But the whole structure of this argument has no real foundation.

(1) 28 Ind. Cas. 422; 42 I. A. 22; 19 C. W. N. 282; 18 A. L. J. 129 ; 17 M. L. T. 118; 21 C. L. J. 218; 2 L. W. 277; 87 A. 49; 28 M. L. J. 577; 17 Bom L. R 418; (1915) M. W. N. 692 (P. C.).

It rests on the supposition that the writing at the foot of the document purporting to be the Tamil signature of Ramasawmy Chetty shows that it was he who presented the document and that he was only an agent. This theory owes its origin to the belated and unfortunate discovery of one of the defendants' legal advisers, and is directly opposed to the official statement signed by the Registering Officer that the document was presented for registration by the mortgagee.

There is no provision in the Regulation or the Rules that requires the signature of the person presenting the document for registration. But under Rule 7 registration shall be effected by the Registering Officer writing on it an endorsement in the terms of that appearing at the foot of the document.

The correctness of this official endorsement is to be presumed, and the Tamil signature for which there was no legal sanction, cannot operate to contradict it.

The presentation, therefore, was by a person claiming under the document.

It is next objected that execution of the mortgage was not admitted before the Registering Officer by Fateh Bahadur Singh. It, however, admittedly bears his signature and it is a fair presumption in the circumstances that the officer acted under Rule 5 when he registered the document. It is true that where any party to a document is unable or refuses to appear the rule requires a note of the circumstances to be made, and that has not been done. But the omission is one for which the person presenting the document cannot be held responsible: it is at most a defect in procedure which did not vitiate the registration made as it was on a proper presentation.

Then the transfer of the mortgage to the limited company, the plaintiffs, is assailed.

It is dated the 11th September 1914 and the parties to it are S. R. M. Soobramaniyan Chetty, S. R. M. Mayappa Chetty, S. R. M. Chinnayu Chetty *alias* Ramasawmy Chetty, and S.R. M. Arunachellam, described as carrying on business in partnership under the style of S. R. M. of the 1st part, Jamal Brothers and Company of the 2nd part, and Jamal Brothers and Company, Limited, the present plaintiffs, of the 3rd part,

The Chetty partners, by the direction of the Jamal Brothers assigned, and Jamal Brothers confirmed, the mortgage debt of Rs. 25,000 with interest and also the mortgaged property to the plaintiff Company, and the deed if executed and duly registered would unquestionably vest the debt and the security in the plaintiff Company.

It is contended, however, that there is no formal proof of execution by the Chettys. It is true that the evidence of M. A. S. Jamal, as recorded on the 11th July 1915, does not speak specifically to execution by them. But later affidavits were sworn by M. A. S. Jamal and his advocate Mr. Ormiston to the effect that the witness had deposed to execution by the attorney of the Chetty firm. A petition was accordingly presented praying that the witness might be examined further on the point of the execution by the assignors of the deed of assignment. Interrogatories directed to this point were prepared under an order of the Court, and though no answers are on the record it is apparent from what is said by the Judicial Commissioner that on further examination under the order of the Court the formal defect was remedied.

It is next urged that though Mayappa was expressed to be a party, he did not execute. But in the attestation clause it is stated that the parties (other than the plaintiff Company) had set their hands and the document is expressed to be signed by all four of the Chetty partners. The signature was in fact by their attorney and in the circumstances their Lordships are satisfied that the attorney acted for all four partners. This view gains support from the endorsement of presentation from which it is apparent that the signatory held a power of attorney authorizing him to act for the four partners. The transfer was also signed by the Jamal Brothers, and execution by them was admitted by their duly authorized attorney. The result then is that the transfer has been sufficiently executed and its registration has been effected in accordance with the law that then applied.

The appeal, therefore, fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant—Mr. *E. Delgadas.*

Solicitors for the Respondent—Messrs. *Waterhorn & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 26 OF 1923.

March 6, 1924.

Present :—Mr. Wazir Hasan, J. C.

KUAR BEHARI LAL—
DEFENDANT—APPELLANT
versus
LALA BENI MADHO AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908) sch. I art. 132—Handnote—Subsequent execution of security-bond—Suit to enforce payment of money charged on property—Limitation.

Where a handnote is first passed for a certain debt and subsequently immoveable property is hypothecated under a security-bond, the proper article governing the period of limitation of a suit to recover the loan is Art 132 of schedule I of the Limitation Act; the suit being one for the enforcement of a charge created by the security bond.

In such a case as the above, where the creditor's remedy for enforcing the personal obligation of the debtor in respect of the loan is barred by limitation, the debt is not extinguished thereby, for the reason that the remedy for enforcing the charge on immoveable property still subsists.

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 21st March 1923, in O. S. No. 175 of 1922.

Messrs. *Hyder Husain*, *Ali Zaheer* and *P. C. Gupta*, for the Appellant.

Messrs. *Bisheshar Nath*, *Mukund Behari Lal* and *Parbhu Dayal Rastogi*, for the Respondents.

JUDGMENT.—On the 28th May 1917, the defendant-appellant and another person called Raj Kumar borrowed a sum of

Rs. 6,000 from the plaintiffs-respondents and passed a handnote of that date in favour of the plaintiffs. The loan was to carry interest at the rate of Rs. 2-4-0 per cent. per mensem and was payable on demand. The plaintiffs also held a decree of Court against the defendant appellant for a sum of Rs. 3,357 dated the 29th April 1918. On the 16th July 1918, the defendant appellant executed a security bond in favour of the plaintiff by means of which he hypothecated certain immoveable property for the satisfaction of the two debts. The suit, out of which this appeal has arisen, was brought to recover the loan due under the handnote of the 28th May 1917 by enforcement of the charge created by the hypothecation bond of the 16th July 1918. The suit has succeeded.

The appeal in this Court is argued on two grounds. The first ground is that the claim is barred by limitation and the second ground is that the plaintiffs have realized the amount of money due under the decree by executing the said decree and that consequently the consideration for the security bond has failed.

I am of opinion that neither of the grounds mentioned above succeeds. The cause of action for the claim for the recovery of the sum due under the pronote clearly consists of the transaction of loan evidenced by that note, the demand for the repayment of the loan and the refusal to repay it. Limitation for a claim like that starts to run from the time when the money becomes due and in the present case it is agreed that it became due at any time after the execution of the pronote. The question, therefore, is, has time run long enough to bar that claim. The answer to this question must depend on the language of the article of the First Schedule of the Indian Limitation Act applicable to this suit.

I have no doubt, in my mind, that the proper article governing the period of limitation of this siut is article 132. From the date when the money became due as indicated above, the present suit, which is essentially and expressly a suit for the enforcement of a charge created by the document of the 16th July 1918, is within time. The learned Counsel for the respondents cited the cases of *Hafezuddin Mandal* v. *Jadu Nath Saha* (1) and *Madhusudan Sen* v. *Rakhal Chandra Das Basak* (2) in support of the argument which has led to the conclusion stated above and I am of opinion that those cases support the conclusion. The learned Counsel for the defendant-appeallant contended that the original cause of action resting entirely on the personal obligation of debtor being barred by limitation, the claim for enforcement of the charge is equally barred.

I am unable to accept this argument and it may best be answered in the language of Cave, J. *In re Hepburn, Ex parte Smith* (3) "There is in law no right without a remedy, and if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy not by action against the debtor but arising out of the possession of the property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred ; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy of action." Similarly, in the present case the plaintiff's remedy for enforcing the personal obligation of the defendant-appellant in respect of the loan in question is barred by limitation but the debt is not extinguished for the reason that this remedy for enforcing the charge on immoveable property still subsists.

The second ground need not detain us long. The security bond of the 16th July 1918 does not in any manner restrict the right of the plaintiffs to recover the money due under the decree by ordinary execution process. The bond provides for an additional remedy. Of this remedy the plaintiffs do not want to avail themselves in so far as the debt due under the decree is concerned and for the reason that they have already recovered that debt by the usual remedy of executing the decree.

(1) 35 C. 298 ; 7 C. L. J. 279 ; 12 C. W. N. 820.

(2) 30 Ind. Cas. 697 ; 48 C. 248; 22 C. L. J. 552 ; 19 C. W. N. 1070.

(3) (1885) 14 Q. B. D. 394 ; 54 L. J. Q. B. 422.

The plaintiffs have filed cross-objections in respect of compound interest which the Court below has refused to allow in their favour. I am of opinion that the decision of the Court below is right. The pro-note, on which the loan now sued for depends, contains no stipulation for compound interest. It is said that the agreement relating to such an interest was reached between the parties after the execution of the pro-note mentioned above. This is hardly likely, but apart from that, there is no satisfactory evidence either directly proving that agreement or even raising a reasonable presumption in favour of it. On the other hand, the plaintiffs are professional money-lenders and nothing could be easier for them than to produce their account-books and show that the alleged agreement was acted upon between the parties. No account books are produced however. The cross-objections must, therefore, be rejected.

The result is that I dismiss both the appeal and the cross-objections with costs.

G. H. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

October 30, 1923.

Present :—Lord Dunedin, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

RAM SINGH—APPELLANT
versus
RAMCHAND—RESPONDENT.

Partnership, dissolution of—Partner, right of—Accounts—Misconduct, effect of.

In the case of a partnership at will a partner is entitled to dissolution of partnership and accounts of the partnership. It is a legal right, and a finding that a partner has been guilty of gross misconduct and falsification of accounts does not deprive him of this right.

Appeal from the judgment of the Lahore High Court, dated the 19th May 1919, reversing the judgment of the District Judge, Delhi, dated the 1st June 1914.

Messrs. *B. Dube* and *Bishen*, for the Appellant.

Messrs. *De Gruyther* and *Parikh*, for the Respondent.

JUDGMENT.—This case is of the simplest nature. A gentleman who has a partnership at will brings a suit for a declaration of dissolution. The learned Judge of the District Court before whom the case depends finds and it is declared "that this partnership shall be deemed to have been dissolved on 11th February 1911, the date of the notice of the plaintiff to the defendant," and then he makes a declaration in ordinary form as to accounts being taken, but he puts in one particular finding, No. 3 :—

" An account of all dealings and transactions between plaintiff and defendant from December 1897, with the instructions that the debit of Rs. 7,559 against defendant and credit of Rs. 3,133 in plaintiff's favour are forgeries and are to be struck off, and all entries relating to interest payable to either party are wrong."

Both parties appealed against that finding. On appeal, so far as the finding of fraud is concerned, the High Court are entirely in accordance with the learned Judge, and they say in their judgment :—

" From the evidence on the record it is, therefore, clear that the plaintiff has been guilty of gross misconduct. He has destroyed the old account books, has falsely prepared a balance sheet, Exhibit P. W. 1, has made false entries in the books and has tried to deprive the firm of a valuable asset."

If they had stayed there all would have been well, but they go on to say this :—

" Having done all this he has had the audacity of coming into Court with a prayer for an equitable relief."

But it is not an equitable relief, for which he is asking. When it is a partnership at will a partner is entitled to dissolution ; it is a legal right, under the Code and under the contract. Then the learned Judges quote a passage from " Lindley on Partnership " which deals with the circumstances in which a Court may order a dissolution of partnership during the term, which, of course, has nothing to do with this case.

The appellant here has been forced to admit that he cannot ask for any alteration of paragraph 3 which has been read, and the respondent cannot support the judgment of the High Court, which says that there is to be no relief given; but on the question of relief he practically says: "There is no room for an account here at all, because we have already seen that this gentleman has falsified all the account books, and there is nothing to account upon." That is really trying to make this Board do what the Commissioner ought to do when the accounts are being taken.

In the circumstances it is quite clear that the appeal must be allowed with costs, and the decree of the District Court restored. With regard to the costs of the appeal to the High Court which were ordered to be paid by the present appellant, their Lordships think that having regard to what took place there, neither party should have any costs, and any costs, paid under the High Court's order must be repaid. The future costs, which will be incurred on the futher proceedings in the District Court will of course be in the discretion of that Court. Their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal allowed.*

Solicitors for the Appellant—Messrs. *Ranken, Ford* and *Chester.*

Solicitors for the Respondent—Messrs. *T. L. Wilson & Co.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 621 of 1922.

March 18, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Dalal.

NARAIN SINGH—DEFENDANT —APPELLANT

versus

CHIRANJI LAL—PLAINTIFF—RESPONDENT.

Minor, contract with—Minority—Burden of proof —Contract Act (IX of 1872), ss. 2, 11—Money obtained during minority—Contract to repay after majority, validity of.

In a suit to enforce a contract, if the defendant alleges that he was a minor on the date of the contract, the burden of proving his minority lies on him.

Jagannath Prasad [*Raja of Deo*] v. *Abdullah*, 45 Ind. Cas. 770; 45 C. 909; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 691; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 I. A. 97 (P. C.), followed.

Gaya Din v. *Musammat Dulari*, 2 Ind. Cas. 889; 6 A. L. J. 693; *Kanhaya Lal* v. *Girdhari Lal*, 13 Ind. Cas. 956; 9 A. L. J. 103, dissented from.

A contract by a minor is void and unenforceable against him, but there is nothing to prevent money received during minority forming the consideration of a contract after attaining majority, having regard to the definition of consideration in section 2 of the Contract Act, which includes services already rendered to the promisor.

Under section 11 of the Contract Act, if a minor accepts money except for necessaries he cannot be compelled to repay it and any contract to do so made by him as a minor is void against him, but if when of full age he takes it upon himself to repay there is no reason either in law or equity why his agreement should be deemed unlawful.

Appeal from the decree of the District Judge, Agra, dated the 1st February 1922.

Dr. *K. N. Katju* and Mr. *M. A. Aziz*, for the Appellant.

Dr. *S. N. Sen* and Mr. *L. M. Banerji*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant against a decree for the amount of a bond executed by him in favour of the plaintiff on 22nd November 1919. The bond was executed in lieu of a pro-note previously executed by him on 14th December 1916. One of the defences to the suit was that the defendant was a minor on the date of the execution of the pro-note. The Court below has held that this defence fails as the defendant has not established the fact of his being a minor on that date.

The appellant contends that the burden of proving that the defendant was not a minor lay on the plaintiff and has cited two cases of this Court of the years 1909 and 1912 respectively in which that view was taken *vide*

KAJU MAL *v.* SALIG RAM

Gaya Din v. *Musammat Dubari* (1); and *Kanhaya Lal* v. *Girdhari Lal* (2) The matter appears to us to be concluded against the appellant by the judgment of the Privy Council in *Jaganath Preshad*, (Raja of Deo) v. *Abdullah* (3) In that case the plaintiff sued on a conveyance executed by *Musammat* Rajeshwari Kuar. One of the main defences to the suit was that *Musammat* Rajeshwari Kuar was a minor on the date of execution. The High Court at Calcutta laid the burden of proving this on her and holding that she had failed to establish it decreed the suit. With reference to this their Lordships say:—

"Their Lordships agree with the High Court. The onus to prove minority is on the defendant who asserts it."

They remark in passing that the evidence tendered by the plaintiff is not open to any obvious objection but they do not decide the case on the plaintiff's evidence. They conclude by saying:—

> "It is enough to say that the matter being left in doubt the defendant fails to prove his assertion."

The appellant argues further that the finding against him on this issue does not dispose of the case because part of the consideration for the pro-note of 1916 consisted of advances made while he was a minor. He suggests that we should now remit an issue as to what part of the consideration was so received and dismiss the suit with regard to it. We are unable to agree with this view. It is settled law that a contract made by a minor is void and unenforceable against him but we know of no law which lays down that money received during minority cannot form the consideration for a contract made by a person of full age and competent to contract. The definition of "consideration" in section 2 (*d*) of the Contract Act includes services already rendered to the promisor. The appellant urges that by decreeing this claim we shall be defeating the provisions of section 11 of the Contract Act with reference to minors. Nothing of the kind is true. If a minor accepts money except for necessaries he cannot be compelled to repay it and any contract to do so made by him as a minor is void against him, but if when of full age he takes it upon himself to repay there is no reason either in law or equity why his agreement should be deemed unlawful. Cases can be cited on both sides of the question but we prefer to decide the issue on the broad question of principle.

We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

(1) 2 Ind. Cas. 839; 6 A. L. J. 693.
(2) 13 Ind. Cas. 956; 9 A. L. J. 103.
(3) 45 Ind. Cas. 770; 45 C. 909; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 I. A. 97 (P. C.).

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE PUNJAB CHIEF COURT.

November 16, 1923.

Present:—Lord Shaw, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

KAJU MAL AND OTHERS—APPELLANTS
versus
SALIG RAM—RESPONDENT.

SALIG RAM—APPELLANT
versus
KAJU MAL AND OTHERS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 3 (1)—Tea garden, whether agricultural land.

A tea garden is "agricultural land" within the meaning of section 3 (1) of the Punjab Pre-emption Act of 1905.

Appeals from the judgment of the Punjab Chief Court affirming the judgment of the lower Court in Gopalpur Tea Estate.

Messrs. *Dunne*, *K. C.* and *Hyam*, for the Appellants.

Messrs. *Lowndes*, *K. C.*, and *Wallach*, for the Respondents.

JUDGMENT.—These are two appeals from a decree of the Chief Court of the Punjab.

The suit is for possession by pre-emption of a portion of an estate known as the Gopalpur Tea Estate. The issue in the case, upon which argument was presented to the Board, is in the following terms: " Is the property in suit definable as agricultural land, . . . within the meaning of section 3 of the Pre-emption Act ? " The reference is to Act II of 1905 and particularly to section 3, sub-section 1.

Under that definition " agricultural land " is declared to mean ' land ' "as defined in the Punjab Alienation of Land Act, 1900."

The reference is to the Act Number XIII of 1900 and to section 2, sub-section 3 thereof. The relevant portions of the definition there given are as follows: "The Expression ' land' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture."

The issue was accordingly properly framed and the argument was confined, as stated, to the simple question whether this land, which extended to about fifteen or sixteen hundred acres, came within the definition of land which is agricultural land. Upon that subject both Courts have pronounced judgment clearly affirming that this tea garden in Punjab falls within the definition of " agricultural land." They have given sound and sensible reasons, if reasons were required, for the affirmation of that proposition : and this Board does not think it necessary to cover the ground any further, and merely contents itself with affirming in all particulars the decree appealed from.

Their Lordships will accordingly humbly advise His Majesty that the appeal fails.

There is a cross-appeal. That cross appeal is partly covered, no doubt, by the judgment already delivered and it is sufficient to say that their Lordships will humbly advise His Majesty that this cross-appeal should also be dismissed.

The parties will bear their own costs of these appeals.

Z. K. *Appeals dismissed.*

Solicitors for the Appellants—Messrs. *Barrow, Rogers* and *Neville.*

Solicitors for the Respondents—Messrs. *Rankan, Ford* and *Chester.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 593 OF 1921.

February 14, 1924.

Present :—Mr. Justice Wallace.

ADDEPALLI VENKATA GURUNADHA RAMA SESHAYYA—PLAINTIFF—APPELLANT

versus

SRI TIRUPURASUNDARI COTTON PRESS, BEZWADA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 10, art. 116—Auction purchaser of company shares, position of—Suit for dividend due before purchase—Company whether trustee for purchaser.

A person who has purchased the shares of a judgment-debtor share-holder in a Company in Court auction but whom the company refuses to register as such is not a share-holder of the company and a suit by him for recovery of dividends due before the date of his purchase is not governed by article 116 of schedule I to the Limitation Act. Nor does the company hold the dividends for share-holders in trust so as to render section 10 of the Limitation Act applicable.

Ripon Press and Sugar Mill & Co. Ltd., v. *Nama Venkatarama Chetty*, 48 Ind. Cas. 903 ; 42 M. 33 ; 35 M. L. J. 253 ; 8 L. W. 354; 24 M. L. T. 246; *Nagabhushanam* v. *Ramachandra Row*, 70 Ind Cas. 659 ; 45 M. 537 ; 15 L. W. 470 ; 30 M. L. T. 281 ; 42 M. L. J. 449 ; (1922) M. W. N. 391 ; (1923) A. I. R. (M) 241, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Bezwada, in A. S. No. 22 of 1920, preferred against the decree of the Court of the District Munsif, Bezwada, in O. S. No. 112 of 1917.

Messrs. *T. S. Raghunatha Rao* and *T. S. Srinivasa Rao*, for the Appellant.

Mr. *P. Satyanarayana Rao*, for the Respondent.

JUDGMENT.—The only question argued in this appeal is one of limitation. The plaintiff had purchased in Court-auction some shares which the judgment-debtor held in the second defendant company and some dividends on those shares which had fallen due before the date of his purchase. The company refused to pay him the dividends and he has filed

a suit for these. His suit was in 1917. One of the dividends, namely, that for 1912, fell due on 11th April 1913 and the lower Courts have held that the plaintiff's suit was barred as regards this dividend, since he had not sued within three years of the dividend falling due. The plaintiff appeals.

2. The plaintiff relies chiefly on a ruling reported in *Ripon Press and Sugar Mill & Co., Ltd.* v. *Nama Venkatarama Chetty* (1) which lays down that a suit by a share-holder to recover dividend is covered by Art. 116 of the Indian Limitation Act, that is, a share-holder gets six years within which to sue for payment of dividend which has fallen due. The rejoinder to this contention is that the plaintiff is not a share-holder, since the company has refused to register him as such. The plaintiff appeals to the ruling in *Nagabhushanam* v. *Ramachandra Rao* (2) but, though that ruling no doubt lays down that a Court-auction purchaser, such as he is, is entitled to be registered as the owner of the shares purchased, the company still retains full discretion to refuse such registry. The plaintiff then is not a share-holder and cannot, therefore, take his stand on the registered contractual relation which is the foundation for any claim to call in aid Art. 116 of the Indian Limitation Act.

The plaintiff, however, argues that the defendant company holds dividends for share-holders in trust for them, and that, therefore, there is no period of limitation at all; but the case he himself relies on, namely, *Ripon Press and Sugar Mill & Co., Ltd.* v. *Nama Venkatarama Chetty* (1) clearly negatives this view.

He next claims that the company's accounts will show that the dividends were due and that the company has thus acknowledged its debt to its judgment-debtor, but he has not chosen to file these accounts to show in what form they run or in what form the acknowledgment is embodied. The balance sheets, Ex. E series, were filed for a different purpose, namely, to show when the dividends were due, and do not contain any acknowledgment specific enough to save limitation.

There is thus no proof of any acknowledgment sufficient to save limitation. The plaintiff's cause of action for the receipt of the dividend arises in the absence of any acknowledgment, on the date on which it fell due for payment. He cannot add to that any extended period of limitation which is applicable only to persons of a specific class such as share-holders to which his judgment-debtor belonged. The plaintiff takes his assignment subject to all the laws of limitation. I agree, therefore, that the decision of the lower Court is correct and dismiss the appeal with costs.

V. N. V.
K. S. D.

Appeal dismissed.

(1) 48 Ind. Cas. 903; 42 M. 33; 35 M. L. J. 253; 8 L. W. 354; 24 M. L. T. 216.

(2) 70 Ind. Cas. 659; 45 M. 597; 15 L. W. 470; 30 M. L. T. 231; 42 M. L. J. 449; (1922) M. W. N. 331; (1923) A. I. R. (M) 241.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

October 19, 1923.

Present:—Lord Dunedin, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

KHANDERAO VITHOBA KORE,
SINCE DECEASED NOW REPRESENTED BY
BHIMABAI—APPELLANT

versus

THE MUNICIPAL CORPORATION OF BOMBAY AND ANOTHER—RESPONDENTS.

City of Bombay Muncipal Act (III of 1888), s. 296—Street, widening of—Municipality, power of, to acquire more land than is necessary—Recoupment.

Where an Act authorises land to be acquired for the actual works contemplated by a local authority, the latter will be restrained from taking more land than is actually necessary for such works.

Galloway v. *London Corporation*, (1866) 1 H. L. 34; 35 L. J Ch. 477; 12 Jur. (N. S.) 747; 14 L. T. 865, relied on.

Under section 296 of the City of Bombay Municipal Act, not only has the Municipality power to acquire land for the purpose of making or widening a street

but it may also acquire, if it seems expedient, land outside the regular line of such street. The section clearly recognises the principle of recoupment.

Trustees for the Improvement of Calcutta v. *Chandra Kanta Ghosh*, 56 Ind. Cas. 32 ; 47 I. A. 45 ; 11 L. W. 566 ; 38 M. L. J. 511 ; 18 A. L. J. 521 ; 22 Bom. L. R. 586 ; 47 C. 500 ; 32 C. L. J. 65 ; 24 C. W. N. 881 ; 2 U. P. L. R. (P. C.) 98.

Appeal from the decision of the Division Bench of the Bombay High Court sitting in its original jurisdiction, dated the 21st October 1920.

Messrs. *De Gruyther*, *K. C.*, and *K. Brown*, for the Appellant.

Sir *G. Lowndes*, *K. C.*, and Mr. *Raikes*, for the Respondents.

JUDGMENT.—In this case the question arises upon what is proposed to be done by the Municipality of Bombay in connection with a projected improvement of a public street. The municipality propose in improving a certain street, not only to widen it, but to take a certain amount of extra ground, contiguous to, but beyond, the actual limits of the widened street, with the avowed intention of erecting new buildings thereon and afterwards reselling the land with the buildings upon it. The powers of the municipality with regard to this matter are dealt with in section 296 of the City of Bombay Municipal Act, 1888, which is as follows :—

"(1) The Commissioner may, subject to the provisions of sections 90, 91 and 92—(*a*) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street or of making any new public street, and the buildings, if any, standing upon such land ; (*b*) acquire, in addition to the said land and the buildings, if any, standing thereupon, all such land, with the buildings, if any, standing thereupon, as it shall seem expedient for the corporation to acquire outside of the regular line, or of the intended regular line, of such street; (*c*) lease, sell, or otherwise dispose of any land or building purchased under clause (*b*)."

Reference has been made to certain cases, but it is perfectly clear that in cases of this sort each must be determined upon its own circumstances, and its circumstances consist first and foremost of the precise terms of the Act in question and, secondly of the thing which is proposed to be done. In one sense no other case is an authority; but at the same time certain principles have been very clearly laid down by this Board in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). In that case what was proposed to be done was similar to what is proposed to be done in the present case, that is to say, the land was going to be acquired for the purposes of future sale and, if prices realised their expectancy, part of the expense to which the municipality had been put would be recouped. Section 42 of the Calcutta Improvement Act, 1911, provided :—

"Any improvement scheme may provide for—(*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

Lord Parmoor, in delivering the judgment of their Lordships, says this at page 53:—

"It is not immaterial to observe that there was at the date of the passing of the Calcutta Improvement Act no novelty in the recoupment principle."

Then he cites *Galloway* v. *London Corporation* (2) and continues :—

"But whether this principle has been sanctioned in the Calcutta Improvement Act must be determined on the language used, and the case of *Donaldson* v. *South Shields Corporation* shows, if authority is necessary, that where an Act authorises land to be taken for the actual works only, a local authority, or other public body, will be restrained from taking more than is actually necessary for such works."

Their Lordships have no doubt that that is the correct principle. One, therefore, has to find in the Act something more than the mere possiblity of acquiring land for the purposes of the improvement where it is proposed

(1) 56 Ind. Cas 32; 47 I. A. 45; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 47 C. 500; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98.

(2) (1866) 1. H. L. 34; 35 L. J. Ch. 477; 12 Jur. (N. S.) 747; 14 L. T. 865.

to do what is proposed to be done in this case. When their Lordships come to this Act they find that the case is *a fortiori* of the *Calcutta Case*. (1) It appears to their Lordships that it clear beyond all doubt, not only that the Municipality may acquire land for the purpose of making a street, but that they may acquire, if it seems expedient, land outside the regular line of such street. If the matter had ended there it might have been said that the land outside the street was only meant to form an appendage to such street; but then comes clause (*c*) which says: that they may "lease, sell, or otherwise dispose of any land or building purchased under clause (*b*)." This seems to their Lordships to point to recoupment with almost the greatest certainty that could be expressed in words. The powers no doubt are drastic. but they are not altogether untrammelled, because when section 91, which is one of the sections to which section 296 is subject, is looked at, it is found that if the Commissioner is unable to acquire any property by agreement Government may in their discretion upon the application of the Commissioner made with the approval of the Standing Committee order proceedings to be taken for compulsory acquirement; so that in the discretionary power of the Government would always be found a certain limitation over and above the limitation which their Lordships think necessarily follows from the fact that what is done must be done in the course of making or widening the street, for it appears to their Lordships that the municipality certainly could not take land which was not in contiguity. Their Lordships think that this result would follow notwithstanding any of the somewhat more vague words which are used in the earlier sections of the Act.

In these circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant—Messrs. *Hughes & Sons.*

Solicitors for the Respondents—Messrs. *Sandersons* and *Orr Dignam.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 377 OF 1922.

February 7, 1924.

Present :—Mr. Wazir Hassan, J. C., and Mr. Neave, A. J. C.

SARABJIT SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAIKARAN SINGH—DEFENDANT—RESPONDENT.

Pre-emption—Contract by pre-emptor to transfer property — Pre-emption, right of, if effected—Oudh Laws Act (XVIII of 1876), s. 9.

Where a person claiming pre-emption enters into a contract with a stranger to transfer the suit property to him on payment of the pre-emption money, he forfeits his own right of pre-emption, whether the stranger is joined as co-plaintiff in the suit or not.

Jatendromohan Tagore v. *Gamendromohan Tagore*, 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C); *Abdulla* v. *Wahid-un-Nissa*, 1 O. C. 308.

To allow a stranger to acquire the subject-matter of a pre-emption suit by entering into a contract to that effect with the pre-emptor is to stultify the law of pre-emption enacted in section 9 of the Oudh Laws Act.

Appeal against the order of the District Judge, Rae Bareli, dated the 14th September 1922, setting aside the order of the Sub-Judge, Rae Bareli, dated the 10th April 1922.

Messrs. *Moti Lal Saksena* and *Wasi Hasan*, for the Appellants.

Messrs. *M. Wasim* and *Ali Zaheer*, for the Respondent.

JUDGMENT.—This appeal has come for decision before a Bench of two Judges through a reference made by one of us. It arises out of a suit for pre-emption brought by the appellants. These appellants were plaintiffs 1 to 4 in the Court of first instance. There were, however, two more plaintiffs to the suit, Balkaran Singh plaintiff No. 4, and Bhawani Bhikh Singh plaintiff No. 5. In paragraph 7 of the plaint it was stated that the plaintiffs Nos. 1 and 2 had executed a deed of agreement in respect of the property in suit in favour of the plaintiffs Nos. 4 and 5. One of the defences to the suit, and that is the de-

fence with which we are concerned, was that the claim for pre-emption is not maintainable in view of the agreement mentioned in paragraph 7 of the plaint. The Court of first instance struck off the names of the plaintiffs Nos. 4 and 5 from the array of parties, and held that that removed the defect in the suit. Eventually that Court passed a decree in favour of the plaintiffs Nos. 1 to 3. On appeal by the defendant vendee the learned District Judge of Rae Bareli reversed the decree of the Court of first instance and dismissed the plaintiff's suit. This appeal is against the decree of the last mentioned Court. The ground, on which the decision of the learned Judge is based is, that the agreement mentioned in paragraph 7 of the plaint is destructive of the plaintiff's right to pre-empt the property in suit. We have given our anxious consideration to this view of the learned Judge but eventually we find ourselves in agreement with him. We have examined the terms of this agreement carefully. As between the parties to it we must accept the fact for the purpose of this litigation that it is binding. The effect of this agreement is, that the plaintiffs Nos. 4 and 5 may acquire the whole of the property in suit except a small portion if they paid the entire pre-emption money. We must hold that the parties intended to carry out the terms of the agreement. It follows that the real pre-emptors are the plaintiffs Nos. 4 and 5. This result is not obviated by the fact that they have been removed from the array of parties. For the purpose of this decision we must further assume that those two plaintiffs have no right in law to acquire this property by pre-emption under the provisions of section 9 of the Oudh Laws Act (XVIII of 1876). It is a well established principle of law that "a man cannot be allowed to do by indirect means what is forbidden to be done directly" *Jotendramohan Tagore* v. *Ganendromohan Tagore* (1). In view of the terms of the agreement mentioned above, the result of a decree in favour of the appellants will in reality be the recognition of the right of the plaintiffs Nos. 4 and 5 to acquire the property in suit in preference to the vendee. This result will obviously stultify the law of pre-emption as enacted in the provisions of the Act mentioned above. In the case of *Abdulla* v. *Mst. Wahid-unnissa* (2). Mr. Blennerhassett, Judicial Commissioner of Oudh said "A Court of law that assisted the plaintiff suing for pre-emption to introduce strangers into the village would be guilty of inconsistent conduct and stultify itself". We think our decision follows the spirit of the observations just now mentioned. On these grounds we uphold the decree of the Court below and dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 18 W. R. 359 ; 9 B. L. R. 377 ; I. A. Sup. Vol. 47 ; 2 Suth. P. C. J. 692 ; 3 Sar. P. C. J. 82 (P. C.).

(2) 1 O. C. 308.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1586 OF 1922.

April 8, 1924.

Present :—Mr. Justice Daniels.

BASU AND OTHERS—DEFENDANTS —APPELLANTS

versus

Musammat NANHI—PLAINTIFF —RESPONDENT.

Adverse possession—Co-sharers—Ouster—Non-participation in profits—Revenue records, entry in, effect of.

If a tenant-in-common has not been in participation of rents and profits for a considerable length of time and other circumstances concur, the Court may find an ouster even though the name of the tenant-in-common continues to be borne on the Revenue records.

Culley v. *Doed Taylerson*, (1840) 11 A. & E. 1008 ; 3 P. & D. 539 ; 9 L. J. Q. B. 288 ; 113 E. R. 697 ; 52 R. R. 566, relied on.

Appeal from the decree of the First Additional Subordinate Judge, Aligarh, dated the 16th May 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondent.

BASU *v.* NANHI

JUDGMENT.—This appeal arises out of a suit for possession of a share in an occupancy holding and for damages. The suit was dismissed after a careful trial by the Munsif but decreed by the learned Additional Subordinate Judge and the defendants appeal. The case involves one question of fact and two of law. The original title depended on the question of fact whether the plaintiff's father was joint with or separate from the other branches of the family. The Courts below differed on this point. The finding of the lower Appellate Court which must be accepted is that the plaintiff's father was separate and, therefore, his share descended to his daughter.

The main question of law is one of limitation. The suit is governed by Article 142 of the Limitation Act and, therefore, it was necessary for the plaintiff to prove possession within twelve years. She alleged in her plaint that she was in possession of the share till the defendants took wrongful possession at the commencement of Fasli 1325 (para 3 of the plaint). The learned Munsif found that she had in fact been out of possession for at least 31 years. Her father died 35 years ago and her mother not more than four years later and since then the plaintiff has never had actual possession of the share. The learned Additional Subordinate Judge does not differ from these findings. He gets over the difficulty by applying the doctrine of constructive possession and treating the possession of the defendants as possession on behalf of the plaintiff. He also says, that as there is no proof of denial of the plaintiff's title and the plaintiff's name appeared in the revenue records within twelve years of suit adverse possession for twelve years is not established.

It appears to me that it is an abuse of the doctrine of constructive possession to apply it to the circumstances of the present case. The plaintiff's own case is that there has been an ouster as a result of which she claims considerable damages for dispossession. The only question is when that ouster took place. She says that it was in F. 1325 within three years of the suit. In reality (for in the absence of any finding to the contrary I have no hesitation in accepting the finding of the Trial Court on this point) it took place over thirty years before suit. The Ceylon Privy Council case *Corea* v. *Appuhamy* (1), which is relied on by the respondent was a case between brother and sister and it recognises that there are cases in which ouster may be inferred from the circumstances. In *Varatha Pillai* v. *Jeevarathnammal* (2), the Privy Council expressed a doubt whether the rule of possession by one co-owner applies to sharers in an unpartitioned agricultural village in India who are not members of a joint family, but without deciding the point they quote with approval the rule laid down in *Culley* v. *Doe d Taylerson* (3), that even where the rule is applicable, if a tenant in common has not been in participation of the rents and profits for a considerable length of time and other circumstances concur the Judge may direct the jury to consider whether in the circumstances they will not find that there has been an ouster. In this case it is common ground that there had been an ouster at the time of suit. The plaintiff said that it took place in 1325 F. That case is false. The actual ouster was when the defendants took exclusive possession of the holding on the death of Ram Sahai's widow. Under these circumstances, to say that they were holding possession on the plaintiff's behalf is in my opinion to apply a legal fiction quite at variance with the facts of the case.

I accordingly allow the appeal and setting aside the decree of the Court below restore the decree of the Trial Court with costs in all Courts.

N. H. *Appeal allowed.*

(1) (1912) A. C. 230 ; 81 L. J. P. C. 151 ; 105 L. T. 836.

(2) 53 Ind. Cas. 901 ; 46 I. A. 285 ; 43 M. 244 ; (1919) M. W. N. 724 ; 10 L. W. 679 ; 24 C. W. N. 346 ; 38 M. L. J. 313 ; 18 A. L. J. 274 ; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444.

(3) (1840) 11 A. & E. 1008 ; 3 P. & D. 539 ; 9 L. J. Q. B. 288 ; 113 E. R. 697 ; 52 R. R. 566.

SUBRAMANIA MUDALIAR *v.* PARASURAMAIER

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 389 OF 1921.

August 16, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

C. K. SUBRAMANIA MUDALIAR AND OTHERS—PETITIONERS

versus

PARASURAMAIER AND OTHERS —RESPONDENTS.

Religious Endowments Act. (XX of 1863), s. 18—Application for leave to sue—Particulars—Leave to sue all or any of the respondents, propriety of—Judge, whether can delegate powers—Report made by person making enquiry, whether evidence.

An application under section 18 of the Religious Endowments Act, for leave to sue must give definite particulars of the charges sought to be made. Leave will not be granted on vague and indefinite allegations.

Leave granted against any or all of the respondents, leaving the petitioners to choose which of them they will proceed against, is improper as it supplies the petitioners with an instrument for extortion and makes it possible for them to let off the persons most responsible and get other members who are less guilty to account severally for the trust property.

Under section 18 of the Religious Endowments Act, the Judge is not entitled to delegate to others the duty of forming an opinion upon the facts before him, and the report of a person who is asked to inquire into the allegations contained in the petition is not evidence.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Coimbatore, dated the 12th April 1921 in O. P. No. 32 of 1921.

Mr. *S. Muthiah Mudaliar*, for the Petitioners.

Messrs. *T. M. Krishnaswami Aiyer* and *A. V. Viswanatha Sastri*, for the Respondents.

JUDGMENT.—We feel constrained to interfere with the District Judge's order granting leave for the institution of a suit in the form in which that leave has been given, as it appears that he has not exercised the power conferred on him by section 18 of Act XX of 1863 in the manner contemplated by that provision of law.

The allegations are extremely vague and indefinite and the charges 2 to 10 as to breach of trust are no more specific than the respondents' accusations. The sums of money kept uninvested in 1st counter-petitioner's hands, or lent to strangers, other sums said to be unaccounted for, the items of temple property dealt with contrary to the interests of the trust are not specified, with the consequence that the suit may be based on charges which have not been clearly made the subject of the order. The giving of sanction against any or all of the respondents, leaving the petitioners to choose which of them they will proceed against, is also improper as it supplies the petitioners with an instrument for extortion and makes it possible for them to let off the persons most responsible and get other members who are less guilty to account severally for the trust property. The Judge's order is, therefore, set aside and he is directed to make a fresh enquiry after calling upon the petitioners to give definite particulars of the charges made by them and after affording the counter-petitioners an opportunity to explain them.

He may then grant leave to the petitioners to proceed upon any charges which he finds to be *prima facie* established against such of the counter-petitioners who in the opinion of the Judge are to be held responsible.

In making the above enquiry it will be open to the Judge under his powers given by section 19 to have the accounts of the Committee produced and inspected in Court by the parties or their Vakils.

But the report of the two High Court Vakils who were asked to enquire into the allegations is not evidence, as the Judge is not entitled to delegate to others the duty of forming an opinion upon the facts before him, and the Vakils in question were not appointed as Commissioners to make a local investigation upon any matter which could not have been enquired into in open Court with equal convenience. The petition is remanded for fresh enquiry.

The respondents are directed to pay the costs of the petitioners in this Court and to bear their own.

Petition allowed.
Case remanded.

Z. K.

CHAMPA KUNWAR *v.* TULSHI RAM

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1590 OF 1922.

April 8, 1924.

Present :—Mr. Justice Daniels.

Mst CHAMPA KUNWAR—PLAINTIFF—APPELLANT

versus

TULSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Agricultural village—Sale of house by tenant, validity of—Special custom.

Apart from special custom, a tenant in an agricultural village has no right to sell his house together with a right of residence.

Sri Girdhariji Maharaja v. *Chote Lal*, 20 A. 248; A. W. N. (1898) 27; 9 Ind. Dec. (N. S.) 520, relied on.

A sale by the tenant in favour of another tenant is just as much prohibited as a sale in favour of an outsider, but a sale in favour of the landlord stands on a different footing.

Appeal from the decree of the Additional District Judge, Aligarh, dated the 8th July 1922.

Mr. *Panna Lal*, for the Appellant.

Dr. *K. N. Katju* and Mr. *Saila Nath Mukerji*, for the Respondents.

JUDGMENT.—This was a suit brought by the plaintiff *zemindar* for possession of a house. The Court below, overruling the Trial Court, has dismissed the suit, and the plaintiff appeals. The house was occupied by a tenant who has made a gift of it to the defendant. One of the defences was that the defendant's vendor had quitted the village twenty years before and that the house escheated to the *zemindar*. The Court below remitted issues to the Trial Court. The findings on those issues were in favour of the appellant. No objections were taken within the time allowed but the learned Additional Judge nevertheless went into evidence and overruled the findings of the Trial Court on the facts. There is some authority in favour of his right to do so but I am constrained to remark that if such a practice became common the procedure of allowing a time within which objections to the findings must be taken would be reduced to a useless farce.

However there is no need to go into this question as the judgment of the learned Additional Judge is clearly wrong on the second issue. That issue is whether the tenant had a right to sell his house together with a right of residence. Apart from special contract it is well settled that no such right exists in an agricultural village. This was laid down as far back as 1898 in *Sri Girdhariji Maharaja* v. *Chote Lal* (1) and followed in *Muhammad Usman* v. *Babu* (2). *Faiyaz Ali* v. *Rekhab Das* (3), only modifies the previous rulings to this extent that it is open to the tenant to prove a special custom allowing a right of sale. In this case the *wajib-ul-arz* is quoted by the Additional Judge. The custom which it records gives the tenant who is resident in the village no right to do more than sell the materials of his house. It does not recognise his right to convey his right of residence to the purchaser. The learned Judge admits the law to be as stated above but finds that it does not apply to a sale by one tenant to another tenant. There is no warrant for making any such distinction. A sale to the *zemindar* himself has been in some cases recognised as valid on the ground that the prohibition against a transfer is for the benefit of the *zemindar* and if he likes to waive the prohibition he is at liberty to do so. There is no infringement of his right. But a sale to another tenant is just as much an infringement of the *zemindar's* right as a sale to a person residing outside the village. The learned Judge at the conclusion of his findings mentions that there are four instances of sales by tenants. He does not say that these instances establish a custom, and clearly they could not do so. Indeed three of the four instances were, as the learned Munsif points out, transfers to the *zemindar* himself. The learned Munsif was, therefore, right in decreeing the suit subject to payment of the price of the materials of the house.

I set aside the decree of the Court below and restore the decree of the Munsif with costs in all Courts.

N. H. *Appeal allowed.*

(1) 20 A. 248 ; A. W. N. (1898) 27 ; 9 Ind. Dec. (N. S.) 520.
(2) 9 Ind. Cas. 314 ; 8 A. L. J. 61.
(3) 61 Ind. Cas. 24 ; 19 A. L. J. 104.

SHEORATAN SINGH *v.* KALI CHARAN

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 69 OF 1923.

March 10, 1924.

Present :—Mr. Kendall, A. J. C.

SHEORATAN SINGH—
DEFENDANT—APPELLANT

versus

KALI CHARAN—PLAINTIFF
—RESPONDENT.

Contract Act (IX of 1872), s. 11—Mortgage in favour of lunatic, whether enforceable—Executed and executory contracts.

A lunatic or a minor is not disqualified as such to take immoveable property under an executed contract and a mortgage executed in favour of a lunatic or a minor is enforceable by him.

Mohari Bibee v. *Dharmadas Ghose*, 30 C. 539; 30 I. A. 114; 5 Bom. L. R. 421; 7 C. W. N. 441; 8 Sar. P. C. J. 374 (P. C.); *Machaima* v. *Usman Beari*, 17 M. L. J. 78; *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, 13 Ind. Cas. 331; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 156; 11 M. L. T. 8; 39 I. A. 1 (P. C.); *Munni* v. *Madan Gopal*, 27 Ind. Cas. 733; 13 A. L. J. 185; *Navaketi Narayana Chetty* v. *Logalinga Chetty*, 4 Ind. Cas. 353; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233; *Kalka Singh* v. *Himayat Ali*, 10 O. C. 218, distinguished.

Raghunath Bakhsh v. *Haji Sheikh Mohamed Bakhsh*, 30 Ind. Cas. 200; 18 O. C. 115 at p. 116; 2 O. L. J. 200, *Munni Koer* v. *Madan Gopal*, 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1084; *Raghava Chariar* v. *Srinivasa Raghava Chariar*, 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363 (F. B.); *Hanmant Lakshman* v. *Jayarao Narasimha*, 13 B. 50; 7 Ind. Dec. (N. S.) 33; *Madhab Koeri* v. *Baikuntha Karmakor*, 52 Ind. Cas. 338; 4 P. L. J. 682; (1919) Pat. 313; *Hari Mohan Mandal* v. *Mohini Mohan Banerji*, 33 Ind. Cas. 994, 22 C. W. N. 190; *Ahmad* v. *Raja*, 39 Ind. Cas. 11; 50 P. W. R. 1917, relied on.

The case of executory contracts, however, is different and a lunatic or a minor cannot validly enter into a contract for sale or mortgage in his favour.

Appeal against the decree of the District Judge, Hardoi, dated the 7th November 1922, passed in C. A. No. 16 of 1922 preferred against the decree of the Additional Subordinate Judge dated the 19th December 1921 in Original Suit No. 79.

Messrs. *Bisheshwar Nath Srivastava* and *H. K. Ghose*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.—The plaintiff respondent instituted three suits on the basis of three mortgage deeds executed in his favour by the appellant in 1902, 1903 and 1904. The suits were contested on various grounds, but were declared in the first Court, and that decision was upheld in the lower Appellate Court. There are five grounds of appeal in relation to these suits, but in argument the question of limitation has been dropped and the decisions of the Courts below have been attacked only on the ground that the mortgege deeds which formed the basis of the three suits were executed in favour of a lunatic, and consequently they are invalid in law under section 11 of the Indian Contract Act. It may be noted that the first Court appears, from a passage towards the end of the judgment, to have held that two successive certificated guardians of the lunatic were actual parties to the contract on behalf of the lunatic and it has been argued in this Court that this was the case. The lower Appellate Court did not take any notice of the passage referred to, and evidently considered that the lunatic and not the guardian was acting in the capacity of a mortgagee. In any case it must be taken as a settled fact that the lunatic and not the guardian was the mortgagee. It has been proved that the plaintiff was declared a lunatic, that his mother was appointed his guardian in 1900, and that on her death his sister was appointed guardian in 1903.

There was, therefore, a certificated guardian in existence when each of these mortgage deeds was executed, but there is no reference to the guardians in the deeds themselves and it is not suggested in the plaint that the guardians had anything to do with the execution of the mortgages. The passage of the first Court to which I have referred is vague, it was apparently not relied on by the lower Appellate Court, and I do not propose to take any further notice of it.

It has been argued for the appellant that a lunatic for the purposes of section 11 of the

SHEORATAN SINGH *v.* KALI CHARAN

Indian Contract Act is in the same position as a minor and is disqualified from entering into a contract, and further that any contract entered into by a lunatic is absolutely void. The decisions in *Mohari Bibee* v. *Darmadas Ghose* (1) and *Machaima* v. *Usman Beari* (2) have been relied upon for this proposition and it has further been argued that even where the contract has been in favour of the disqualified person it has been held to be invalid *Mir Sarwarjan* v. *Fakhruddin Mahomed Choudhuri* (3), *Munni* v. *Madan Gopal* (4) and *Navakoti Narayana Chetty* v. *Logalinga Chetty* (5). The decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Choudhuri* (3) is a Privy Council ruling, and relates to a suit for specific performance of an agreement for the sale to a minor of immoveable property, which had been entered into by the manager of his estate and his guardian, and their Lordships held that it is not within the competence of a manager of a minor's estate or of a guardian of a minor to bind the minor or the minor's estate by a contract for the purpose of immoveable property, and consequently that as the minor was not bound by the contract there was no mutuality and that the minor after attaining majority could not obtain specitic performance of the contract.

It is clear that that suit was of an altogether different nature from the present suit. There is no question here of binding a lunatic's estate. What the lunatic did was to advance money on security obtained from the mortgagor. In *Kalka Singh* v. *Himayat Ali* (6) a distinction has been drawn between what are called executed contracts and executory contracts, and it is evident that the contract referred to in the Calcutta decision is an executory contract, where something remained to be done such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed. Such a contract cannot be validly entered into by a lunatic or a minor. The case of an executed contract stands on a different footing altogether, and it has been clearly held in a decision of a Bench of this Court reported in *Raghunath Bakhsh* v. *Haji Sheikh Muhmmad Bakhsh* (7), that a minor is competent to take property in transfer or sale. This decision has rightly been relied on by the Appellate Court. It is confirmed by the recent decisions of other High Courts, for instance *Munni Koer* v. *Madan Gopal* (8), a Bench ruling, in which an earlier Allahabad decision was overruled, and *Raghavachariar* v. *Srinivasa Raghavachariar* (9), a full Bench ruling, in which it was held that a mortgage executed in favour of a minor is enforceable by him. Other decisions that have been quoted on behalf of the respondent are *Hamant Lakshman* v. *Jayarao Narasimha* (10), *Madhale Koeri* v. *Baikuntha Karmaker* (11), *Hari Mohan Mondel* v. *Mohini Mohan Banerjee* (12), *Ahmed* v. *Raja* (13). In some of these, the deed in question was a sale and in others it was a mortgage, but the principle underlying them all appears to be the same, *viz.*, that a minor or a lunatic is not disqualified, as such, from being the transferee of immoveable property. The learned Counsel for the appellant has tried to distinguish the present suit from the cases discussed in *Raghunath Bakhsh* v. *Haji Sheikh Muhammad* (7), but even if there were no authority on the point that decision would, in my opinion, dispose of the matter. A mortgage is a transfer of an interest in immoveable property, and a lunatic is not disqualified from being the transferee for the same reasons that he is not disqualified from being the transferee in the case of a sale. The appeals, therefore, fail and are dismissed with costs. This judgment will govern Second Civil Appeals Nos. 69 to 71 of 1923.

N. H. *Appeals dismissed.*

(1) 30 C. 539 ; 30 I. A. 114 ; 5 Bom. L. R. 421 ; 7 C. W. N. 441 ; 8 Sar. P. C. J. 374 (P.C.).
(2) 17 M. L. J. 78.
(3) 13 Ind. Cas. 331 ; 39 C. 282 ; 16 C. W. N. 74 ; (1912) M. W. N. 22 ; 9 A. L. J. 33 ; 15 C. L. J. 60 ; 14 Bom. L. R. 5 ; 21 M. L. J. 156 ; 11 M. L. T. 8 ; 39 I. A. (P. C.)
(4) 27 Ind. Cas. 783 ; 13 A. L. J. 185.
(5) 4 Ind. Cas. 383 ; 33 M. 312 ; 19 M. L. J. 752 ; 7 M. L. T. 233.
(6) 10 C. C. 218.
(7) 30 Ind. Cas. 200 ; 18 O. C. 115 at p. 116 ; 2 O. L. J. 200.
(8) 31 Ind. Cas. 792 ; 38 A. 62 ; 13 A. L. J. 1084.
(9) 36 Ind. Cas. 921 ; 40 M. 308 ; 31 M. L. J. 575 ; 20 M. L. T. 407 ; (1916) 2 M. W. N. 363 (F.B.).
(10) 13 B 50 ; 7 Ind. Dec. (N.S.) 33.
(11) 52 Ind. Cas. 338 ; 4 P. L. J. 682 ; (1919) Pat. 313.
(12) 83 Ind. Cas. 994 ; 22 C. W N. 130.
(13) 89 Ind. Cas. 44 ; 50 P. W. R. 1917.

CHUNI LAL *v.* CHUNI LAL

LAHORE HIGH COURT.

CIVIL REVISION NO. 774 OF 1922.

Present:—Mr. Justice Moti Sagar.

May 16, 1923.

CHUNI LAL—PLAINTIFF—PETITIONER
versus
CHUNI LAL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 106, applicability of—Ejectment—Notice to quit, when should expire.

Section 106 of the Transfer of Property Act merely lays down in a codified form what has always been understood to be the general law on the subject, and the section is applicable in the absence of a contract to the contrary.

Pirbhu v. *Ram Chand*, 5 P. R. 1904; 42 P. L. R. 1904; *Radha Kishen* v. *Ratan Lal*, 56 I. C. 7, relied on.

In the absence of an agreement or local custom to the contrary a notice to quit must be given to expire on and with the last day of some period of the tenancy.

A condition in a lease that the landlord would give one month's notice if he wants to have the premises vacated does not mean that notice can be given at any time and that it is not to expire with the end of the month of the tenancy as required by section 106 of the Transfer of Property Act.

Petition for revision of the order of the Small Cause Court Judge, Lahore, dated 26th July 1922.

Messrs. *M. N. Mukerjee* and *N. C. Mehra*, for the Petitioner.

Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—This was a suit by a landlord against a tenant on the basis of a lease, dated the 4th November 1920. The lease provided that the tenancy was to commence from 1st November 1920, and that if the landlord wanted to have the premises vacated he will give one month's previous notice to the tenant. On the 14th November 1921, the plaintiff gave a notice to the defendant requiring him to vacate the premises within one month and informing him that if default was made he would be liable to pay rent at an enhanced rate. The defendant not having vacated the premises, the plaintiff brought this suit for the recovery of rent at the enhanced rate. The Trial Court dismissed the suit on the ground that the notice was not valid in law inasmuch as it did not expire with the end of a month of the tenancy. Against this decision a revision has been filed to this Court and two contentions have been raised before me on behalf of the petitioner. Firstly, it is contended that though some of the principles of the Transfer of Property Act, are applicable to the Punjab yet the Act is not applicable in its entirety and that section 106 of the Transfer of Property Act, which does not lay down a general principle of law, should not be held applicable to this province. The second contention is that section 106 is inapplicable inasmuch as there was a contract between the parties to the effect that one month's notice will be given and that there was no stipulation that the notice should be given on any particular date, or that it should end with any particular date. In my opinion there is no force in any of these contentions. There is ample authority for holding that where there is no contract, section 106 of the Transfer of Property Act applies to such cases—*Vide Radha Kishen* v. *Ratan Lal* (1) and *Pirbhu* v. *Ram Chand* (2). Section 106 merely lays down in a codified form what in fact has always been understood to be the general law on the subject. In Foa's Law of Landlord and Tenant at page 592 the general rule laid down is that in the absence of agreement or local custom to the contrary a notice to quit must be given to expire on and with the last day of some period of tenancy. Dr. Gour in his Law of Transfer at page 1902 says that a notice would be invalid if it expires before or after but not coincidently with the end of the year or month of the tenancy. I do not think there is any substance in this contention and I overrule it.

As to the second contention there is no doubt that the parties may enter into a contract to determine the tenancy by notice of any length or expiring at any time or even

(1) 56 Ind. Cas. 7.
(2) 5 P. R. 1904; 44 P.L.R. 1901.

without notice. The question for consideration, however, is whether the parties in the present case did enter into any such contract. It is argued that the condition in the lease that the landlord would give one month's notice if he wanted to have the premises vacated means that notice could be given at any time and that it was not to expire with the end of the month of tenancy as required by section 106 of the Transfer of Property Act. In my opinion this condition does not bear any such interpretation whatever. Reliance is placed on 56 I. C. 7, but the facts of that case were entirely different and do not support the plaintiff in his contention. In that case there was a clear contract in the lease to vacate at one month's notice, the month to count from date of receipt of notice. There is no such contract in the lease in the present case and I must, therefore, hold that the lower Court was right in holding that section 106 of the Transfer of Property Act is applicable.

I dismiss the petition with costs. This judgment will also govern Civil Revisions Nos. 775, 776, and 777 of 1922 the facts of which are identical with those of the present case.

Z. K. *Petition dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 19 OF 1922 AND CIVIL REVISION PETITION NO. 315 OF 1922.

February 17, 1924.

Present:—Mr. Spencer, Officiating Chief Justice, and Mr. Justice Devadoss.

ELLAMMAL—DEFENDANT—APPELLANT

versus

A. S. VEKATARAMANA RAO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract, performance of—Widow, alienation by—Suit by reversioners—Compromise—Decree upholding alienation conditional on payment of sum of money by widow to reversioners within specified time—Time, whether of essence of contract—Non-payment, Effect of.

In a suit by a reversioner to set aside an alienation by a widow, a compromise decree was passed which provided that in case of payment of a sum of money by the widow to the plaintiffs within a time fixed, the alienation was to be declared valid and on default, it was to be set aside as null and void. Two days after the prescribed time, the defendant applied to the Court to be allowed to deposit the amount in Court:

Held, that time was of the essence of the contract and that the question of relieving against forfeitures did not arise in the case and the alienation by the widow must be declared void.

Nagappa v. *Venkat Rao*, 24. M. 265; *Ana Sheik Mohidin Tharagan* v. *Vadivalagia Nambia Pillai* 22 Ind. Cas. 37; (1914) M. W. N. 92; *Supdu Dhodu* v. *Mathavaram Jivaram*, 57 Ind. Cas. 534; 22 Bom. L. R 780; 44 B. 544, distinguished.

Kandarpa v. *Bamuari*, 60 Ind. Cas. 864; 33 C. L. J. 244 at p. 250, relied on.

Appeal against the order, dated 5th day of August 1921, of the Court of the Subordinate Judge of Vellore, in Appeal No. 82 of 1921, (A. S. No. 199 of 1920, on the file of the District Court of North Arcot) preferred against the order of the District Munsif of Tiruppattur in M. P. No. 552 of 1919 in (O. S. No. 493 of 1918).

Messrs. *P. Hari Rao* and *M. C. Narayanaswamy*, for the Appellant and Petitioner.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

ORDER.—The Subordinate Judge had not found whether the sum payable was actually tendered in time. He is directed to return a finding on this point within six weeks from the date of the receipt of the record in these cases and seven days are allowed to the parties for filing objections to the findings after notice of the return of the same shall have been posted up in this Court.

[In compliance with the order contained in the above judgment, the acting Subordinate Judge of Vellore submitted the following finding.]

FINDING.—1. The High Court has called for a finding on the point "Whether the sum payable was actually tendered in time"?

My predecessor made a reference to the High Court whether additional evidence was to be taken on the point and the High Court in its letter No. 1841-J., dated 14th August 1923, observed that its original order has not directed the taking of additional evidence. These things make it clear, therefore, that a finding has to be recorded upon the said point on the strengh of the affidavits already on record in conjunction with the probabilities and that no additional evidence as desired by the appellant need be taken.

For a due and proper appreciation of the averments contained in the affidavits which constitute the only evidence in the case, a brief resume of facts involved in it seems to be pertinent in this connection and I proceed to set it out here.

Plaintiffs claiming to be the reversioners of a certain Nagoji Rao, the deceased husband of 1st defendant, who is the appellant, instituted O. S. No. 493 of 1918 on the file of the Court of the District Munsif of Tiruppattur impeaching certain alienations, in particular, a gift made by the said Hindu widow and challenging their validity after her life-time. The suit ended in a compromise on 29th May 1919. The compromise provided that in case of payment of a sum of Rs. 175 by 1st defendant to plaintiffs within 6 months, *i. e.*, before 29th November 1915, the gift in question would be declared valid and if default was made, it would be set aside as null and void.

The said compromise, in particular, the condition in it relating to the payment of the said sum of Rs. 175 has given rise to this proceeding.

The case of the appellant is that she made a tender of the said sum to 1st plaintiff on 30th November 1919 but that the latter refused to receive it and pass a receipt therefor. 1st plaintiff has impugned the alleged tender as absolutely false. This conflict between them has culminated in this enquiry.

On a careful consideration of the affidavits filed on both sides and the probabilities arising in the case, I cannot resist the conclusion that the tender pleaded by the appellant should be a myth, in that it does not accord with probabilities.

It has to be remembered in this connection that the compromise provided that the payment of Rs. 175 should be made to both the plaintiffs who were admittedly divided brothers before the 30th November 1919 and that the said sum was in fact deposited by the appellant in the lower Court on the 2nd December following.

It cannot be doubted in the circumstances that the aforesaid sum was not admittedly paid within the due time, *i.e.*, before the 30th November and that the appellant made no attempt to make a tender of it before the said date. It is also clear that she has not adduced any explanation worth the name whatever that she made the alleged tender in due time as provided by the compromise decree. Such being the case, her case should fail.

This digression apart, there is another outstanding feature which requires special mention and has to be noted in this connection.

The petition of the appellant praying that the aforesaid sum of Rs. 175 may be received in Court is not signed by her. Her vakil has signed it. The affidavit filed in support of it has been sworn to by a certian Venkata Krishna Ayyar, her senior maternal aunt's son. It being so, it is plain that the appellant has studiously avoided committing herself to any definite statement.

* * * *

The foregoing reasons should make it abundantly clear that the tender pleaded by the appellant cannot be true. I accordingly find the point under consideration.

JUDGMENT.—The Subordinate Judge has now found against the alleged tender by appellant on November 30th and it has not been suggested that there was a tender on any other day before a petition was filed on December 2nd that the Court should allow the amount to be deposited in Court. We think that time in this case was of the essence of the contract and that the question of relieving against forfeitures, which arises when a penalty is provided for non-performance as it did in *Nagappa* v. *Venkat Rao* (1), and *Ana Sheik Mohidin Tharagan* v. *Vadivalagia Nambia Pillai* (2), does not arise here.

(1) 24 M. 265.
(2) 22 Ind. Cas. 37 ; (1914) M. W. N. 92.

LALA KUNDAN LAL *v.* PARSHADI

The distinction between the two classes of cases is made clear in the judgment of Mookerjee, Acting Chief Justice, *Kandarpa* v. *Banwari Lal Nag* (3), at 250.

The interval between the date for payment of money and the date for taking possession of lands made the case in *Supdu Dholu* v. *Madhavaram Jivaram* (1), one where time was not of the essence of the contract.

In the present case neither the appellant (1st defendant) nor the5th defendant had any absolute title to the land apart from the compromise, and it was expressly stipulated in the last paragraph of the compromise decree, that in default of payment within the time fixed, the alienation by the 1st defendant in favour of the 5th defendant should be null and void.

The lower Appellate Court is right and the Civil Miscellaneous Second Appeal is dismissed with costs and the Civil Revision Petition is dismissed.

V. N. V. *Appeal and petition dismissed.*
K. S. D.

(3) 60 Ind. Cas. 861 ; 33 C. L. J. 241 at p. 250.
(1) 57 Ind. Cas. 531 ; 44 B. 511 ; 22 Bom. L. R. 780.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 834 OF 1922.

March 24, 1924.

Present :—Mr. Justice Daniels and
Mr. Justice Dalal.

LALA KUNDAN LAL—DEFENDANT—APPELLANT
versus
PARSHADI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901) s. 167—Ejectment decree against non-occupancy tenant—Civil suit to be declared grove-holder, whether maintainable—Jurisdiction of civil and revenue Courts.

A plaintiff cannot by merely changing the form of his relief evade the provisions of section 167 of the Agra Tenancy Act.

Ajudhia Puri v. *Brij Bhukham*, 51 Ind. Cas. 143 ; 17 A. L. J. 922; 1 U. P. L. R. (A.) 64.

Where a person has been ejected by the revenue Court as a non-occupancy tenant, he cannot subsequently obtain a declaration in the Civil Court that he is a grove-holder, so as to defeat the decree regularly obtained in the revenue Court.

Jagannath v. *Balwant Singh*, 68 Ind. Cas. 247; 44 A. 692; 20 A. L. J. 570 ; (1922) A. I. R. (A) 372; 4 U. P. L. R. (A.) 194, followed.

Appeal from the decree of the District Judge, Pilibhit, dated the 4th March 1922.

Dr. *Sen*, for the Appellant.
Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—The plaintiffs in this case had been ejected by the defendant by a suit under the Agra Tenancy Act from a certain plot of land as being non-occupancy tenants. The suit against them was decided *ex parte*. They alleged that notice was not served on them and made an attempt in the Revenue Court to get the *ex parte* decree set aside, but the finding was against them and their application was dismissed. They filed the suit out of which this appeal arises in the Civil Court alleging that the whole proceedings in the Revenue Court were tainted by fraud of the present defendant, who in collusion with the peon pretended to get notices served on them, whereas in fact no notices were served and the plaintiffs knew this. On this allegation he asked for a declaration that the Revenue Court decree should be cancelled and that it should be declared that the land in dispute was a grove and possessed by the plaintiffs as grove-holders. The Revenue court decree was described as having been fraudulently obtained by the defendant, and on this allegation the case went to trial. The learned Judge of the court below found against the plaintiffs that there was no fraud on the part of the defendant. He has nevertheless granted the plaintiffs a declaration that they are grove-holders of the plot in suit because in his view the Revenue Court came to a wrong finding on the facts and the plots in dispute were not agricultural land. The learned Judge admits that he has no jurisidiction to cancel a decree for ejectment granted by the Revenue Court. He has, however, overlooked the fact that the effect of the decree

granted by him so far it can have any effect at all, is to do indirectly what he admits he cannot do directly and to defeat the result of the decree regularly obtained in the Revenue Court in a matter which was within that Court's jurisdiction. The ejectment suit being before the Revenue Court that Court had jurisdiction to decide whether the defendants in the Civil Court were agricultural tenants or not. It decided against them and its decision was under section 167 of the Tenancy Act a bar to any civil suit on the same matter. It has been held more than once *e.g.*, *Ajudhia Puri* v. *Brij Bhukhan* (1) that a plaintiff cannot by merely changing the form of his relief evade the provisions of section 167. That case was in many ways similar to the one before us. The plaintiff had been held by the Revenue Court as a tenant of the defendants. He then came to the Civil Courts for a declaration that he was not a tenant, but a *muafidar*. It was held that the Civil Court had no jurisdiction. Substitute "groveholders" for "*muafidar*" and the case is on all fours with the case before us.

In *Jagannath* v. *Balvant Singh* (2) this Court went so far as to hold that a suit to question the legality of an adoption was not maintainable in the Civil Court where the sole object was to affect a question between tenant and landlord which was cognizable solely by the Revenue Court. In this view we consider that the decree of the Court below is wrong and we accordingly allow the appeal and dismiss the suit with costs in all Courts including this Court on the higher scale.

H. C. *Appeal allowed.*

(1) 51 Ind. Cas. 143; 17 A. L. J. 922; 1 U. P. L. R. (A.) 64.

(2) 68 Ind. Cas. 247; 44 A. 692; 20 A. L. J. 670; (1922) A. I. R. (A.) 372; 4 U. P. L. R. (A) 191.

PRIVY COUNCIL.

APPEAL FROM MADRAS HIGH COURT.

November 13, 1923.

Present :—Lord Dunedin, Lord Phillimore, Sir John Edge, Mr. Ameer Ali, and Sri Lawrence Jenkins.

OBALA KONDAMA NAICKER AYYAN AND ANOTHER—APPELLANTS

versus

KANDASAMY GOUNDAR—RESPONDENT.

Hindu Law—Daughter, estate taken by—Alienation—Necessity—Alienee, position of—Enquiry.

In the Madras Presidency, a Hindu daughter as heiress of her father, takes a restricted interest similar to that taken by a widow with a similar power of disposal. This power is conditional; she can dispose of the inheritance for legal necessity, but it lies on the alienee or the person claiming under him to prove the existence of this necessity, and this is so even though the absence of necessity be not pleaded by the reversioner.

Sham Sunder Lal v. *Achhan Kunwar*, 25 I. A. 183 at p. 191; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417, followed.

Even though there may not be legal necessity in fact, the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

Where the inheritance is not transferred so as to bind the reversioners, the reversioners on the death of the alienor can treat it as a nullity without the intervention of any Court.

Bijoy Gopal Mukerji v. *Kishori Mahishi Debi*, 34 I. A. 87; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 C. 329. (P. C.), followed.

Appeal from the judgment of the Madras High Court dated the 2nd May 1919, varying the judgment of the Subordinate Judge, Madura, dated the 23rd December 1916.

Messrs. *De Gruyther*, *K. C.* and *K. Brown*, for the Appellants.

Messrs. *Finlay*, *K. C.* and *Narasimham*, for the Respondent.

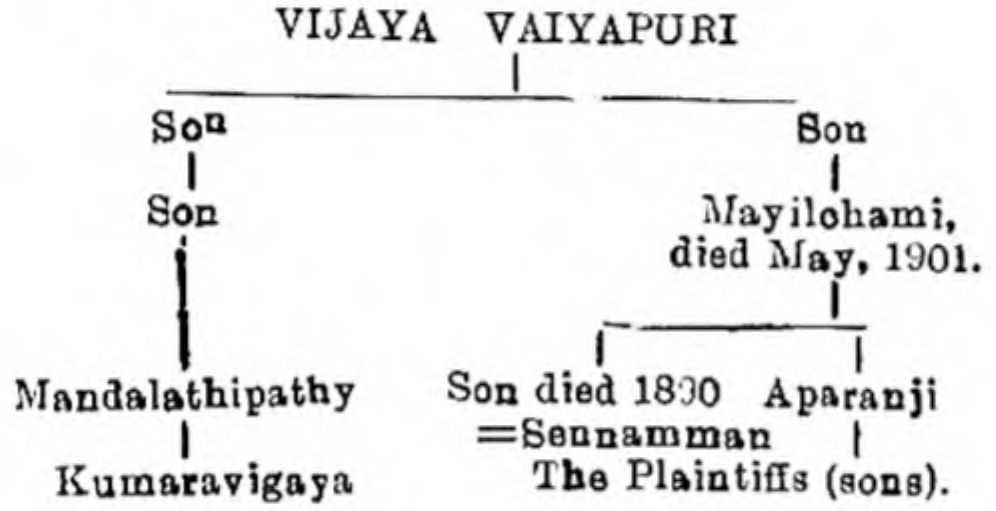
JUDGMENT.—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd May, 1919, which

OBALA KONDAMA NAICKER AYYAN *v.* KANDASAMY GOUNDAR

varied a decree of the Subordinate Judge of Madura, dated the 23rd December, 1916. The plaintiffs are the reversionary heirs of their maternal grandfather Mayilchami, who died in May 1901, and was succeeded by his daughter, Aparanji Amman, the mother of the plaintiffs. The defendants are (among others) Aparanji Amman, Kumaravigaya, the son of the late Mandalathipathy, Sennamman Avergal, and Kandasamy Goundar.

The purpose of the suit is to establish the plaintiffs' title as reversioners.

To explain this title it will be convenient to set out the following pedigree :—



On Mayilchami's death Sennamman commenced proceedings under the Criminal Procedure Code for possession of the estate of her father-in-law. Her application substantially failed. She then instituted a suit on the 14th February 1902, against Aparanji and Mandalathipathy seeking to establish a Will alleged by her to have been executed by Mayilchami and praying that possession should be given to her of one-third share of the property left by him.

Both defendants to that suit filed written statements and the litigation closed with a compromise in 1903.

It provided that 10 Kulies of the property therein described and a house should be delivered by the defendants to Sennamman. To this extent it was within the scope of the suit, and ultimately a decree was passed in accordance with this stipulation.

But the compromise also purported to define the rights of the defendants to that suit as between themselves. By clause 8 it provided that the properties described in the plaint (other than what was given to Sennamman) should be divided into moieties and that each of those defendants should take one. On the 23rd February, 1907, a partition deed was executed in accordance with the terms of the compromise. On the 2nd July, 1910, Mandalathipathy executed a mortgage on property taken by him under the compromise to secure Rs. 10,000 advanced to him by the respondent Kandasawmy Goundar, and on the 7th January 1915, a decree for Rs. 17,257 was passed on it in the mortgagee's favour.

The plaintiffs, as reversioners under their maternal grandfather, have instituted this suit on the 2nd March 1915, seeking to establish the invalidity as against them of the respective titles claimed by Kumaravigaya, the son of Mandalathipathy, deceased, and by the mortgagee.

It has been held by the High Court, and their Lordships adopt the finding, that Mayilchami and Mandalathipathy were separate and not joint, and there can be no doubt that this was known to Mandalathipathy at the time of the compromise.

But the compromise was based on the supposition that there was a question as to whether there had been a separation between the two lines of the family.

The High Court has further found that there is no evidence that Aparanji, with full knowledge that there was no truth in the claim put forward by Mandalathipathy, agreed to the compromise from ulterior motives and that there is not sufficient evidence to show that in assenting to the terms of the compromise she was not acting *bona fide* in the light of the circumstances then brought to her notice. Their Lordships do not dissent from this appreciation of the evidence. Aparanji at the time of the compromise stood in need of especial protection. She was a purdanashin lady recently widowed, the mother of infant sons, and, so far as the evidence discloses, without any adult male relation except Mandalathipathy to advise her.

But it was under his advice and influence that she acted in the litigation with Sennamman and in the compromise by which Mandalathipathy took to the detriment of herself and her infant sons the benefits to which, as he well knew, he had no honest claim.

In these circumstances the High Court rightly came to the conclusion that as against

defendant No. 2, Mandalathipathy's son and heir, the plaintiffs established the invalidity of the compromise after their mother's death. From this part of their adjudication no appeal has been preferred, and the only contest now is with the mortgagee in whose favour the High Court decided.

The ground of this decision is that the mortgagee is a *bona fide* transferee for value, and so stands in a better position than his transferor, whose title was held to be bad.

The High Court appears to have thought that justification for this view was to be found in the provisions of the Trust Act. In their Lordships' opinion this was erroneous : the Act has no direct relevance to the circumstances of this case, and it was properly realized in the argument here that if the High Court's conclusion can be supported it must be on other grounds.

It has thus been contended that the High Court acted without jurisdiction in remanding the case as it did, and that the true view of the facts is that taken by the first Trial Judge. But though the High Court's procedure may invite criticism, this is of no importance in view of that Court's ultimate findings of fact which, as already indicated, their Lordships accept.

They, therefore, do not think it necessary to discuss further the propriety of the remand.

It is then contended that the plea of purchaser for value without notice assists the respondent.

But an initial difficulty in applying this doctrine is that on the face of the title the mortgagee had notice that his mortgagor took from one who only had a limited and conditional power of disposal. And so the enquiry comes back to this: what was the daughter's interest and power, bearing in mind that the case comes from the Madras Presidency? It is now settled beyond dispute that a daughter as heiress of her father takes a restricted interest similar to that taken by a widow with a similar power, of disposal. This power is conditional ; she can dispose of the inheritance for legal necessity, but it lies on the alienee to prove the existence of this necessity and this is so even though the absence of necessity be not pleaded by the reversioner. Thus it was laid down in *Sham Sunder Lal* v. *Achhan Kunwar* (1), "In a suit like the present, on a bond made by a person with restricted power of alienation, the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage." And later it was said the "touchstone of the authority is necessity." It may be conceded that even though there may not be legal necessity in fact, the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

But here there is no proof either of necessity or of enquiry validating the compromise.

The inheritance, therefore, was not transferred so as to bind the reversioners. On the contrary, the reversioners on the mother's death can treat it as a nullity without the intervention of any Court. (*Bijoy Gopal Mukerji* v. *Kishore Mahishi Debi* (2).

Nor in their Lordships' opinion does it alter the position that the dealing with Mandalathipathy purported to be a compromise and an acknowledgment of an existing title. Even so, it was improperly induced and equally vitiated.

As against the reversioners in this case, it was not within the power of Mandalathipathy to transfer a larger legal title than he himself had, nor have the reversioners by any act or omission debarred themselves from insisting on this contention. It is true that the reversion is still an expectancy, but an expectant reversioner's right to sue for a declaration has statutory recognition, and for the purpose in hand it is legitimate to consider what their position would be on their mother's death in their lifetime. They would in that event have the immediate title without the intervention of any Court, and there would in their Lordships' view be no principle of justice, equity or good conscience that would empower the Court to deprive them of that legal title or to impose any restriction in derogation of it.

(1) 25 I. A. 183 at P. 191 ; 21 A. 71 ; 2 C. W. N. 729 ; 7 Sar. P. C. J. 417.

(2) 31 I. A 87 ; 11 C. W. N. 424 ; 5 C. L. J. 334 ; Bom. L. R. 602 ; 2 M. L. T. 133 ; 17 M. L. J. 154 ; 4 A. L. J. 329 ; 34 C. 329 ; (P. C.).

Their Lordships, therefore, are unable to agree with the High Court's decision in the mortgagee's favour, and they will accordingly humbly advise His Majesty that the appeal be allowed, and that the decree of the High Court be varied so far as it dismissed the appeal as against the 4th defendant and ordered that the plaintiff should pay to the 4th defendant Rs. 621—2—6 for his costs, by directing in lieu thereof (*a*) that it be declared that the mortgage of the 2nd July, 1910, and the decree thereon are inoperative against the plaintiffs beyond their mother's lifetime, and (*b*) that the 4th defendant pay to the plaintiffs their costs in the lower Courts so far as attributable to his claim against them, the amount of such costs to be assessed by the High Court. The 4th defendant must pay to the plaintiffs their costs of this appeal.

Solicitor for the Appellant.—Mr. *E. Delgodo*,

Solicitor for the Respondent.—Mr. *Douglas Grant*,

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 344 OF 1922.

January 16, 1924.

Present:—Mr. Wazir Hasan, J. C. and Mr. Neave, A. J. C.

GUR SAHAI KANDU AND ANOTHER—PLAINTIFFS—APPELLANTS.

versus

CHHEDI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I3 Arts 142, 144. scope of—Suit for possession—Dispossession—Adverse possession—Burden of proof.

In cases falling under Article 142 of schedule I to the Limitation Act the claimant must prove his possession within twelve years next preceeding the date of the institution of the suit, and in such cases an enquiry into the question of adverse possession is irrelevant In cases falling under Article 144 of Schedule I of the Indian Limitation Act, where the defence is one of title acquired by adverse possession for more than 12 years, it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit.

Case-law discussed.

Plaintiffs, who were the purshasers of a house, sued to recover possession of the house from the defendants on the allegation that the latter were the tenants of the plaintiffs' vendor and that in a suit brought by the plaintiffs for recovery of rent they had denied the plaintiffs' title and had set up a title to the house in themselves. It was found that the defendants; were not the tenants of the plaintiffs ;

***Held*, that the suit was governed by Article 142 of schedule I to the Limitation Act, and the plaintiffs were bound to prove possession within twelve years of the institution of the suit.**

Appeal against the decree of the District Judge, Fyzabad, dated the 21st August 1922, upholding decree of the Munsif, Fyzabad, dated the 25th May 1922.

Mr. *Niamat Ullah*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal in a suit to recover possession of a house. The previous owner of the house was one Suraj Ram. On the 23rd July 1921, he sold it to the plaintiffs. The only defence with which we are concerned was one of limitation. This defence gave rise to the following issue which was framed by the Court of first instance :—"Have the plaintiffs been in possession of it within limitation?" A further issue as to adverse possession by the defendants was framed. Both Courts have held that the plaintiffs failed to prove their possession within limitation. They have further held that the plaintiffs succeeded in establishing their title to the house in dispute. The finding as to limitation has been challenged before us on the ground that the plaintiffs having proved their title had no further onus to prove their possession within limitation and that their suit could only be dismissed in the event of the defendants establishing their adverse possession, which the Courts below have not found in favour of the defendants.

We are of opinion that the decree of the Courts below is correct and should be maintained. In the case of *Mohima Chunder Mazoomdar* v. *Mohesh Chunder Neoghi* (1) their Lordships of the Privy Council held, to quote the head-note, that though the

(1) 16 C. 473 ; 16 I. A. 23 ; 5 Sar. P. C. J. 321 ; 6 Ind. Dec. (N. S.) 312.

claimants "showed an anterior title but that was not enough without proof of their possession within twelve years to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession." The burden of proof was on the claimants to prove their possession at some time within the 12 years next preceding the suit. That case specifically fell within the purview of Article 142 of Schedule II of Act XV of 1877.

This view of the law was repeated in the case of *Muhammad Amanulla Khan* v. *Badan Singh* (2). It was held in this case that there had been dispossession or discontinuance of possession within the meaning of Article 142 and that whether any proprietary right had existed or not in the plaintiff's ancestors the 12 years limitation ran from the date of dispossession or discontinuance. In delivering the judgment of the Privy Council in the case just now mentioned Sir Robert Couch said :—" No doubt the proprietary right would continue to exist until by the operation of the Law of Limitation it had been extinguished ; but upon the question whether the Law of Limitaation applies, it appears to be clear that it comes within the terms of Article 142, and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the Law of Limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Article 144, as to adverse possession, only applies where there is no other article which specifically provides for the case." This decision is, therefore, a clear authority for the proposition that in cases falling under Article 142 of the Indian Limitation Act the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an inquiry into the question of adverse possession is irrelevant.

On behalf of the appellants, reliance was placed upon a recent decision of their Lordships of the Privy Council in the case of *Secretary of State for India* v. *Chellikani Rama Rao* (3), and also upon the case of *Jaichand* v. *Girwar Singh* (4), decided by a Bench of the High Court at Allahabad. The last-mentioned case is founded upon the decision of the Privy Council in the case of *Secretary of State for India* v. *Chellikani Rama Rao* (3). In the Allahabad case the distinction as to the *onus* of poof between cases falling under Article 142 and cases where the defence to a suit for possession was 12 years' adverse possession by the defendant, if we may say so, is well emphasized. The Privy Council decision in the case of *Secretary of State for India* v. *Chellikani Rama Rao* (3) and the Allahabad case make it perfectlyclear that in cases falling under Article 144, Schedule 1 of the Indian Limitation Act where the defence is one of title acquired by adverse possession for more than 12 years, it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit ; so far as the *onus* on the claimant in such a case lies it is satisfied by proof of title and it is then for the defendant to establish his plea of adverse possession before the suit can be dismissed as barred by limitation. It would follow from what we have said above that the real question in the case before us is the determination of the Article applicable to this particular case.

The allegations on which the plaintiffs came into Court are that the defendants were holding the house in suit as the tenants of the plaintiff's predecessor-in-interest and that in a suit brought by the plaintiffs for the recovery of rent the defendants denied the plaintiff's title and set up title to the house in themselves and that this amounted to the plaintiff's dispossession. The defendant's denial of the plaintiff's title would certainly not constitute the plaintiff's dispossession if they were in actual possession on the date of the denial. The reasonable inference, however, is that the possession of the plaintiff's or their predecessor-in-interest was discontinued when the defendants entered into the possession of the house in suit. Both Courts have found that the defendants are not

(2) 17 C. 137 ; 16 I. A. 148; 13 Ind. Jur. 330; 5 Sar. P. C. J. 412; 23 P. R. 1890 ; 8 Ind. Dec. (N. S.) 620 P. C.).

(3) 35 Ind. Cas. 902 ; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311 ; (1916) 2 M. W. N. 224 ; 14 A. L. J. 1114 ; 20 M. L. T. 435 ; 4 L. W. 486 ; 18 Bom. L. R. 1007 ; 25 C. L. J. 69 ; 43 I. A. 192 (P. C.).

(4) 52 Ind. Cas. 366 ; 41 A. 669; 17 A. L. J. 814.

the tenants of the plaintiffs. This being so, we are of opinion that the Article of Limitation applicable to the present suit is 142 and not 144 of Schedule 1 of the Indian Limitation Act.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORGINAL SIDE APPEAL No. 54 OF 1923.

November 2, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, and Mr. Justice Ramesam.

M. SUBBRAMIAH—APPLICANT—APPELLANT

versus

BAUSILAL ABEERCHAND AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act, (III of 1909) s. 49 (4)—Partners, insolvency of—Creditors, rights of, inter se—*Separate debts.*

First and second insolvents carried on a business at Madras in partnership, but the creditors of the firm were not aware that second insolvent was a partner in the firm. First insolvent also carried on a business at Cuddappah. On a question as to priority arising in regard to the assets at Cuddappah, between the Cuddappah creditors and Madras creditors;

Held, that the Madras creditors were entitled to elect as to which assets they would proceed against, the general assets of the two partners or the separate assets of the first insolvent.

In *exparte Hodgkinson*, (1815) 19 Ves. Jun. 291; 34 E.R. 525; 13 R. R. 199; In *ex parte Norfolk*, (1815) 19 Ves. Jun. 454; 34 E. R. 585, relied on.

Per *Schwabe, C. J.*—The Madras creditors can elect until the very end of the proceedings and only when they have actually received a dividend there is an election Even after they have received a dividend, they can still pay it back and prove against the other assets.

Per *Ramsem J.*—The debts due to the Madras creditors were "separate debts" within the meaning of the expression in section 49 (4) of the Presidency Towns Insolvency Act.

Appeal against the order of Mr. Justice Coutts-Trotter, dated the 31st January 1923 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Insolvency Petition No. 82 of 1921 (In the matter of Y. V. Subbiah Chetty and S. Vankatasami Naidu, insolvents).

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *Sundararajier*, for the Respondents.

JUDGMENT.

Schwabe, C.J.—This is an appeal from the dismissal of a petition in insolvency made on behalf of some Cuddappah creditors of the first insolvent who claimed that, as far as the assets of the Cuddappah business were concerned they were entitled to priority over the Madras creditors, who, they alleged, were creditors of the two insolvents in partnership in Madras. The learned Judge has found as a fact that, in respect of the Madras business, the Madras creditors did not know that the second insolvent was a partner but treated him only as an agent of the firm and that, therefore, they are entitled to prove, in competition with the Cuddapah creditors, against what may be called the Cuddapah assets. Assuming that the finding was open to him and that it was a correct finding of fact then on the authority of the Old English case, In *ex parte Hodgkinson* (1), and In *ex parte Norfolk* (2) they are entitled to elect as to which assets they will go against, the general assets of the two partners or the separate assets of the one against whom they elect; and it is clear law that they could elect until the very end of the proceedings and that, only when they have actually received a dividend there is an election: and, I think, I am right in saying that even after they have received their dividend, they could still pay it back and prove against the other assets.

The main evidence given in this case was that of the second insolvent. There was also the evidence of the first insolvent given on a different occasion. There were a partnership deed, a power-of-attorney and the promissory-notes or *hundis* in respect of which the Madras

(1) (1815) 19 *Ves. Jun.* 291; 34 E. R. 525; 13 R. R. 199.

(2) (1815) 19 *Ves. Jun.* 454; 34 E. R. 585.

creditors mainly were proving. The second insolvent swore that, although there was a partnership deed between him and the first insolvent, he was never in fact a partner that that deed had never been acted upon, and that he never mentioned it to anybody and never used it : and that story is very much corroborated by the fact that the power of attorney is given to him not as a partner but as though he was somebody not a partner of the firm, and was used by him as appears from an examination of the document itself, in this Court on many occasions, as an agent of the firm and not as a partner in it. Further the documents given to the Madras creditors were signed by him not as a partner but as an agent of the firm. I think the learned Judge was entitled to come to the conclusion he came to. I think further that, he would have been, if he thought it to be the fact, entitled to come to the conclusion on this evidence that the second insolvent, although he entered into this agreement was not in fact a partner at all. I think further on the document that it is fairly clear, and that is my view of the facts that, whether he was a partner or not, his interest in the Cuddapah business and his interest in the Madras business were exactly the same, and there was no separate Cuddapah or Madras business at all but that it was one firm, and that if that is the correct view of the case, it does not matter for the present purpose whether the second insolvent was a partner in the firm or not. I think there is ample evidence to support the learned Judge's view namely that, however, that may be, the Madras creditors did not know that he was a partner in Madras.

It is suggested that, if that was the view taken by the Judge, the Cuddapah creditors ought to have had some further opportunity of adducing evidence to contradict it In my judgment there was no such evidence which in the face of this document could have been adduced with the remotest chance of being believed. On the view I take of the facts, such evidence would be irrelevant.

In my judgment, this judgment was right and the appeal must be dismissed with costs on the Original Side scale. There will be a separate set of costs for the Official Assignee.

Ramesam, J. If the finding of the learned Judge is correct that the Madras creditors at the time of dealing with the Madras branch were under the impression that they were dealing only with the first insolvent through his agent the second insolvent, then they are entitled to say that the debts due to them were, so far as their knowledge was concerned, separate debts within the meaning of the expression in sub-clause (4) of section 49 of the Presidency Towns Insolvency Act III of 1909. The only effect of their discovery at the time of filing the insolvency petition that there was a partnership would be merely to give them a right to an election. This is the English Law according to the authorities cited in my Lord's judgment just delivered, and section 49 ought to be interpreted in accordance with the English Law. On the evidence I agree with my Lord's judgment and think that the learned Judge's finding is justified, that the Madras creditors did not know of the partnership of the second insolvent at the time of their dealings with the Madras branch.

As to the other points that were argued in the case, I feel some hesitation in saying that the whole of the Cuddapah business of the first insolvent was the same in interest as the Madras business. Whatever amounts and jewels were sent from Cuddapah to Madras, to that extent the Cuddapah dealings were no doubt identical with the Madras business : but it may be that there is much more of the Cuddapah business, the object of which cannot be said to be the furtherance of the Madras business. I also feel some hesitation in saying that the interest of the Insolvent is the same in Madras as well as in Cuddapah. But, however, this may be, on the finding of the learned Judge that the Madras creditors had no knowledge of the second insolvent's partnership, the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 163 OF 1923.

January 17, 1924.

Present:—Mr. Daniels, J. C.

THE NATIONAL BANK OF UPPER INDIA Ltd.—IN LIQUIDATION—JUDGMENT-DEBTOR—PETITIONER
versus
SHEO MANGAL BAJPAI—DECREE-HOLDER—OPPOSITE PARTY,

Companies Act (VII of 1913), s. 155, 171 and 232—Decree against Company—Voluntary liquidation after decree, effect of—Jurisdiction of executing Court.

Section 232 of the Companies Act is expressly limited to (1) winding-up either by Court or (2) subject to the supervision of the Court.

Therefore, a voluntary liquidation cannot have the effect *ipso facto* of putting an end to an attachment already in force under a decree passed prior to liquidation.

Halsbury Laws of Eng Vol. V, para. 1006; followed.

Petition for revision from the order, of the Additional Judge, Small Cause Court, Lucknow, dated the 14th May 1923 passed in Execution of Decree Case No. 1719 of 1923.

Mr. *Hargovind Dayal*, for the Petitioner.

Mr. *Jai Krishna Tandon*, for the Opposite Party.

JUDGMENT.—This is a revision from an order passed in execution proceedings in a Court of Small Causes. The respondent-decree-holder was applying to execute his decree against the applicant company. This company after the execution was put in force went into voluntary liquidation not under the supervision of the Court. Their contention is that by going into voluntary liquidation the jurisdiction of the executing Court to continue to execute the decree is ousted. In support of this contention they rely on section 171 of the Companies Act and on section 155 which says that the provisions of this Act with respect to winding-up apply, unless the contrary appears, to the winding-up of the company under any of the three possible modes. Section 155 makes any general provision applicable to winding-up under any head, but the particular section invoked by the applicant is contained in a section of the chapter specifically headed "Winding-up by the Court" and the opening words of the section are "when a winding-up order has been made." In the case of a voluntary liquidation no winding-up order is made. Section 232 contains an express provision that any attachment, distress or execution put in force against a company without leave of the Court after the commencement of the winding-up shall be void in the case in which the company is being wound up either by the Court or subject to the supervision of the Court. The fact that the section is limited to these two kinds of winding-up shows that it was not intended that a voluntary winding-up should have the effect *ipso facto* of putting an end to an attachment already in force. It does not do so under English Law (Halsbury Laws of England, Vol. V, para. 1006). There is direct authority against the applicant in the case of *Suraj Bhan* v. *Boot Factory Agra* (1). The application is, therefore, dismissed with costs.

G. H. *Application dismissed.*

(1) 36 Ind. Cas. 397; 38 A. 407; 14 A. L. J. 513.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 154 OF 1921.

March 16, 1923.

Present:—Mr. Justice Oldfield and Mr. Justice Devadoss.

BAVA LEVVAI SAHIB AND OTHERS—APPELLANTS
versus
AMMEENAMMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. IX, r. 13 O. XLI, r. 22—Decree Ex parte—Appeal whether lies—

BAVA LEVVAI SAHIB *v.* AMMEENAMMAL

Cross-objections, point, whether can be taken in—Application for leave to defend and produce evidence, effect of.

A defendant who has been placed *ex parte* is entitled to impugn the decree ultimately passed, subject to the condition that he has not moved the Court of first instance to set aside the *ex parte* decree under O. IX, r. 13 of the Civil Procedure Code.

A defendant cannot be deemed to have so moved the Court merely because, before the decree was passed but under the incorrect impression that it had been passed, he presented a petition asking the first Court to allow him to make a defence and produce his evidence and the Court disposed of that petition on its merits. Such a petition is not a remedy recognised by the Code and the fact that it was intended to be and believed to be a petition recognised by the Code cannot alter its real nature or give it and the order passed on it a legal effect to which they would not in fact be entitled.

Krishna Aiyar v. *Kuppan Aiyangar*, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479 (F. B); *Badvel Chinna Asethu* v. *Vattipalli Kesavayya*, 60 Ind. Cas. 215; 39 M. L. J. 697; 12 L. W. 507; (1920) M. W. N. 780; 29 M. L. T. 63, followed.

Where a defendant is entitled to appeal against his having been wrongly placed *ex parte* he would also be entitled to raise the point by a memorandum of cross-objections under O. XLI, r. 22 of the Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge, Madura, dated the 9th December 1920 in A. S. No. 34 of 1917 (A. S. No. 109 of 1917, on the file of the District Court, Madura) preferred against the order of the Court of the Additional District Munsif, Dindigul, dated the 22nd December 1916, in O. S. No. 328 of 1913.

Messrs. *S. Srinivasa Aiyangar* and *K. S. Ganapathi*, for the Appellants.

Messrs. *A. Krishnaswamy Aiyar* and *P. S. Chandrasekara Aiyar*, for the Respondents.

JUDGMENT.—This appeal is against the final decree passed in a partnership suit. The course of the proceedings before the District Munsif was that, after the preliminary decree had been passed, the scope of the enquiry was defined in an order, dated 25th September 1916 and the suit was then posted for evidence. On the date, to which it was adjourned, the 1st defendant did not appear to adduce his evidence; and the District Munsif declared him *ex parte*. A decree was afterwards given on the basis of the evidence adduced by the other parties to the proceedings; and against that decree there was an appeal to the lower Appellate Court, by the 1st plaintiff. There was also a memorandum of objections by the 1st defendant, in which he complained *inter alia* of his having been debarred from producing evidence. The lower Appellate Court held that his absence on the date of hearing was sufficiently explained and the District Munsif's order placing him *exparte* and excluding his evidence was not justified. It, therefore, remanded the suit directing that his evidednce should be taken, and we first deal with the appeal so far as it is against that direction.

It is urged that the 1st defendant was not entitled to bring his objection to the enquiry, based on his having been placed *ex parte* before the Appellate Court in a memorandum of objections, unless in the words of O. XLI, r. 22 (1) Civil Procedure Code, he could have taken his point by way of appeal. The right of a person who has been placed *ex parte* to impugn the decree ultimately passed on that was recognised in *Krishna Ayyar* v. *Kuppan Aiyangar* (1) subject to the qualification, which is emphasized in *Badvel Chinna Asethu* v. *Vattipalli Kesavayya* (2) that he has not moved the Court of first instance to set aside the *ex parte* decree under O. IX, r. 13 of the Code of Civil Procedure. It is urged, however, that in effect the 1st defendant had so moved the Court, because before the decree was passed, but under the incorrect impression that it had been passed, he presented a petition asking the District Munsif to allow him to make a defence and produce his evidence and the District Munsif disposed of that petition on its merits. Such a petition is not a remedy recognised by the Code; and we do not see how the fact that it was intended to be and believed to be a petition recognised by the Code can alter its real nature or give it or the order passed on it a legal effect, to which they would not in fact be entitled. Taking this view, we regard the case in *Krishna Ayyar* v. *Kuppan Ayyangar* (1), as in point, and hold that the 1st defendant is entitled to object to the order placing him *ex*

(1) 30 M. 54; 1 M.L.T. 268; 16 M. L. J. 479 (F.B.).
(2) 60 Ind. Cas. 215; 39 M. L. J. 697; 12 L. W. 507; (1920) M. W. N. 780; 29 M. L. T. 63.

parte in his memorandum of objections. Nothing has been said here against the lower Appellate Court's conclusion that he was wrongly placed *ex parte*, and its decree so far as it directs the District Munsif to hear his defence and to take his evidence must, therefore, stand.

The lower Appellate Court's decree, however, went further than that, because it set aside the decree of the District Munsif *in toto* and remanded the suit for disposal according to law with a direction that further evidence might be adduced by all the parties with reference to the order dated 25th September 1916 already referred to as defining the scope of the inquiry. That order was objected to on its merits, not only by the 1st defendant in his memorandum already referred to, but also by the 1st plaintiff in his grounds of appeal and by two other plaintiffs in their memorandum of objections. Unfortunately all this seems to have been lost sight of by the lower Appellate Court. For it has made no reference at all in its order of remand to the merits of those objections. We consider that it would be futile, so long as those objections are outstarding and undisposed of, to have further enquiry or further evidence taken on the lines, to which the majority of those concerned object. We must therefore set aside the lower Appellate Court's order except in so far as it recognises the right of the 1st defendant to take part and adduce evidence in the future proceedings and direct it to consider the remaining grounds set out in the appeal and memoranda of objections by him and the other parties. When it has dealt with those objections on their merits, it will again remand the case. Costs here and in the lower Appellate Court will be costs in the cause and be provided for in the order to be passed. Stamp value will be refunded on application.

V. N. V.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 277 OF 1922.

July 10, 1922.

Present :—Mr. Justice Martineau.

KISHEN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KANHYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Evidence, absence of—Conjecture.

A finding of fact which is not based on any evidence but is conjectural cannot be upheld in second appeal.

Second appeal from the decree of the Additional Judge, Rohtak, Hissar, dated the 27th October 1921, reversing that of the Munsif, 2nd Class, Rohtak, dated the 1st March 1921.

Lala *Har Gopal*, for the Appellants.

Lala *Amar Nath Chona* for Lala *Janki Parshad*, for the Respondents.

JUDGMENT.—Jug Lal, who was an occupancy tenant of the land in suit, has died, and the proprietors sue his collaterals for possession. The only question in the case is whether Sujagan, the common ancestor of the defendants and Jug Lal, occupied the land. The first Court found that this was not proved and gave the plaintiffs a decree, but the additional Judge has found in favour of the defendants and dismissed the suit. The plaintiffs have presented a second appeal to this Court.

In the earliest settlement record Hardhan, a nephew of Sujagan, is entered as an occupancy tenant of the land, and there is no entry showing that the land was ever in the possession either of Sujagan or of Dani, who was Sujagan's father and Hardhon's grand-father. It is true that in 1847 on the death of Hardhan without issue his tenancy was inherited by Jesukh, Mohar Singh and Ram Dat, each representing one of three branches of Dani's descendants, but this fact in no way shows that the land had formerly

been occupied by Dani, the common ancestor of those persons and Hardhan, as in 1847 there was no Tenancy Act in existence and no rule of law by which a collateral of a deceased occupancy tenant could not succeed to the tenancy unless the common ancestor had occupied the land. What occurred subsequently to 1847 also does not help the defendants. The fact mentioned by the learned Additional Judge that the various descendants of Dani divided the land with one another in accordance with ancestral shares proves nothing, as that could be the only possible method of division when once the land had devolved on Hardhan's collaterals.

As regards the case brought by the proprietors in 1876, the question whether Hardhan's ancestors had occupied the land did not then arise and the Superintendent of Settlement decided only that the proprietors could not dispute the occupancy rights of Hardhan's collaterals because they had consented to their succeeding to the tenancy in 1847.

The learned Judge's finding, therefore, that the common ancestor of the defendants and Jug Lal formerly occupied the land in suit is not based on any evidence, but is conjectural, and this being so it cannot be supported. Not only is there no evidence to show that Sujagan or his father Dani occupied the land, but the fact that during Hardhan's life-time he was the sole occupancy tenant and the other descendants of Dani had no share in the land strongly supports the plaintiff's case.

I accordingly accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the Court of first instance. The respondents will pay the appellants' costs throughout.

Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 13, 1924.

Present :—Lord Shaw, Lord Phillimore, Lord Blanes Burgh and Lord Salvesen.

KALYANDAPPA BIN AYAPPA DESAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHANBASAPPA BIN DODAPPA DESAI DEFENDANT—RESPONDENT.

Limitation Act (IX *of* 1908), *Sch. I, Arts.* 118, 141—*Suit for possession by reversioner—Adoption, invalidity of, involved—Limitation.*

A suit for possession of immoveable property by a reversioner involving the invalidity of an alleged adoption by a Hindu widow is governed by Article 141 of Schedule I to the Limitation Act and not by Article 118 of the Act.

Case-law reviewed.

Shrinivas Sarjerao v. *Balwant Venkatesh*, 20 Ind. Cas. 162; 37 B. 513; 15 Bom. L. R. 533, disapproved.

Mr. *E. B. Raikes*, for the Appellants.

Mr. *W. Wallach*, for the Respondent.

JUDGMENT.—The suit in this case was brought in the Court of the Subordinate Judge of Bijapur to recover possession of certain *watan* lands and other lands of ordinary tenure, the plantiff making a claim as the nearest agnate to the last male owner, and averring that his title accrued on the death of the latter's widow. The principal defendant, the now respondent, being in possession of the property, pleaded various defences of which the one which is important for present consideration, depends upon the Indian Limitation Act.

The plaintiff recovered judgment before the Subordinate Judge for possession of the *watan* lands but not of the lands of ordinary tenure. Appeal was taken to the High Court of Judicature at Bombay which reversed the decision of the Subordinate Judge and gave judgment for the defendant.

From this decree, the representatives of the original plaintiff have appealed to His Majesty in Council. As to the non-*watan* lands the plaintiff acquiesced in the decision of the Subordinate Judge against him. Of the *watan* lands

there were two kinds, and it was contended for the defendant that as regards one kind, known as *Desgat watans*, he was in a more favourable position than with regard to the others and must in any event succeed. But the Subordinate Judge and the High Court agreed, though for somewhat different reasons, that the parties stood in the same position with regard to both kinds of *watan* lands. Their Lordships do not find it necessary to go into the reasons given by the Subordinate Judge, but they are satisfied upon the ground given in the judgment of the High Court that the defendant was in no better position with regard to the *Desgat watans* than he was with regard to the other *watan* lands. But as regards both classes of *watans*, there is, as the High Court observed, a serious defence under Article 118 of the Indian Limitation Act.

The facts of the case can be stated in a comparatively short compass. The plaintiff was cousin to the former owner of this property, by name Dodappa. Dodappa married Malkamma, the second but not contesting defendant in the case, and died long ago. The plaintiff averred that after Dodappa's death in the year 1880, Malkamma took in adoption to him as his son, one Madivalappa, who was her daughter's son: that Madivalappa married Baslingamma and died himself in 1895: that upon his death Baslingamma took the ordinary Hindu woman's estate and died in 1903: and that upon her death, plaintiff's title accrued and that as he brought his suit on 1st July 1912, he had brought it within the period of 12 years allowed to him by Article 141 in the Second Schedule to the Limitation Act.

He stated in his plaint that the defendant denied the validity of Madivalappa's adoption and set up that he, on the other hand, was the person validly adopted by Malkamma as son to Dodappa.

The defendant No. 1 did in substance set up this case. He admitted some show of adoption of Madivalappa, but denied that it was legal or valid; and he set up his own adoption by Malkamma in 1901. In the proceedings in the first Court, the validity of the adoption of Madivalappa was in contest; but the Subordinate Judge decided that it was valid; and this validity was not disputed in the appeal o the High Court. If Madivalappa were validly adopted, the property passed to him at once upon the adoption; and when he, the adopted son, died, his heir should succeed subject to the estates of the two widows. The adoption, therefore, of the first defendant, if it can be enquired into at all, must be pronounced either invalid or ineffectual, and such as to confer no title upon the first defendant to the lands in suit.

The point of law as between the two parties can be stated as follows. Plaintiff says: "I deduce a good title. You have no right to possession as against me, and I bring my suit within 12 years, that being the period allowed to me by Article 141 in the first Schedule of the Limitation Act, which provides that for a suit by a remainderman or a reversioner 'entitled to the possession of immoveable property on the death of a Hindu . . . female,' there is a period of 12 years from the time 'when the female dies.'"

The defendant says: "You can try to put it in that way, but, in truth, your suit is one governed by Article 118, being one 'to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place,' for which you have only six years from the date 'when the alleged adoption becomes known to the plaintiff;' and as regards knowledge, I can show you knew of my claim (as indeed he could show) more than six years ago."

It is true that the plaintiff in his plaint as originally framed claimed a declaration that the defendant had not been validly adopted, which was imprudent. But he wisely asked to amend this plaint as striking out this claim and making the suit a plain one for possession, and this amendment was allowed.

The controversy as to which of the two principles of limitation should be applied in cases of this nature is an old one and has given occasion to many decisions, some of which are in conflict. Some of these authorities amount to decisions on the exact point, which if they are decisions of this Board, must be accepted as conclusive. Others may be said to consist of dicta rather than actual decisions; and others are again decisions of the High Courts in India, and as such entitled to much respect but in no way binding upon their Lordships.

The earlier of these decisons turned upon the construction of the Act of 1871. The article in the schedule of that Act, which

dealt with cases of adoption, was in different language from the article in the schedule to the Acts of 1877 and 1908, the two latter being identical in terms.

The Article in 1871, No. 129, is expressed as follows :—

"To establish or set aside an adoption—twelve years from the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father."

It will be shown hereafter that not only is the description of the suit different from that contained in article 118 of the two later Acts, but that the time from which the limitation begins to run is different.

However, as regards the earlier Act, the decisive authority is a decision of this Board in *Jagadamba Chowdhrani* v. *Dakhina Mohun Rai* (1). In that case their Lordships held that the words "to establish or set aside an adoption" "were not technical words and did not describe with accuracy any known form of suit,' and that, therefore, any suit which brought the validity of an adoption into question must be considered as a suit to set aside an adoption, even though it might also be looked at as a suit by the man entitled to recover possession ; and that, therefore, article 129 and not article 142 (as then numbered) applied.

In the course of their judgment their Lordships made a reference to the Act of 1877, which by that time had been some years in force, though the case had been started so long ago that it was governed by the earlier Act of 1871. These observations are as follows :—

"It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Article 118 of the Act of 1877, which corresponds to article 129 of the Act of 1871 so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never, in fact, took place,' and assigns a different starting-point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act, is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable."

The next case to be cited is that of *Mahesh Narain Munshi* v. *Taruck Nath Moitra* (2), in which it was endeavourd to argue that the Act of 1877 and not the Act of 1871 applied ; but it was held that the defendant had established his right before ever the Act of 1877 came into force, and was, therfore, (though his adoption was an invalid one) entitled to insist upon the Limitation Act of 1871 in his favour. In this decision there was again a reference to the Act of 1877, and the words used by their Lordships were as follows :

"It was suggested that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute in which the language used is somewhat different, the suit there referred to as necessary to save the limitation being described as one 'to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.' It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage."

But then their Lordships proceeded to give the reason why the Act of 1877 would not apply.

In neither of these cases did their Lordships intend to pronounce any decision on the construction of the Act of 1877. Perhaps it might be observed that there is a shade of inclination in the passage of the first judgment towards there being a definite change in the law, and a shade of inclination in the opposite direction in the second judgment.

When the Act of 1877 came to be applied, there were differences of opinion in the various High Courts in India. The authorities are somewhat evenly balanced. Their Lordships, however, deem it unnecessary to go into the detail of any of the cases which preceded the next judgment of this Board, ex-

(1) 13 I. A. 84 ; 13 C. 308 ; 10 Ind. Jur. 307 ; 4 Sar. P. C. J. 715 ; 6 Ind. Dec. (N. S.) 705 (P. C.).

(2) 20 I. A. 30 ; 20 C. 487 ; 6 Sar. P. C. J. 261 ; 17 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 880 (P. C.).

cept the very important decision of the Full Bench in the Bombay High Court presided over by Sir Lawrence Jenkins, C. J., and decided in the year 1899. The case is reported as *Shrinivas* v. *Hanmant*. (3) It was there held, partly on grounds of public policy, partly in supposed obedience to the judgments of this Board, and partly in deference to the supposed indications of opinion by this Board, that the same rule should be applied to the Act of 1877 as to the Act of 1871, and that a suit to recover possession which involved the decision of an issue as to the validity or invalidity of the defendant's adoption, was a suit to obtain a declaration that an alleged adoption was invalid or never took place, to which Article 118 of the Act of 1877 applied and which, therefore, must be brought within a a period of years dating from the plaintiff's knowledge, and was, in the particular instance time-barred. The limit of time for these declaration suits which was 12 years under the Act of 1871, had become 6 years under the Act of of 1877.

In that suit, as in the present suit before it was amended, the plaintiff claimed a declaration that the adoption of the defendant was invalid, and he also claimed possession of the property, and when pressed by Article 118 he endeavoured, as in the present case, to throw aside this claim for declaration and rely only on the claim for possession. But it was held that the real matter for decision was a question for adoption, and that, therefore, Article 118 applied.

As it was put by one of the learned Judges:—

> " Article 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without impugning the validity of the defendant's adoption."

Shortly afterwards the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Baksh Singh* (4) came before this Board. In that case again there was a conflict between the reversioner and a defendant claiming under an adoption which was held either non-existent or invalid by both Courts in India. Whereupon the defendant appealed ; but his appeal was dismissed. It should be observed parenthetically that in the head-note to the report the important word " not " is unfortunately omitted.

The conclusion arrived at in that case was shortly stated by Lord Macnaghten, who delivered the judgment of the Board ; and their Lordships cannot do better than quote the passage in full :—

> " On the appeal before their Lordships it was argued that there was at any rate an apparent adoption, and that, on that assumption, it mattered not whether the adoption was valid or invalid, because there was enough to satisfy the provisions of the Limitation Act of 1871, as interpreted by this Board in the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1). Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were, therefore, saved by section 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court.
>
> " Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the Jagadamba Case and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of section 2 of the Act of 1877.
>
> " Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not an apparent adoption to which the ruling in the Jagadamba Case would apply if the Act of 1871 were now in force."

This language looks at first sight conclusive in favour of the plaintiff in the present suit; but it has been thought in subsequent cases in India, and has been argued before their Lordships, that the decision of this point was unnecessary, because the plaintiff, being a

(3) 24 B. 260 ; 1 Bom. L. R. 799 ; 12 Ind. Dec. (N. S.) 704.

(4) 33 I. A. 156 ; 10 C. W. N. 1065 ; 8 Bom L. R. 722 ; 16 M. L. J. 440 ; 3 A L J. 695 ; 4 C. L. J. 405 ; 1 M. L. T. 265 ; 9 O. C. 377 ; 28 A. 727 (P. C.).

minor, had three years after attaining majority to bring his suit, and that this provision in his favour superseded the protection given to the defendant by Article 118 and left the matter open to be decided according to Article 141. This line of reasoning seems to assume that you cannot impute knowledge to a minor—a view which is certainly not in accordance with the facts of human nature. But it is not necessary to go so deeply into the matter. It is obvious from a perusal of both the arguments and judgment that the minority of the plaintiff (though mentioned in the argument) was not the reason for the decision, and that the intention was to decide the same point as is contended for in the present appeal.

In consequence of this decision the High Court of Madras in the case of *Velaga Mangamma* v. *Bandlamudi Veerayya* (5), went back upon its previous decision in *Ratnamasari* v. *Akilandammal* (6), decided in 1902, and held in obedience to the decision of this Board that Article 118 only applied to declaratory suits in respect of adoption and not to suits for possession, and that in suits for possession Article 141 was the proper one to apply.

Next in order comes the decision of this Board in *Muhammd Umar Khan* v. *Muhammad Niaz-ud-din Khan* (7). That was the case of a Mahomedan adoption, in which the District Judge said that Article 118 was inapplicable, as the adoption was "inherently invalid and *ipso facto* void"; but the Chief Court reversed his decision and held that the adoption was not inherently invalid, and that Article 118 applied, and the suit was barred by it.

The Chief Court did not, however, mean to hold that the adoption was valid; because, if the Judges had thought that, there would have been no necessity to rely upon the doctrine of limitation. What the learned Judges meant was that it was an adoption with sufficient colour of title to have it treated as one which would have to be got out of the way by a plaintiff suing for possession, and, therefore, that the time-limit applicable to suits for declaring an adoption invalid applied.

This decree of the Chief Court was affirmed by this Board upon other grounds, it is true; but in affirming it their Lordships expressed themselves upon the point of limitation as follows:—

> "Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the ommission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhurwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4). Under the general Mahomedan Law an adoption cannot be made; an adoption if made in fact by a Mahomedan, could carry with it no right of inheritance.
>
> "It may further be observed that, even if an adoption by a Mahomedan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply."

As against the weight of this authority, it has been observed that, generally speaking, a Mahomedan adoption does not confer any right of succession to property, as, indeed, their Lordships said in the passage just quoted. But, on the other hand, as the passage shows and the general trend of the case shows, there may be a tribal custom among Mahomedans (and this particular case came from the Punjab, which is the home of customs) allowing adoption to carry rights of succession. Indeed it was upon some such idea that the Chief Court had relied when it introduced Article 118 as fixing the period of limitation.

That Hindu tribes converted in more recent times to Mahomedanism may keep as part of their customary law the old Hindu Law in respect of family matters and succession, is

(5) 30 M. 308 at p. 309; 17 M. L. J. 182; 2 M. L. T. 178.

(6) 26 M. 291; 13 M. L. J. 27.

(7) 13 Ind. Cas 344; 39 I. A. 19; 6 P. W. R. 1912; (1912) M W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 39 C. 418; 126 P. R. 1912 (P. C.).

shown in the recent case of the Halai Memons in 1922, (*Khatubai* v. *Mahomed Hagi Abu* (8).

Anyhow, it would seem that their Lordships desired to take this opportunity of elucidating and affirming their decision in the case in *Thakur Tirbhurwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4). In this connection it should be noted that, though the judgment is stated to have been delivered by SIR JOHN EDGE, one of the members of the Board was LORD MACNAGHTEN, who had delivered the judgment in *Thakur Tirbhurwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4) and must have known well what was intended to have been conveyed by the earlier judgment and by this one.

In 1913 these judgments came under consideration by the High Court of Bombay in *Shrinivas Sarjerao* v. *Balwant Venkatesh* (9) and the learned Judges came to the conclusion that, notwithstanding the passages in the two decisions of this Board which have been last cited, they were still bound by the principle expressed in the decisions on the Act of 1871: and they accordingly held that the period of limitation in a case like the present is that of six years from the knowledge of the adoption, differing on this point from the High Court of Madras. Their decision has been followed by the Court in the present case, the learned Judges observing that "the adoption of the defendant may be clearly invalid by Hindu Law and Malkamma's power of adoption may have been already exhausted; nevertheless the law of limitation will effectively defeat the plaintiff's claim."

Their Lordships are of opinion that the High Court of Bombay both in this and in the previous case attached too little weight to the authority of the last two judgments of this Board, and further that the learned Judges seemed not to have noticed that since the decision in *Thakur Tirbhurwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4), the Limitation Act of 1908 was passed by the Indian Legislature with this Article in precisely the same language as that used in 1877 after the construction already put upon it by this Board. This, in the view of their Lordships, is a point of considerable importance.

The matter might almost rest here; but as this question has so often been raised and discussed, their Lordships would wish to put it upon the ground of principle as well as on the ground of authority. In the Act of 1871, as observed in the judgment in *Jagadambal Chaodhrani* v. *Dakhina Mohun Roy* (1), the words used had no technical meaning, and they were treated as expressing popular language to which in popular reasoning the meaning which prevailed could attach. In the Acts of 1877 and 1908, the matter is otherwise. The words "a suit to obtain a declaration" are terms of art. They relate back to the Specific Relief Act passed in the same year 1877, being Act No. I of that year, whereas the Limitation Act is Act No. 15. Section 42 of the Specific Relief Act deals with declaratory decrees, and the illustration (Letter F) is much in point:—

> "A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid."

It is to this class of suits that this particular limitation applies. The date from which the time begins to run is a subjective or personal date; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years. But if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued, and even till the limit (no doubt a very wide limit) of 12 years from that accruer has passed.

Strange consequences would otherwise ensue. It was decided by this Board in *Venkatanarayana Pillai* v. *Subbammal* (10), in the

(8) 72 Ind. Cas. 202; 50 I. A 108; (1922) A. I R. (P. C.) 414; 44 M. L. J. 35; 25 Bom. L. R. 127; 17 L. W. 208; 37 C. L. J. 131; 32 M. L. T. 45; 27 C.W. N. 774; 47 B. 146 (P. C.).

(9) 20 Ind. Cas. 162; 37 B. 513; 15 Bom. L. R. 533.

(10) 29 Ind. Cas. 298; 42 I. A. 125; 17 M. L. T. 435; 28 M. L. J. 535; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; 38 M. 406; (1915) M. W. N. 555; 21 C. L. J. 515 (P. C.).

year 1915, that a suit by a presumptive reversioner for a declaration that an adoption was invalid was one brought in a representative capacity and on behalf of all reversioners, and that on the death of a presumptive reversioner the next presumable reversioner would be entitled to continue a suit which his predecessor had begun.

If a suit for possession involving the invalidity of an adoption were to be treated as coming under Article 111, the first reversioner might have known, and the second might not have known, of the adoption six years before. Or *vice versa*. And the suit for possession might succeed or fail, and the defendant might be ousted of his property or keep it if the first reversioner died before he brought his suit to a hearing.

Moreover, it seems not to have been noticed by the Judges of the Bombay High Court who decided the case in *Shrinivas Sarjerat* v. *Balvant Venkatesh* (9), that one of the cases cited in *Muhammad Umar Khan* v. *Muhammad Niaz-ud-Din Khan* (7), was *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (11), decided in 1906. And this case seems to indicate the true canon of construction. Article 91 provides a period of limitation for a suit "to cancel or set aside" certain instruments, the period from which the time begins to run, dating again from the plaintiff's knowledge. The case in *Bijoy Gopal Mukerjee* v. *Krishna Maheshi Debi* (11), was a suit for a declaration that a particular form of lease, made by a Hindu widow, had become inoperative against the reversioners, and for possession of the property. The suit was brought more than three years after the plaintiffs knew of the making of the lease; and the High Court of Calcutta thought that the time-limit applied. The chief Justice put it that, according to the authorities, if the plaintiffs could recover possession without setting aside the lease then Article 141 would apply ; but if thay had, first to set aside the lease, then Article 91. Their Lordships agreed so far, and agreed further that the particular lease was voidable only and not void. But they held that the reversioner might treat it as a nullity, and showed his election to do so by bringing an action for possession, and that he had 12 years for so doing ; and in that case the plaintiff had not, as in the present case, amended his plaint by striking out the claim for a declaration.

The present case seems *a fortiori*. The adoption of the first defendant was void, and the plaintiff is entitled to brush it aside and sue for possession to which he has a right. His time-limit is 12 years from the death of the Hindu widow, and he was in time.

A further point was taken for the appellant against the judgment of the High Court which seemed to assume that one adopted son could claim to be the brother and heir of another adopted son. But it is not necessary for their Lordships to pronounce upon this contention which might otherwise have had to be seriously considered.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree of the High Court should be reversed and the decree of the Subordinate Judge restored, and that the appellants should have their costs here and below.

N. H. *Appeal allowed.*

Solicitor for the Appellants—Mr. *E. Dalgado.*

Solicitors for the Respondent—Messrs. *T. L. Wilson & Co.*

(11) 34 I. A. 87 ; 11 C. W. N. 421 ; 5 C. L. J. 334 ; 9 Bom. L. R 602; 2 M. L. T. 138; 17 M. L. J. 154; 4 A. L. J. 329; 34 C. 329; (P. C.)

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1306 OF 1916.

October 27, 1920.

Present :—Sir Shadi Lal, Chief Justice, and Mr. Justice le Rossignol.

MADHO PARSHAD—PLAINTIFF—APPELLANT

versus

THE FIRM AHSAN ILAHI ABDUL HAFIZ—DEFENDANTS—RESPONDENTS.

Appeal, second—Cross-objections, as to costs, whether can be entertained—New Case whether can be set up.

SHEIKH ABDUL MANNAF *v.* SHEIKH MUSLIM

A new case cannot be allowed to be set up in second appeal. Cross-objections as to the costs of the Courts below cannot be entertained in second appeal as this is not a matter for second appeal.

Second appeal from the decree of the District Judge, Delhi, dated the 7th February 1916 reversing that of the Subordinate Judge, 1st Class, Delhi, dated the 2nd November 1915.

Rai Sahib Lala *Moti Sagar*, for the Appellant.

Khan Bahadur Mian *Fazli Hussain*, for the Respondents.

JUDGMENT.—The case for the plaintiff was that for many years past he had dealings with the defendant firm, that accounts between them were closed in 1906 and reopened in 1909, and the present suit was on the last named account which included an item of Rs. 2,481-0-6 due by a firm owned by the son of Ahsan Ilahi defendant.

With regard to this item it was alleged that the money had been advanced to defendant's son on defendant's written guarantee and defendant had specifically assented to the transfer of the debit to his own account.

Defendant denied that he had consented to the debit or had acquiesced in it and pleaded that if he was liable at all, his liability would repose on the *ruqqa* or note of indemnity on which plaintiff made the advance to defendant's son.

The District Judge found the plaintiff's case, *viz.* that the debit had been transferred to defendant's account by consent, unproved and he held that there was no acquiescence in the transfer on defendant's part.

This second appeal was admitted mainly on ground 7 which has not been mentioned before us, and the facts on which we are asked to hold that there was acquiescence have not been proved.

A belated argument is that the defendant in any case is liable on the *ruqqa* but this was not plaintiff's case and if it had been, defendant would have had certain lines of defence open to him.

The appeal has no force and is dismissed with costs, as also are the cross-objections as to costs, in the Courts below, for that is not a matter for second appeal.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2450 OF 1921.

March 3, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

SHEIKH ABDUL MANNAF—PLAINTIFF—APPELLANT

versus

SHEIKH MUSLIM—DEFENDANT—RESPONDENT.

Bengal Tenancy Act, (VIII of 1885) s. 52 (1) (b)—Reduction of rent, when can be claimed—Tenant, what must prove.

In order to bring the case whithin the scope of section 52 clause (*b*) of the Bengal Tenancy Act the tenant must prove that he is entitled to a reduction of rent on account of deficiency in area proved by measurement of the holding as compared with the area for which rent has been previously paid by him.

When, therefore, in a suit for rent on the basis of a *Kabuliyat* executed by the defendant at the rate of rent fixed therein the defendant claimed reduction on this ground that the area was less than that mentioned in the *Kabuliyat*, and it appeared that the area was not fixed with reference to actual measurement but by approximate estimate.

Held (1) that what was leased out to the defendant was land within certain definite boundaries, the area being stated by guess.

(2) that the rent fixed being a lump sum for the land within the boundaries the defendant was not entitled for a reduction thereof.

Appeal against the decree of the Subordinate Judge, 5th Court, Dacca, dated the 5th August 1921 reversing the decree of the Munsif, 1st Court, dated the 22nd July 1920.

SHEIKH ABDUL MANNAF *v.* SHEIKH MUSLIM

Babu *Krishna Kishore Basak* and Babu *Kanai Lal Shaha*, for the Appellant.

Babu *Amulya Chandra Chatterjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a rent suit brought by the plaintiff on the basis of a *Kabuliyat* executed by the defendant at a rate of rent fixed therein. The defence is that the area within the boundaries is less than what his mentioned in the *Kabuliyat* and therefore, the defendant is entitled to a reduction of rent. The Court of first instance held that what was leased out was the area within specified boundaries and that the defendant was not entitled to claim reduction of rent due to the area being found less than what is mentioned in the *Kabuliyat*. The lower Appellate Court has reversed that decision and has given effect to the defendant's plea on the ground that" the *jama* being a variable one dependent on the area to be found on measurement, the test is not the boundaries within which the *jama* is situate. In this particular case the area of the land is the principal matter to be taken into consideration." The question on which the Courts below differed really turns upon the construction of the *Kabuliyat* as is observed in the case of *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*. (1) The *Kabuliyat* which has been placed before us begins with the words "ordinary Karsha Rayati Kabuliat within a fixed *jama* and limited term." Then, it goes on to describe how the plaintiff acquired this property. The stipulation with regard to rent is in these terms: "I having requested you to grant me lease of the land described in the schedule below within your Sahan for the purpose of dwelling therein as ordinary Karsha Rayat and you having consented thereto, I settle Rs. 30 as annual *jama* and after executing this *Kabuliyat* I agree and promise to the following effect. I shall pay the said rent to your office every year in kists stated below." After the detail of the instalments there is the following clause: "I shall recognise the occasional measurement of the land, settlement of rent and its enhancement." In the body of this document the area is not mentioned, but in the schedule at foot the two plots leased out are separately described. All the 4 boundaries are stated after which we find the words "within these boundaries the part of the Batwara Dag No. 93 (& No. 94,) the land measuring by guess." Then follows the area. We have carefully considered the question of the construction of the *Kabuliyat* and are of opinion that the view taken by the learned Subordinate Judge is not correct. It is an ordinary *Kabuliyat* by which a certain quantity of land within definite boundaries is let out and the area is fixed not with reference to actual measurement but by approximate estimate and the rent fixed is a lump sum for the land within the boundaries. The landlord in cases like this reserves the right of enhancement of rent if the area is found to be more than what is stated in the deed; and this reservation is made for his own benefit. In order to bring the case within the scope of section 52 clause (*b*) of the Bengal Tenancy Act the tenant must prove that he is entitled to a reduction of rent on account of deficiency in area proved by measurement of the holding as compared with the area for which rent has been previously paid by him. It is neither party's case that there has been any dimunition in area since the land was first let out. The defendant, therefore, cannot claim abatement of rent under section 52, clause (*b*). He must rely upon the terms of the contract to show that what was leased out to him was a fixed quantity of land described or situated within certain boundaries. The *Kabuliyat* does not establish this point and it is apparent that what was leased out to the defendant was the land within certain definite boundaries, the area having been stated by guess. That being the construction we put upon the contract in this case, we think that the reading of the document by the lower Appellate Court is not right and the decree passed by it ought to be set aside.

We accordingly allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all the Courts.

K. S. D. *Appeal allowed.*

(1) 21 Ind. Cas. 750; 41 C. 493; 18 C. W. N. 665; (1914) M. W. N. 1; 15 M. L. T. 68; 19 C. L. J. 95; 40 I. A. 223; 26 M. L. J. 25; 16 Bom. L. R. 42 (P.C.).

ANOKH SINGH *v.* SAPURAN SINGH

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 925 OF 1922.

April 12, 1923.

Present :—Mr. Justice Broadway.

ANOKH SINGH AND ANOTHER—
DEFENDANTS—APPELLANTS
versus
SAPURAN SINGH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Necessity—Just debt, what is—Debt incurred to prosecute abduction case—Appeal, second—Finding of fact—Wrong principles, application of.

A just debt incurred by a male proprietor for a necessary purpose is always binding on his estate irrespective of the income and means of the alienor.

A just debt is a debt which is actually due and is not immoral or illegal or opposed to public policy and is not contracted as an act of reckless extravagance or wanton waste or with the intention of destroying the interests of the reversioners.

Devi Ditta v. *Saudagar Sing*, 65 P. R. 1900; P. L. R. 1900 ; P. L. C. 322 ; *Kirpal Singh* v. *Sardar Balwant Singh*, 17 Ind. Cas. 666 ; 26 P. R. 1913 ; 13 M. L. T. 5 ; 11 A. L. J. 1 ; 9 P. W. R. 1913 ; 17 C. L. J. 137 ; 15 Bom. L. R. 79 ; 17 C. W. N. 302 ; 28 P. L. R. 1913 ; 24 M. L. J. 318 ; (1913) M. W. N. 58 ; 40 C. 288 (P. C.) followed.

A debt incurred to prosecute a case under section 498 of the Penal Code may reasonably be regarded as necessary.

A finding of fact arrived at by the application of wrong principles is not final and binding in second appeal.

Appeal from the decision of the District Judge, Amritsar, dated the 10th January, 1922.

Mr. *Faqir Chand*, for the Appellants.

Mr. *L. C. Mehra*, for the Respondents.

JUDGMENT.—On the 6th January, 1912, one Jind Singh, a childless proprietor, mortgaged a vacant site measuring 12 *marlas* 6 *sarsahis* for Rs. 340 in favour of Anokh Singh and Ladha Singh, sons of Sohan Singh, residents of the same village. On the 7th February, 1921, Indar Singh, brother of Jind Singh, who had died, instituted a suit for possession of this site claiming that the property was ancestral and that the mortgage, which was for a term of 40 years, had been made without consideration or necessity. The mortgagees pleaded that the land was not ancestral and that the mortgage had been effected for consideration as well as necessity. It was also alleged that the suit was time-barred. The trial Court found that the land was ancestral and that the suit was within time. It also found that the mortgage had been entered into for consideration as well as necessity and granted the plaintiff a decree for immediate possession on payment of Rs. 584 this sum being made up of the principal and interest that had accrued thereon. The plaintiff was, however, directed to pay the defendants' costs. Against this decree both parties appealed, the defendants arguing that the question of necessity ought not to have been gone into at all and that immediate possession should not have been granted inasmuch as the term of the mortgage was 40 years. The plaintiff urged that he should not have been made to pay the defendants' costs and that interest on the principal amount should not have been allowed.

The learned District Judge found that the land was ancestral and that consideration had been paid. He, however, held that necessity for the mortgage had not been proved and the decree was accordingly modified by giving the plaintiff a right to take possession of the site without payment of any sum whatever. He confirmed the order of the trial Court directing the plaintiff to bear the defendants' costs in the first Court. Against this decree the defendants have come up to this Court in second appeal through Mr. Faqir Chand and I have heard Mr. Lal Chand Mehra on behalf of the respondent. The only point argued before me is whether the finding of the learned District Judge on the question of necessity is correct. It has been argued by Mr. Lal Chand Mehra that this is a finding of fact which cannot be gone into On the other hand, it has been alleged that the learned District Judge has decided this question on entirely wrong principles and, therefore, his finding is vitiated and can be examind in second appeal. It has also been urged that the principles enunciated in *Devi Ditta* v.

ANOKH SINGH *v.* SAPURAN SINGH

Saudagar Singh (1), and approved of in *Kirpal Singh* v. *Sardar Balwant Singh* (2), have been ignored.

Now the consideration for the mortgage was Rs. 342 made up of three items, namely : (1) Rs. 250 paid to Dalel Singh, (2) Rs. 80 taken at the time of the registration for certain litigation and (3) Rs. 12 costs of conveyance and registration fees. The learned District Judge has assumed that Jind Singh was in possession of a large area or land on the ground that in 1916 the said Jind Singh executed another mortgage involving 253 *kanals* of land. He also appears to have been under the impression that the second mortgage of 1916 was in favour of the present mortgagees-appellants. It appears that on both points the learned District Judge has fallen into an error. In 1912 Jind Singh owned 144 *kanals* 3, *marlas* of land and the land that he subsequently mortgaged in 1916, as is evidenced from the mortgage deed, Exhibit p. 4, had come to him subsequent to the year 1912. Again as is also apparent from the mortgage-deed, Exhibit P. 4 the mortgagee was one Jagat Singh who as far as the record is concerned at any rate, had no concern whatever with the appellants. Influenced by these errors the learned District Judge in dealing with the item of Rs. 250 came to the conclusion that inasmuch as the appellants were residents of the same village they must have realised the risk they were running in dealing with Jind Singh and that, therefore, their *bona fides* must on the whole be regarded as somewhat doubtful more especially in view of the later alienation by Jind Singh of large areas of land to the same defendants for considerable sums of money in 1916." In my opinion this indicates that the learned District Judge had not fully understood the case of the appellants and his finding, therefore, cannot be regarded as final.

Again it was held in *Devi Ditta* v. *Saudagar Singh* (1), that an alienee, who pays antecedent debts in consideration of the transfer of property to him, if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived. It was also held that a just debt incurred by a male proprietor for a necessary purpose is always binding irrespective of the income and means of the alienor and that just debts are debts which are actually due and are not immoral or illegal or opposed to public policy and not contracted as an act of reckless extravagance or wanton waste or with the intention of destroying the interests of the reversioners. This definition of a just debt was approved of by their Lordships of the Privy Council in *Kirpal Singh* v. *Sardar Balwant Singh* (2).

In the present case the appellants have paid Dalel Singh a sum of Rs. 240 as found due on the *bahi* account together with interest thereon amounting to Rs. 10. Nowhere has it been suggested that the claim set up by Dalel Singh was fictitious or that he was in any away in collusion with the appellants. In *Jhanda* v. *Niamat Khan* (3), it was held by the learned Chief Justice that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof. It having been found that consideration for the present mortgage actually passed, it seems to me that the learned District Judge ought, having regard to the authorities referred to above, to have held that this sum of Rs. 250 was a valid charge on the property.

As to the sum of Rs. 80 it has been shown that Jind Singh had instituted a case under section 498 of the Indian Penal Code relating to his wife's abduction. The only reason the learned District Judge has given for disallowing this item is that Jind Singh owned large areas of land as pointed out above. In this the learned District Judge has fallen into an error. Debts incurred for a litigation of this nature may, in my opinion, be reasonably regarded as necessary. The remaining item of Rs. 12 is clearly admissible if the two main items are found to be for necessity. As in my opinion the appellants have discharged the *onus* that was upon them as laid down in *Jhanda* v. *Niamat Khan* (3), the mortgage must be regarded as one for necessity and I accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

Z. K. *Appeal allowed.*

(1) 65 P. R. 1900 ; P. L. R. 1900, P. 322.
(2) 17 Ind. Cas. 666; 26 P. R. 1913; 13 M. L. T. 5; 11 A. L. J. 1 ; 9 P. W. R. 1913 ; 17 C. L. J. 137 ; 15 Bom. L. R. 79 ; 17 C. W. N. 302 ; 28 P. L. R. 1913 ; 21 M. L. J. 318 ; (1913) M. W. N. 58; 40 C. 283 ; (P. C.)
(3) 54 Ind. Cas. 842 ; 1 L. 472.

RAJABALA DASI *v.* RADHIKA CHARAN ROY

CALCUTTA HIGH COURT.

CIVIL RULE NO. 230 OF 1924.

March 10, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

SM. RAJABALA DASI—PLAINTIFF—PETITIONER

versus

RADHIKA CHARAN ROY—DEFENDANT—OPPOSITE PARTY.

Court Fees Act (VII of 1870), s. 7 (c) IV—Suit for setting aside decree, for injunction not to disturb possession and for consequential relief—Court-fee payable.

In a suit firstly for a declaration that a decree obtained by the defendant was fraudulent and secondly for an injunction against defendant restraining him from interfering with the plaintiffs' possession of the property in suit and thirdly for consequential relief confirming plaintiff's possession, the valuation to be put upon the plaint is the valuation of the decree sought to be set aside and not the actual value of the property.

Umatul Batul v. *Nanji Koer*, 11 C. W N. 705 ; 6 C. L. J. 127, followed.

The value to be put by the plaintiff on the plaint in a suit like the above should be taken as the proper value unless it appears that the value so put is arbitrary and inconsistent with the value of the reliefs sought.

Krishna Das Laha v. *Haricharan Banerji*, 10 Ind. Cas 865 ; 14 C. L J. 47 ;15 C. W. N. 823; *Raj Krishna* v. *Bepin*, 17 Ind. Cas. 162 ; 17 C. W. N. 591 ; 40 C. 245 ; 16 C. L. J. 194 distinguished.

Mohendrasundar v. *Dinabandhu*, 21 Ind. Cas. 771 ; 19 C. L. J. 15, relied on.

Rule against an order of the 1st Sub-Judge, Howrah, in Title Suit No. 46 of 1921, dated the 13th February 1924.

Babu *Khitish Chandra Chakravarty*, for the Petitioner.

Babu *Manmatha Nath Roy* (with him Babu *Sailendranath Mukerji*), for the Opposite Party.

ORDER.—This Rule is directed against an order holding that the plaint is under valued and directing the plaintiff to put in deficit Court fees according to the valuation fixed by the Court. The history of the case is that in 1919 the defendant brought a suit against the plaintiff being suit No. 106 of 1919 in which a *solenama* was purported to have been filed by the plaintiff in this suit, admitting the defendant's claim and stating that she was the defendant's *benamidar* in respect of the property in that suit. That suit was valued at Rs. 6000. The plaintiff has brought the present suit (in 1921) in which she prays for a declaration that the decree obtained by the defendant in suit No. 106 of 1919 was fraudulently obtained and for declaration for her title to the property in suit. One of the objections taken by the defendant was that the suit was under-valued and the plaint insufficiently stamped. The suit was originally valued at Rs. 2100, Rs. 2000 being the value of the declaration sought and Rs. 100 value of the relief claimed by way of injunction. On this objection being taken by the defendant, the plaintiff filed an application to the Court for amendment of the plaint by raising the valuation to Rs. 6100. The defendant was allowed to file additional written statement after the amendment was allowed and in his additional written statement he again took the objection that the suit was under-valued and the plaint was insufficiently stamped. Fresh issues were framed relating to valuation, which are issues Nos. 6, 15 and 16, They were tried first, and the Court below passed the following order: "I have considered the evidence adduced by the parties and I may mention that the properties might fetch Rs. 20,000 at the time of the institution of this suit. The plaintiff is directed to put in the deficit Court-fee at once." Against this order this Rule has been obtained and it is contended that the new valuation put upon the plaint and the Court-fee paid upon it are sufficient and that the order of the Court below is wrong in law. In order to determine whether a suit is properly valued or not, it is necessary to confine our attention to the plaint itself and not to look to other circumstances which may subsequently influence the judgment of the Court as to the true value of the relief sought. The plaintiff says in the plaint that she bought these properties with her own money in the name of the defendant who was her paramour. She further says that the decree obtained against her was fraudulent. On these allegations she

makes the following prayer (ka). "That the aforesaid decree in title suit No. 106 of 1919 obtained by the defendant from this Court having been fraudulent, it may be so declared and that the plaintiff's title to the said property be established after setting aside that decree and holding that no right or title has accrued to the defendant in respect of the property in schedule 'Ka'; (kha). That it may be declared that the defendant has no right in or title to the property in schedule (kha) and that the plaintiff has right or title to the said property ; (Ga) that a decree be passed in favour of the plaintiff for delivery of possession if during the pendency of the suit she is dispossessed from the property in suit, (Gha) that a permanent injunction be granted against the defendant so that he may not interfere with the plaintiff's possession of the property in suit." In the body of the plaint she says that all these properties are in her possession. Para. 18 of the plaint is in these terms: "That the property in suit having been in the possession of the plaintiff, she brings this suit only for the declaration of her title thereto and as she has once lost her confidence in the defendant it is necessary for her to sue for declaration and to get a declaration of her title to the property mentioned in schedule Kha." Looking at the plaint it is clear that it is a suit firstly for a declaration that the decree obtained by the defendant is fraudulent, and secondly, for an injunction against the defendant restraining him from interfering with the plaintiff's possession of the property in suit, thirdly, for consequential relief confirming plaintiff's possession. In our judgment the valuation now put upon the plaint by the plaintiff is sufficient. The suit the decree in which is sought to be set aside was valued at Rs. 6,000 and the plaintiff says that she is in possession of the property in suit. We, therefore, see no reason why she should value her claim according to the value of the property in suit. A point very similar to this, came up for the consideration of this Court in the case of *Umatul Butul* v. *Nanji Koer* (1). There the suit was for declaration that a mortgage decree for Rs. 10,000 obtained by the defendant against the plaintiff was fraudulent and for an injunction restraining the defendant from executing it by sale of the mortgaged properties. It was held that the prayer for injunction was a prayer for consequential relief within section 7, sub-section (4) and clause (*c*) of the Court Fees Act and that the valuation to be put upon it should be the valuation of the decree which the plaintiff sought to have set aside in that suit namely Rs. 10,000. We are aware of the numerous cases in which it has been held that under section 7, sub-section 4, clause (*e*) of the Court FeesAct theplaintiffis not entitled arbitrarily to value the relief he seeks ; but at the same time, as has been observed in the case of *Mohendra Sundar* v. *Dina Bandhu* (2) that sub-clause provides that in a suit for injunction the amount of court-fee to be paid on the plaint is to be computed according to the amount at which the relief sought is valued in the plaint. In that case the suit was for an injunction to restrain the defendant from interfering with the plaintiff in the management of the endowed property of which he was the sole sebayet. As the suit was valued at Rs. 1000 and the plaintiff put in a court-fee Rs. 10 on the plaint the Court below held that the property in suit was worth Rs. 5,000 and it accordingly asked the plaintiff to supply deficit court-fees. This Court held that the suit was properly valued at Rs. 100 and that the court-fee paid was sufficient. The view we take of the law is that the value to be put by the plaintiff on the plaint in a suit like the present should be taken as the proper value unless it appears that the value so put is arbitrary and inconsistent with the value of the reliefs sought. The learned vakil for the opposite party has invited our attention to the case of *Raj Krishna Dey* v. *Bepin Behary Dey* (3). There the plaintiff put one value for purposes of jurisdiction and another for purposes of payment of court-fee. It was held that under section 8 of the Suits Valuation Act that could not be done ; and further in that case the plaintiff brought a suit for a declaration that he was the sole sebayet of the debutter and that the defendant was in joint possession of the endowed property under an erroneous order of the revenue authorities. The suit was for removing the defendant. It was then held that the plaintiff ought to value his suit

(1) 11 C. W. N. 705 ; 6 C. L. J. 427.

(2) 21 Ind. Cas. 771 ; 19 C. L. J. 15.

(3) 17 Ind. Cas. 162; 16 C. L. J. 194 ; 17 C. W. N. 591 ; 40 C. 245.

according to the value of the property involved in the suit. To the same effect is the decision in the case of *Krishna Das Laha* v. *Hari Charan Banerjee* (4). There the Settlement Officer had recorded the defendant as the person who was entitled to collect rent from the raiyats and the plaintiff brought a declaratory suit with consequential relief and valued the suit at Rs. 500. The learned Judges held that the order of the Settlement Officer which the plaintiff sought to have set aside virtually dispossessed the plaintiff from the property and the suit was practically one for recovery of possession and the value of the relief was the value of the property. These cases, therefore, are no authorities for the proposition which has been so broadly stated by the learned vakil for the opposite party, that in a suit for injunction the value of the property involved must be the value put upon the plaint for purposes of ascertainment of the proper court-fee payable. We hold that the valuation given by the plaintiff is the proper valuation and that the issue relating to valuation should have been decided in her favour. At the same time, we should observe that our decision is based upon our reading of the plaint. If in future, circumstances come to light as the case progresses, the Court will be at liberty to revise the order regarding valuation.

The result is that this Rule is made absolute and the order of the lower Court set aside. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at two gold mohurs.

As the case is an old one, the Court will, we hope, take it up as soon as it is convenient for it to do so.

M. B. *Rule made absolute.*

(4) 10 Ind. Cas. 865 ; 14 C. L. J. 47 ; 15 C. W. N. 823.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1839 OF 1919.

August 2, 1922.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Abdul Quadir.

GHANNU RAM—DEFENDANT—APPELLANT
versus
HOTU RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Interest—Covenanted rate—Executant—Mortgagor whether entitled to relief—Post diem interest—Reasonable rate.

In a suit for possession by redemption it appeared that the property had been mortgaged with possession for Rs. 1,800 it being stipulated that income from the land should count as interest on Rs. 800 while Rs. 1,800 should carry interest at the rate of Rs. 250 per annum, and that on the expiry of six years if the money was not paid with interest, the mortgage should be converted into a sale. Plaintiffs were purchasers of the equity of redemption for the relief of a third:

Held, (1) that interest at the stipulated rate was payable on one-third of Rs. 1,000 for the original period of six years;

(2) that there was nothing to show that there was any stipulation express or implied in the mortgage deed, for payment of *post diem* interest and, therefore such interest could not becleared under the covenant;

(3) that *post diem* interest could be allowed by way of damages, and that it should be allowed at the rate of 18 per cent. per annum from the date when the term of the mortgage expired to the date of the decree.

Second appeal from the decree of the District Judge, Multan, dated the 16th June 1919.

Mr. *Har Gopal*, for the Appellant.

Mr. *Durga Das*, for the Respondents.

JUDGMENT.

Abdul Quadir J :—The suit out of which this second appeal has arisen was brought by *Nawab* Muhammad Saifullah Khan, plaintiff No. 1, Hotu Ram and Mula Ram, plaintiffs Nos. 2 and 3, for possession by redemption of 1/3 of certain lands and a house which had been mortgaged by one Jesa Ram to Aya Ram,

father of Ghannu Ram, defendant, on the 11th February 1888. The mortgage was with possession, for Rs. 1,800 and it was understood that income from the land was to count as interest on Rs. 800 out of the consideration money and Rs. 1,000 was to carry interest at Rs. 250 *per annum*. It was further stipulated that, on the expiry of six years, if the money was not paid with interest the mortgage would be converted into a sale. The plaintiffs who were purchasers of the equity of redemption from the mortgagor, brought the suit on the 2nd July 1918. Before the decision of the suit, plaintiff No. 1 surrendered his rights to the mortgagee and the contest remained only between plaintiffs Nos. 2 and 3 and the defendant. The Trial Court granted them a decree for possession of 1|3 share of the whole land and the house, together with some trees, provided that they paid Rs. 597-11-8 to the defendant and also pay interest at the rate of 1|3 of Rs. 250 per year, till the date of the decree. The sum awarded represented 1|3 of the total consideration for the mortgage minus Rs. 2-4-4 which were found to be due by the defendant on account of some trees cut by him. The plaintiffs appealed against this decision, urging that the period for which the interest agreed upon, could be allowed was only six years, and after that interest could be allowed by way of damages only and should not be more than Rs. 9 *per cent. per annum*. The District Judge modified the decree of the Trial Court by granting *post diem* interest for six years, by way of damages at the rate of 12 *per cent.* and granted the plaintiffs a decree for possession of 1|3 of the land in dispute on payment of Rs. 1,529-11-8 with further interest at 12 *per cent. per annum* to the date of payment, but allowed the parties to bear their own costs throughout. Against this decree the defendant has preferred an appeal, claiming an additional sum of Rs. 1,628 by way of interest calculating it at the stipulated rate. The plaintiffs have also filed cross-objections urging that interest should have been calculated on Rs. 333-5-4 only in accordance with the terms of the deed and that the amount payable should be reduced to Rs. 1,337-11-8 in all. We have heard *Lala* Har Gopal, for the appellant and *Lala* Durga Das for the respondent, and this judgment will dispose of the appeal as well as the cross-objections.

Lala Har Gopal contends that, though the payment of *post diem* interest was not expressly agreed upon in the mortgage deed, it must be held that there was implied contract to pay interest and as the mortgagor was a Hindu belonging to the trading class and had entered into the agreement with open eyes, his successors-in-interest, who purchased the equity of redemption in a speculative spirit, were bound by his agreement and had no equities in their favour and that therefore, the mortgagee was entitled to interest at the rate of 1|3 of Rs. 250 *per annum* for the entire period. Reference is made to Civil Appeal No. 757 of 1917, a case published as *Matan Mal* v. *Muhammad Bakhsh* (1) in which *post diem* interest has been allowed. Another decision cited is *Aziz Khan* v. *Duni Chand* (2), where it is laid down that high rate of interest is no reason for reducing it, if there is nothing to show that the man advancing money had taken undue advantage of his position. *Lala* Durga Das replies by saying that the present case differs materially from the cases relied upon by the appellants inasmuch as this relates to a mortgage by way of conditional sale, where the parties never contemplated the payment of any interest after the period fixed for redemption or foreclosure. He argues, therefore, that no interest for any period beyond six years should be allowed. He further urges that the stipulated rate of interest was exorbitant and though he cannot object to its being enforced, so far as the original period of six years is concerned, it should not be enforced for any period after that, for which a nominal interest might be allowed by way of damages. He adds that the mortgagee had an opportunity of foreclosing the mortgage which he did not avail of and if full interest was to be allowed in a case like this, it would encourage mortgagees to keep quiet even after the expiry of the period of foreclosure and to allow heavy interest to accumulate and would amount practically to a denial of the right of redemption. The learned Vakil also points out, that according to the terms of the mortgage-deed, the only sum on which the interest was chargeable was Rs. 1,000 so that the interest now allow-

(1) 66 Ind. Cas. 771 ; 4 U. P. L. R. (L.) 55 ; 3 L. 200 ; (1922) A. I. R. (L) 254 ; 42 P. L. R. 1922 (F. B.).
(2) 48 Ind. Cas. 933 ; 101 P. R. 1918 ; 23 C. W. N. 130 ; 165 P. W. R. 1918 (P. C.).

ed should be on 1|3 of that sum that is Rs. 333-5-4 and not on Rs. 600, as allowed by the lower Appellate Court. I think there is force in some of these contentions, though I do not think that they can render any material assistance to the respondents, because of the view I am going to take as to the period for which interest should be allowed. It is true that, on the facts found, there is nothing to show that there was any stipulation express or implied, in the mortgage-deed, for payment of *post diem* interest, and, therefore, such interest cannot be claimed under the covenant. It is conceded, however, by the other side, that interest by way of damages can be allowed, and I think that Rs. 18 *per cent. per annum* would be a reasonable rate of interest in the present case. I see no reason why it should be allowed for only six years after the expiry of the term of the mortgage, and I am of opinion that it should be allowed from the 10th February 1894, when the term of the mortgage expired, to the date of the decree, *i.e.*, 31st October 1918, or for a period of 24 years and 8 months approximately. The sum on which it should be allowed is Rs. 333-5-4 that is 1|3 of Rs. 1,000 on which interest was to be charged according to the original contract. This would mean Rs. 60 *per annum* for the period above-mentioned, and comes to Rs.1,480. I would, therefore, modify the decree of the lower Appellate Court so that the plaintiffs will get possession of 1|3 of the land in dispute, on payment of Rs. 597-11-8 plus Rs. 500 as interest at the stipulated rate for the first six years plus Rs. 1,480 for the period of 24 years and 8 months from 1894 up to the date of the decree. They will also have to pay further interest at 12 *per cent. per annum* on Rs. 333-5-4 to the date of payment. The appellant will be allowed his costs in this Court against the respondents, but the orders of the lower Appellate Court as to parties bearing their own costs in the Courts below need not be disturbed under the circumstances of this case. The cross-objections fail and are dismissed but no order as to costs need be passed as regards the cross-objections.

Shadi Lal, C. J.—I concur.

K. S. D. *Appeal allowed.*
Cross-objections dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL MISCELLANEOUS NO. 63 OF 1924.

April 26, 1924.

Present :—Mr. C. M. Lobo, A. J. C.

In the matter of AN ARBITRATION BETWEEN MESSRS. ADAMJI LUKMANJI, AND MESSRS. LOUIS DREYFUS & COY.

Arbitration Act (IX of 1899), ss. 10 (b), 11—Special Case—Opinion of Court—Res-judicata—Arbitrators, whether bound.

The Order of the Court on an application by arbitrators under section 10 (b) of the Arbitration Act is an *opinion* given by the Court in what is merely its consultative jurisdiction and is not a judgment or decision of the Court and cannot, therefore, operate by way of *res-judicata*.

In re *Knight & Tabernacle Permanent Building Society*, (1892), 2 Q.B. 613 ; 62 L. J. Q. B. 33; 4 R. 67; 67 L. T. 403 ; 41 W. R. 35; 57 J. P. 229, relied upon.

Furthermore where one of several arbitrators has not joined in seeking the opinion of the Court, he is in no way bound by it on the principle of *res-judicata*, the parties to the two proceedings not being the same *Firm of Jain Narain Babulal* v. *Firm of Narain-das Janimal*, 66 Ind. Cas. 706 ; 16 S. L. R. 79 ; (1922) A. I. R. (S) 6, relied upon

In India it is in the discretion of the arbitrators to state a special case for the opinion of the Court or not as they choose and the Courts have no power to compel them to do so.

If, however, an opinion is sought by them, that opinion is not in any case and in all the circumstances bindings upon them and they still remain the final judges of law and fact and are not legally bound to follow it. They may not lightly flout the opinion so obtained for they would run the risk of having their award set aside on the ground of dishonesty or immorality but there may exist special circumstances which may not make it dishonest or immoral on their part not to act upon it.

In re *Knight & Tabernacle Permanent Building Society* (1892) 2 Q. B. 613 ; 62 L. J. Q. B. 33; 4 R. 67 ; 67 L. T 403; 41 W. R. 35; 57 J. P. 229, relied upon.

Application by the arbitrators under section 10 (b) of the Indian Arbitration Act.

Mr. *Kimatra Bhojraj*, for the Arbitrators.

Messrs. *T. G. Elphinston, Tolasing Khushal-sing*, for the Respondents.

ADAMJI LUKMANJI, *In re*

JUDGMENT.—This is an application under section 10 (*b*) of the Indian Arbitration Act IX of 1899 in which the arbitrators Messrs. Clayton and Crawford state a case for the opinion of the Court in the matter of an arbitration between Messrs. Adamji Lukmanji and Messrs. Louis Dreyfus & Co.

The matter comes before me in the following circumstances.

By a reference dated 30th August 1922 Respondents I and II referred certain disputes pending between them and arising out of four contracts for sugar to the arbitration of Messrs. Clayton and Brachi. On 26th February 1923 during the course of the arbitration the arbitrators Messrs. Clayton and Brachi stated a case for the opinion of the Court under section 10 (*b*) of the Arbitration Act. The matter J. Mis. 75 of 1923 was disposed of by Madgavkar, A. J. C. with an opinion dated 22nd March 1923. Thereafter one of the arbitrators Mr. Brachi left for Europe and the appointment of a substituted arbitrator became necessary. Mr. Brachi being the appointe of Messrs. Louis Dreyfus & Co. Respondents I called upon them to appoint an arbitrator in place of Mr. Brachi and on their failure to do so they themselves proceeded to appoint Mr. Crawford to act as arbitrator on behalf of Respondent II. Then followed an application to this Court J. Mis. 169 of 1923 by Respondent II. for revocation of the submission under sections 5 and 9 of the Arbitration Act. This application having been heard and dismissed on 27th July 1923 the arbitrators Messrs. Clayton and Crawford proceeded with the reference. The points previously submitted for the opinion of the Court have again been raised before the Arbitrators-petitioners who find the matter further complicated by the rival contentions of the parties before them as to the relevance and binding effect of the opinion expressed by Madgavkar, A. J. C. and referred to above. They now under section 10 (*b*) of the Arbitration Act, seek the opinion of the Court on the following points.

I. Whether the petitioners are bound to follow the opinion of Mr. Madgavkar, A. J. C.

II. Whether the petitioners are bound to make their decision on the basis of that opinion.

III. If so must or should the said opinion be added to and form part of their award.

Mr. Elphinston who appeared for the Respondent I first argued that Mr. Crawford being merely appointed by substitution for Mr. Brachi as an arbitrator the proceedings after his appointment merely continued from the point where the original arbitrators had left them, that all previous proceedings including the opinion of Madgavkar, A. J. C. were, therefore, binding on the subsituted arbitrator Mr. Crawford, and that all that there remained for the arbitrators to do was to make an award in accordance with and on the basis of the opinion so obtained.

Mr. Elphinston was not able to refer me to any authority for this startling proposition, he merely relied on section 9 of the Arbitration Act and the order of Madgavkar A. J. C. in J. Mis. 169 of 1923, I am unable to find in section 9 anything which expressly or by implication supports the proposition, that has been advanced. To my mind section 9 is confined to empowering parties to an arbitration to fill a vacancy which may arise in certain contingencies in the office of Arbitrator. Nor is there anything in the order of Madgavkar, A. J. C. in J. Mis. 169 of 1923 which advances the proposition, Mr. Tolasing for Respondent II has urged that Respondent I have no right to raise this point on this reference as it has never been raised before the petitioners. In the view that I have taken, it is scarcely necessary for me to enter upon the question.

Mr. Elphinston next argued that the opinion recorded by Madgavkar, A. J. C. was *res judicata* as between Respondents I and II, that arbitrators were clearly bound by general principles of law, that the doctrine of *res judicata* was one of these general principles of law, that even a point of law could be *res judicata* between parties, and that on these grounds the petitioners were bound to follow the opinion of Madgavkar, A. J. C. On each of the above propositions Mr. Elphinston quoted a list of authorities.

In reply to this argument Mr. Tolasing has urged that the principle of *res judicata* is totally inapplicable in that the essential

ingredients for the application of that principle are entirely absent. He urges that the parties are not identical the petitioners as arbitrators do not constitute a Court, there has been no decision that could operate as *res judicata*. He relies on the case of *Firm of Jai Narain Babul Lal* v. *Firm of Naraindas Janimal* (1), in support of his argument.

In my opinion Mr. Ekphinston's proposition is entirely unsound. In the first place in order to attract the application of the principle of *res judicata* there must be a decision. Now under section 10 (*b*) of the Arbitration Act the arbitrators have power to state a special case for the *opinion* of the Court on any question of law involved. J. Mis. 75 of 1923 was such an application and was concluded by an opinion of Madgavkar, A. J. C. Section II (3) of the Arbitration Act again reads "Where the arbitrators or Umpire state a special case under section 10, clause (*b*), the Court shall deliver its *opinion* thereon, and such *opinion* shall be added to, and shall form part of the award." These are the only two sections of the Act relating to the subject and in both these sections the order of the Court on an application by arbitrators under section 10 (*b*) of the Arbitration Act is described as an *opinion*. An opinion is not a judgment or decision *In re Knight and Tabernacle Permament Building Society* (2), and, therefore, one of the essential ingredients for the application of the principle of *res judicata* is entirely absent. Then again the parties to the two proceedings must be the same and the case reported in *Firm of Jainarain Babulal* v. *Firm of Naraindas Janimal* (1), though the ruling of a single Judge of this Court is sufficient authority for holding without further elaboration that in this case the parties are not identical.

The third and last point urged by Mr. Elphinston on behalf of Respondent No. 1 is that the petitioners are bound by the opinion by Madgavkar, A. J. C. in J. Mis. 75 of 1923 and failure on their part to follow it will necessarily involve misconduct vitiating the award.

Before discussing the law on this point it is important to note that on the subject of the statement of a case by arbitrators for the opinion of the Court there is an essential distinction between the law as prevailing in India and the English Arbitration Act of 1899; under the latter any referee, arbitrator, or umpire may at any stage of the proceedings under a reference and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. Under the Indian Arbitration Act, section 10 (*b*), arbitrators have power to state a special case for the opinion of the Court on any question of law involved, but there is no means of compelling them to do so. As stated by Gopaldas in his Law of Arbitration in India, "in England the Court can compel an Arbitrator to state a case, but the Courts in India have no such power. Clause (*b*) of section 10 leaves it to the discretion of the arbitrators to state a special case or not as they choose and the Court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the rulings or obey the directions." Now clearly this distinction must have an important bearing on the effect, so far as the arbitrators are concerned of an opinion on any question of law obtained from the Court by Arbitrators. If they can legally be compelled to obtain that opinion then it would seem that they are legally bound by the opinion when obtained; if it is merely optional to them to seek such an opinion it would appear that it has not necessarily a binding effect upon them. But in the case of *In Re Knight* and *Tubernacle Permanent Building Society* (2), a decision of the Court of Appeal Bower, L. J. in dealing with the effect of an opinion obtained by an arbitrator under section 19 of the English Arbitration Act states as follows: "The section contemplates a proceeding by the arbitrator for the purpose of finding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject matter of the arbitration. He still remains the final Judge of Law and fact. No doubt a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality after taking the opinion of the Court to act upon such opinion. If he did not, it would at any rate be a matter calling for explanation on his part. But the arbitrator is still clothed with the final duty of determi-

(1) 66 Ind. Cas. 796; 16 S. L. R. 79; (1922) A. I. R. (S.) 6.

(2) (1892) 2 Q. B 618; 62 L. J. Q. B. 33; 4 R 67; 67 L. T. 403; 41 W. R. 35; 57 J. P. 229.

ning the case. The opinion of the Court does not finally determine the case ; it only binds the arbitrator in honesty or morals to act upon the law as the Court states it. There could be no appeal from his decision because he did not do so, although it might be a ground for impeaching his award on the ground of misconduct if he did not." This is direct authority that even in a case where under section 19 of the English Arbitration Act an arbitrator could be compelled to seek the opinion of the Court, that opinion is not in any case and in all circumstances binding upon him and he still remains the final Judge of law and fact. Of course he may not lightly flout the opinion so obtained for he would run the risk of having his award set aside on the ground of dishonesty or immorality, but there may exist special circumstances which may not make it dishonest or immoral on his part not to act upon it. That under English Law the Jurisdiction of the Court in a reference by an arbitrator under section 19 of the Arbitration Act is merely consultative is established by a number of authorities cited in Halsbury's Laws of England Vol. I. para. 976. The Annual Practice 1924, p. 2215, and Russel on Arbitration pp. 152, 153, Mr. Elphinston relied on a passage in the dissenting Judgment of Vaughan Williams, L. J., in the case of *British Westinghouse Electric and Manufacturing Co.*, v. *Underground Electric Railway Company of London* (3), in which the learned Judge states "The arbitrator is entitled and intended by the Arbitration Act to act upon the answers given by the Court to the questions in the special case. The arbitrator is I think, bound but in any case entitled and intended to act upon them. I say intended because it must be intended at least in every case in which the Arbitrator is directed by the Court to state a special case after a refusal on his part to do so on the request of a party to the arbitration." Apart from the fact that in that case the House of Lords on appeal did not uphold the Judgment of Vaughan Williams *British Westinghouse Electric and Manufacturing Co.*, v. *Underground Electric Ry.* (4), the passage quoted can hardly be taken as an authority for the proposition that the opinion of the Court is in all cases binding on the arbitrator. Now this being the law in England where as I have already stated arbitrators can be compelled under section 19 of the Arbitration Act to state a case it can scarcely be argued that, in India, where it is wholly optional with arbitrators to state a case under section 10, (*b*) of the Indian Arbitration Act, the opinion obtained from the Court is final and binding on the arbitrators. And if such opinion is not binding even on the arbitrators who sought it much less can it be binding on the petitioners in this case one of whom, Mr. Crawford, was not a party to the application in J. Mis. 75 of 1923. Whether the petitioners will or will not follow the opinion of Madgavkar, A. J. C., whether in the event they do not they would be guilty of misconduct or whether they would be able to justify their action are questions which it is neither necessary nor possible to enter into at this stage. I feel, no doubt, however, that the petitioners are not legally bound to follow that opinion.

On the first point, therefore, I am of opinion that the petitioners are not bound to follow the opinion of Madgavkar, A. J. C.

On the second point it follows that if the petitioners are not bound by that opinion they are not bound to make it the basis of their decision. No answer is in the circumstances needed on the third point.

This reference is to be returned to the petitioners as soon as possible with a copy of the opinion.

P. B. A. *Answered accordingly.*

(3) (1912) 3 K. B. 128.
(4) (1912) A. C. 673 ; 81 L. J. K. B. 1132; 107 L. T. 325 ; 56 S. J. 734.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1869 OF 1919.

August 3, 1922.

Present :—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Abdul Quadir.

FIRM RAM DYAL SHEO PERSHAD—DEFENDANTS—APPELLANTS

versus

FIRM GHAMANDI LAL NARAIN DAS PLAINTIFFS—RESPONDENTS.

Second appeal—New plea whether can be raised.

A point which has not been taken in the pleadings and to which no reference has been made in the Judgment of the Court below cannot be raised for the first time in second appeal.

Second appeal from the decree of the District Judge, Delhi, dated the 26th June 1919.

Mr. *Des Raj Sawhney*, for the Appellants.

Mr. *Sardha Ram*, for the Respondents.

JUDGMENT.

Abdul Quadir, J.—This judgment will dispose of two cross-appeals arising out of one and the same suit. The parties are cloth merchants of Delhi The plaintiff firm purchased 30 cases of white shirting from the defendant firm The present dispute relates to 15 cases out of the said 30 cases. On the 11th July 1917, the defendants sent invoices and shipment patterns of 10 cases to the plaintiffs. According to the terms of the contract between the parties, which was written on a form, the conditions of which corresponded to those of the form used by J. Khanna and Co., it was necessary for the purchaser to pay for the goods on or before the due date or to return the draft connected therewith, in order to be entitled to claim the insurance money in case the goods were lost. The ten cases in question containing piece-goods were sunk at sea and the defendants wrote a letter on the 13th July 1917 to the plaintiffs informing them of this and asking them if they were willing to pay for the goods. They demanded a reply within three days. The plaintiffs replied to that letter the same day but at the time of making that reply they were undecided as to paying for the goods. After some further correspondence, they made up their mind to pay and sent Rs. 600 by a cheque on the 27th July 1917, but the defendants refused to accept it, because it had been sent after the time originally allowed to the plaintiffs to make the payment. Another consignment of five cases met with a similar fate. The invoices and shipment patterns were sent to the plaintiffs by the defendants on the 6th August 1917, and the fact of the goods having been lost was communicated to them on the 10th September 1917 but the defendants did not write to say that they were ready to make any payment for the lost goods. Later on the defendants admittedly realised certain sums from the Insurance Company on account of the lost goods, which had been insured before being shipped.

The plaintiffs brought a suit claiming the sums realised by the defendants, on account of the said 15 cases of shirting. The Trial Court held that the plaintiffs had failed to comply with condition No. 6 of the indent form and were not entitled to the insurance money and their claim was accordingly dismissed. They appealed against this decision and their appeal was accepted in part by the learned District Judge. He held with regard to the first lot of ten cases, that as the defendants had practically repudiated the terms of the contract as regards the insurance, it was not necessary that any actual tender of money should have been made to them and that it was sufficient for the plaintiffs to show their readiness to pay the money. He, therefore, granted them a decree for Rs. 921-13-6, which were found to be due to them on account of the insurance money relating to the lot of ten cases. With regard to the five cases, however, he held that " the plaintiffs made no attempt either to tender the money or communicate their readiness to tender it" and decides that the plaintiffs were not entitled to any relief as regards this second lot of goods. Against this decision each of the parties has preferred a second appeal to this Court and we have heard Mr. Des Raj for the defendants, against the decree of Rs. 921-13-6 passed in favour of the plaintiffs and *Lala* Sardha Ram for the plaintiffs, who urges that Rs. 665-13-4 more

should have been decreed in favour of the plaintiffs. I think, however, that both these appeals must fail.

Mr. Des Raj argues that the letter of the plaintiffs, dated the 15th July, 1917, from which their readiness to pay has been inferred does not amount to a tender in law, and the plaintiffs not having paid for the goods before the due date are not entitled to the insurance money according to the terms of the contract between the parties. The decision against the defendants, however, is based on the repudiation of the contract by them, and in view of that finding by the lower Appellate Court, which is a finding of fact, and which cannot be disturbed in second appeal, I hold that the decision of the learned District Judge with regard to the lot of ten cases is correct and the claim of the plaintiffs regarding the same has been rightly decreed.

Lala Sardha Ram, in his appeal regarding the lot of 5 cases contends that actual tender of money is not necessary and refers to *Sriram Rupram* v. *Madangopal Gowerdhan* (1), but that is a case in which the plaintiffs proved that they were ready and willing to carry out their part of the bargain, while in the present case the learned District Judge has come to the conclusion that so far as this lot was concerned the plaintiffs did not show any readiness to pay the money. This again is a finding of fact and concludes *Lala* Sardha Ram's second appeal.

The learned Vakil for the plaintiffs tried to raise some new points in this Court. One of them was that clause (6) of J. Khanna and Co.'s indent form did not govern the agreement between the parties as the terms of the contract were modified by a written agreement. I find no reference to this theory of the original contract having been modified either in the judgments of the Courts below or in the pleadings of the parties and cannot allow this new point to be raised in second appeal.

Another point to which he has drawn our attention is that the plaintiffs had paid Rs. 300 to the defendants as profits realised by them on the 21st August 1917, by selling the lot of 5 cases to a firm called Makhan Lal-Hazari Lal, before they knew of the loss of goods at sea, and this sum they were entitled to recover from the defendants in any case. He refers to a letter of the defendants in which they expressed their willingness to repay this money to the plaintiffs. The plaintiffs appear to be in the right, so far as this sum of Rs. 300 is concerned, but I do not see how I can give a decree for that sum to the plaintiffs in second appeal, when no such relief was asked for by them in the Courts below. The sum is not claimed anywhere by the plaintiffs in their pleadings and cannot be allowed to them in this case.

Both the appeals are, therefore, dismissed with costs.

Shadi Lal, C. J.—I concur that both the appeals should be dismissed with costs.

K. S. D. *Appeal dismissed.*

(1) 30 C. 868; 5 Bom. L. R. 483; 8 C. W. N. 25 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 296 OF 1922.

March 26, 1922.

Present:—Mr. Justice M. N. Mukerjee.

Sreemati ASMATI BIBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAIMUDDI PATHAN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Conjugal rights, restitution of, —Wife, if to establish cruelty such as would justify divorce—Ill-treatment, simple chastisement if amounts to—Inability, to maintain wife, if ground for separation.

Under the Muhammadan Law where the wife seeks to resist the enforcement of a claim for restitution of conjugal rights, it is not necessray for her absolutely to establish that there was cruelty such as would justify a divorce from her husband. It is enough if she proves that there has been ill-treatment of some sort which would create in her an apprehension as to her life or safety.

Simple chastisement of the wife by the husband does not amount to such cruelty or ill-treatment as would be sufficient to create a reasonable apprehen-

sion that her life, health or safety would be endangered on her return to the husband.

Mere inability to maintain the wife is no ground for separation under the Hanafi Law.

Appeal against the decree of the Sub-Judge, 1st Court, Tipperah, dated the 22nd September 1921, reversing the decree of the Munsif 5th Court, Comilla, dated the 17th December 1920

Facts.—This appeal arose out of a suit for restitution of conjugal rights. The wife set up in defence the plea of divorce in the exercise of the authority delegated to her by a *Kabilnama* The Munsif dismissed the suit holding that the husband was not maintaining the wife for a long time and although the stipulation in the *Kabilnama* that he must reside in his father-in-law's house was void, still the plaintiff used to ill-treat his wife in various ways and there was breach of the marriage obligation on the part of the husband, he was not entitled to any assistance from the Court. On appeal the Subordinate Judge found that the ill-treatment complained of, was nothing more than simple chastisement for correction and that the terms of the *kabilnama* had not been violated and consequently decreed the suit. The defendants appealed.

Babu Gopal Chandra Das, for the appellant:—The learned Subordinate Judge had not considered the question of illtreatment from the point of view of what constitutes 'legal cruelty.' The findings of the learned judge may not be sufficient to establish cruelty in a suit for divorce but, it was sufficient for the purposes of defence in a suit for restitution of conjugal rights. The nature of cruelty necessary to be proved was quite different in the two cases.

The cases of *Moonshe Buzloor Rahim* v. *Shumsunnessa Begum* (1), *Hamid Hussain* v. *Kubra Begum* (2), *Husain Begum* v. *Md. Rustam Ali Khan* (3), cited and discussed.

Moreover the 3rd clause of the *Kabilnama*, makes it necessary that the husband shall not leave the house of the father-in-Law. 'Parabash' there has no connection with domicil at all. It means that the husband who was becoming a *ghur Jamai* shall not leave the father-in-law's house. The husband has however, deserted the wife and has not maintained her for the last 18 months. The ill-treatment coupled with the desertion of the wife and breach of the marriage contract is a sufficient defence to a suit by the husband as a plaintiff for the restitution of conjugal rights.

Babu *Upendra Kumar Ray* for the Respondent.—It is significant that in the *Talaknama* which has been exhibited in this case, ill-treatment was not made a ground of divorce at all. The allegations there were that the husband was not maintaining the wife and had left the father-in-law's house. The learned judge's finding is that the cruelty was not made out but the ill-treatment amounted to mere chastisement for correction. In view of this finding the alleged ground of cruelty fails. Moreover the inability of maintaining a wife or desertion or refusal to maintain, is not sufficient for an order of separation. Ameer Ali's Mahomedan Law, Vol. 2, p. 453. The provision about residence in the father-in-law's house is void in law. Cases of *Abdul Pirojkhan Nabab* v. *Hussanbi* (4) and *Imam Ali* v. *Arfatunnessa* (5), cited.

JUDGMENT.—This appeal arises out of a suit for restitution of conjugal rights in which the plaintiff the husband, after being unsuccessful in the Court of first instance, has obtained a decree in the lower Appellate Court The Defendants are the appellants in this Court the defendant No. 1 being the wife. The two grounds put forward in the appeal on behalf of the appellants arise upon a clause in the *Kabilnama* which has been specified therein as the third clause. That clause runs thus: "Condition No. 3: I shall not abuse my wife or beat her and I shall not go to *parabash* without her permission nor shall I marry again." The learned Vakil appearing on behalf of the appellants has contended, first, that, although the learned Subordinate Judge has found that the ill-treatment if any, which may be taken to have been proved as having been caused by the husband

(1) 11 M. I A. 551 at p. 553; 8 W. R. P. C. 3; 2 Suth P. C. J. 59; 2 Sar. P. C. J.59, 20 E.R. 203.
(2) 41 Ind. Cas. 728; 40 A. 332; 16 A. L. J. 192.
(3) 29 A. 223; 4 A. L. 60; A. W. N. (1907) 27.
(4) 6 Bom. L. R. 728.
(5) 21 Ind. Cas. 87; 18 C. W. N. 693.

to the wife does not amount to such cruelty as would entitle the wife to divorce her husband still there should be a finding by the learned Judge on the question as to whether there was such ill-treatment although it may not amount to cruelty in the eye of law, as would be a sufficient defence in a suit for restitution of conjugal rights. Secondly, it has been contended that the learned Subordinate Judge has been in error in interpreting the expression "I shall not go to *Parabash*" and that he is wrong in holding that it only means that the husband shall not go to other countries without the permission of the wife or that he shall not domicile in the lands. without her permission and that, as a matter of fact, the expression substantially means that the husband would not desert the wife. It is further said, that, if it was found that the husband did not maintain the wife for a period of about eighteen months or so, it should have been held, upon the circumstances of the case, that there was such desertion and that there was a breach of the aforesaid condition and, on that ground, the learned Judge should have refused a decree for restitution of conjugal rights.

Now, with reference to the first of these contentions reliance has been placed upon the decision of the Privy Council in the case of *Moonshee Buzloor Raheem* v. *Shumsonissa Begum* (1),and certain passages appearing at pp. 611 and 612 of the report have been relied upon as authority for the proposition that it is not absolutely necessary to resist a claim for restitution of conjugal rights, that the ill-treatment should be of such description as would amount to cruelty sufficient to obtain a divorce under the English law. Their Lordships at p. 611 quoting the *Hedaya* observed as follows:" as to personal violence there are certain passages in the *Hedaya* which, founded on a text in the *Koran*, imply that the husband may use it for correction; but this right of corporal chastisement is expressly said to " be restricted to the condition of safety "; and it may be questioned whether these authorities go the full length of the *Futwa* at p. 14 of the record (see *Hedga* Vol. II, Book VII, Ch. 6. pp. 75-81). The Mohomedan law on a question of what is legal cruelty between man and wife would probably not differ materially from our own of which one of the most recent exposition is the following:—" There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it." Thereafter, at p. 612 will be found the following further observations. " If, however, it be granted that, according to Mohemedan law the husband may sue to enforce his right to the custody of his wife's person and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows, that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights." Further on, their Lordships at p. 615 made the following observation: " It seems to them clear that if cruelty in a decree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be too that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for the refusing to him the assistance of the Court." Now, it is quite clear upon these observations that, in a case where the wife seeks to resist the enforcement of a claim for restitution of conjugal rights, it is not necessary for her absolutely to establish that there was cruelty such as would justify a divorce from her husband but that it is enough if she proves that there has been ill-treatment of some sort which would create in her an apprehension as to her life or safety. This principle has also been recognized in the case of *Hamid Husain* v. *Kubra Begum* (2), in a case which has also been relied upon by the learned Vakil appearing on behalf of the appellants. It will be seen that in that case, the lower Appellate Court was required to come to a finding upon two issues that were framed by the High Court in a suit for restitution of conjugal rights. The issues framed were (1) " It is proved that the defendant has in the past been subjected to ill-treatment, physical or mental by the plaintiff"?—(the plaintiff there being, the husband and the defendant the wife); and (2) " On the case as a whole, is the Court of opinion that the defendant has reasanable grounds for believing that her health and

safety would be endangered if she returned to her husband's custody?" The lower Appellate Court upon the evidence in the case came to the finding that there had been a good deal of ill-treatment short of physical cruelty and recorded the opinion that, by return to her husband's custody, the defendant's health and safety would be endangered. The High Court having regard to those findings refused to interfere with the decree which the lower Appellate Court had passed dismissing the plaintiff's suit. The next case relied upon with regard to this contention is the case of *Husaini Begum* v. *Mohammud Rustam Ali Khan* (3), where the following proposition of law was laid down. "In a suit for restitution of conjugal rights the parties being Muhomedans, if the defendant raises a plea of legal cruelty, the facts to be proved to establish such a plea are similar to those which must be proved to establish a similar plea under the English law. But in a suit for restitution brought by the husband misconduct on the plaintiff falling short of legal cruelty may be a ground for the Court refusing relief. Thus where the plaintiff apparently only brought his suit on account of his wife having filed another suit against the plaintiff's father and in his plaint accused his wife of immorality of the most serious kind a charge which he totally failed to substantiate, it was held that the Court would be justified in refusing him relief," and, on the general facts of the case, also, it having been found that the defendant had reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house, the Court refused to grant a decree for restitution of conjungal rights. There can be no doubt, however, that the principle enunciated by the learned Vakil appearing on behalf of the appellants is well settled. Judging by that principle, let us see what the findings of the learned Subordinate Judge in the present case amounts to? Do they really dispose of the questions which the learned Judge had to try or is it necessary that there should be a remand in order to enable him to come to a proper finding on the question as to whether, although legal cruelty has not been established, there was such ill-treatment on the part of the husband as would justify a refusal on the part of the Court to grant him a decree for restitution of conjugal rights? In order to appreciate the nature of the cruelty or the ill-treatment that was alleged in the case, it is necessary to refer to the ill-treatment which is said to have formed the justification for the first defendant's executing the *Talaknama* not that she is precluded from proving any other sort of ill-treatment in the suit but for seeing exactly what her case was. It would appear from the *Talaknama* which has been proved in this case and marked as Ex. B that there the defendant No. 1 stated this: " At present, I am passing my days in great difficulty and am suffering great trouble for want of food and raiment and you have left me and gone away to a different place and you are not maintaining me and you are also not taking me". That being the allegation in the *Talaknama* which, according to the defendant No. 1, formed the justification for the execution on her part of the document, it is rather strange that in her defence to the present suit she would put forward other sorts of ill-treatment as justifying the divorce. Be that as it may, it has been found by the learned Subordinate Judge that the evidence with regard to this cruelty as it stands when analysed amounts to simple chastisement once or twice". The learned Judge also finds that it is impossible to believe that evidence. If that be the finding of the learned Judge on the question of cruelty or ill-treatment, then there is scarcely any room for the appellant's contention noted above. Furthermore, even if it was proved, it cannot be said to be such cruelty or ill-treatment as, in the light of the decisions to which I have referred, would be sufficient to create a reasonable apprehension in the mind of the defendant No. 1 that there would be any danger to her life, health or safety in case she has got to return to her husband. I, therefore, think that the finding of the learned Subordinate Judge with regard to this question is sufficient for the purpose of disposing of the defence based on the ground of ill-treatment or cruelty that was taken by the defendant No. 1 to resort the plaintiff's claim for restitution of conjugal rights.

Now, with regard to the second contention, I am not prepared fully to agree in the interpretation which the learned Subordinate Judge has given to the expression " I shall not go to

"*Parabash*" without your permission". The learned Judge says that it means that the husband was stipulating not to go to a different place and acquire a domicile in other lands. Judging from the words appearing in the document, it seems to me that the two parts of this clause one to the effect that the husband will not go to *Parabash* and that he will not marry again are interrelated being joined by the letter "O" and stand aloof from the other conditions in that clause from which they are separated by the word "ebong" and that the real meaning of this expression is that the husband was stipulating that he would not marry again and live at a different place, without the permission of his wife. That interpretation seems to be more in consonance with the circumstance of the case, inasmuch as the husband was admittedly a *Khana-damad*, that is to say, a *ghur Jamai* and it might have been in the contemplation of the parties that the husband might not marry again and go to live in the house of his other wife abandoning the present defendant No. 1. Be that as it may, nothing has been proved in this case upon the findings of the learned Subordinate Judge to justify the inference that there was a desertion of the wife by the husband. All that has been found is that, for about eighteen months, the husband did not maintain the wife. That would not amount to desertion in the eye of law, and, as has been pointed out by the learned Vakil appearing on behalf of the respondent, inability to maintain the wife is no ground for separation under the *Hanifi* Law. "A wife under the *Hanifi* rules, cannot obtain an order for separation either for desertion or inability or refusal to maintain her." (See Amir Ali's Mohomedan Law, third Edition, vol. II, p. 453). The learned Subordinate Judge has found that there was no proof of breach of any of the other conditions mentioned in the *Kabilnama* and that none of the grounds mentioned in the *Talaknama* or in the written statement of the defendant No. 1 as being the ground justifying her refusal to live with her husband have been made out. In my opinion, the learned Judge was right in passing a decree in favour of the plaintiff. I would, therefore, dismiss this appeal with costs.

M. B. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1727 of 1919.

April 5, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

CHIRANJI LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
DOST MAHOMED—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872) s. 16—Under influence—Mortgage—Need of money—Compound interest—Interest, high rate of—Donee from mortgagor's widow, whether can object.

Urgent need of money on the part of a borrower does not of itself place the lender in a position to dominate his will the meaning of section 16 of the Contract Act.

Sunder Koer v. *Rai Sham Krishen*, 34 C. 150; 34 I. A. 9; 17 M. L. J. 43; 11 C. W. N. 249; 9 Bom L. R. 304; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106; (P. C.), followed.

There is nothing inherently wrong or oppressive in an agreement for the payment of compound interest, nor is the mere fact of the rate of interest being high sufficient to raise a presumption of undue influence.

Balla Mal v. *Ahad Shah*, 48 Ind. Cas. 1; 124 P. R. 1918; 95 M. L. J. 614; 16 A. L. J. 905; 28 C. W. N. 238; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 P. C.; *Bolaki Mal* v. *T. G. Heres*, 151 P. L. R. 1901; 96 P. R. 1901; followed.

A donee from the mortgagor's widow is not entitled; to the equities which existed in favour of the mortgagor and it is not therefore, open to him to plead that the contract of mortgage is bad for indue influence.

Aziz Khan v. *Duni Chand*, 20 Ind. Cas. 812: 305 P. L. R. 1913; 195 P. W. R. 1913, relied on.

Appeal from the decision of the District Judge, Hissar, dated the 10th May 1919.

Mr. *Tek Chand*, for the Appellants.

Mr. *Sham Lal*, for the Respondent.

JUDGMENT.—In 1896 the land in suit was mortgaged by the plaintiff's father-in-law Imam Ali to the defendants' uncle Mani Ram

for Rs. 480. After Imam Ali's death his widow in 1917 made a gift of the land to the plaintiff, who now sues for redemption. The mortgage-deed provided that the mortgagor would remain in possession of the land and pay interest annually at the rate of Rs. 1-9-0 *per cent. per mensem.* In default of such payment the mortgagor was to deliver possession to the mortgagee and pay him interest less the amount of the profits of the land, and, in case of failure to pay the interest, he would be liable to pay compound interest. There was also a stipulation that the mortgagor would redeem the land by payment of the principal interest, and compound interest within three years, otherwise the land would be deemed to be sold to the mortgagee, but the conditional sale clause was struck out by the Deputy Commissioner in 1903 under section 9 of the Land Alienation Act.

The question is as to the amount payable to defendants, who in the first Court claimed Rs. 18,194 on account of interest and compound interest in addition to the principal sum of Rs. 480. The Courts below have concurred in finding that the mortgage was brought about by undue influence. The Subordinate Judge held that, as the defendants' father had taken possession of the land soon after the mortgage, the defendants were not entitled to the interest and compound interest which they claimed, and he allowed, on account of interest, an amount equal to the amount of the principal, and passed a decree for redemption on payment of Rs. 960. The District Judge on appeal held that the defendants were entitled to simple interest at the rate of Rs. 1-9-0 *per cent. per mensem.* He found that the mortgagee obtained possession of the land in 1903 and that the profits amounted to Rs. 450, and deducting this sum from the amount of interest and adding the principal, he enhanced the amount payable to the defendants to Rs. 2,010. The defendants have preferrred a second appeal to this Court.

The lower Appellate Court's finding as to undue influence cannot be supported. In the first place, the mortgagor of his own accord delivered possession of the land to the mortgagee and never protested that there had been any undue influence. In the second place, the plaintiff, never alleged undue influence in his plaint or objected to the terms of the mortgage, and, in act, he recognised the terms as binding, but pleaded, that after the principal, interest and the compound interest had been allowed for, there was a sum of Rs. 1,200 due to him. The plea of undue influence was an afterthought on the part of the plaintiff's pleader, who, when examined after the defendants had filed their pleas, said that owing to the famine prevailing at the time of the mortgage, the plaintiff was under the undue influence of the defendants. He did not set forth the facts which constituted undue influence, and the plea was obviously wrong, as the plaintiff was not the person who mortgaged the land and the defendants were not the persons to whom it was mortgaged. It was indeed not open to the plaintiff's pleader to set up such a plea which was inconsistent with the plaint. Besides this it would not be open to the plaintiff himself to plead that the contract is bad for undue influence as he is only a donee from the mortgagor's widow and is not entitled to the equities which existed in favour of the mortgagor, *Aziz Khan* v. *Duni Chand* (1).

There is moreover no evidence to support the finding. The learned District Judge says that 1896 was a year of famine and that the mortgagor was obliged to borrow in order to support himself and his family, and he points out that only Rs. 101 out of the mortgage money were paid to the mortgager in cash, the rest of the consideration being made up of debts due to the mortgagee. Taking all the circumstances into consideration he concludes that the mortgagee dominated the mortgagor's will and took an undue advantage of his embarrassing financial position. With this view we cannot agree. It has been held by their Lordships of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* (2) that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will. They have also held in *Balla Mal* v. *Ahad Shah* (3) that there is

(1) 20 Ind. Cas. 812; 305 P. L. R. 1913; 195 P. W. R. 1913.

(2) 34 C. 150; 34 I. A. 9; 17 M. L. J. 439; 11 C. W.N 249; 9 Bom. L R. 304; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106 (P. C).

(3) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614 16 A. L. J. 905; 28 C. W. N. 238; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L R. 558 (P. C.)

nothing inherently wrong or oppressive in an agreement for the payment of compound interest. The rate of interest in the present case was not exorbitant, and the mere fact of its being high would not be sufficient to rise a presumption of undue influence, *Bulaki Mal* v. *T. G Heres* (4). The terms of the mortgage cannot be regarded as unconscionable, and the *onus* is on the plaintiff to show that undue influence was exercised. It is to be observed that the mortgagor was a *lambardar* of the village and was not an ignorant *zemindar* or a man whose faculties were enfeebled by old age. The lower Appellate Court has cited four rulings, of which one is quite irrelevant, another is a misquotation, and the other two are distinguishable from the present case. We hold that the plaintiff has entirely failed to prove that any undue influence was exercised.

It is contended on behalf of the plaintiff that the mortgagee's right to interest ceased from the time when he obtained possession of the land. But this contention is opposed to the terms of the mortgage-deed, and the conditions with regard to interest were in no way affected by the fact of the conditional sale clause being struck out.

In this Court as well as in the lower Appellate Court the defendants have not asked for the amount which they claimed in the first Court, but have limited their claim to Rs. 6,710. To this they are entitled, and we accordingly dismiss the plaintiff's appeal and, accepting that of the defendants, we alter the decree to one for possession of the land in suit on payment of Rs. 6,710. The plaintiff will pay the defendants' costs throughout.

Z. K. *Appeal allowed.*

(4) 96 P. R. 1901 ; 151 P. L. R. 1901.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 43 OF 1924.

April 9, 1924.

Present :—Mr. Justice Daniels.

TOTA RAM—PETITIONER
versus
PANNA LAL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, scope of—Application beyond time, admission of—Inherent power of Court.

Section 151 of the Civil Procedure Code is not intended to override the express provisions of the law. On the other hand it is intended for cases for which the strict letter of the law provides no remedy.

Where the law provides a period of limitation for a particular class of applications, the Court cannot admit them beyond time by applying section 151 of the Civil Procedure Code.

Joshi Shib Prakash v. *Jhinguria*, 78 Ind. Cas. 416 ; 46 A. 144 ; *Ajodhya Mahton* v. *Phul Kuar*, 65 Ind. Cas. 341 ; 1 Pat. 277 ; (1922) Pat. 61 ; (1922) A. I. R. (Pat.) 479 ; *Bissa Mal* v. *Kesar Singh*, 58 Ind. Cas. 789 ; 1 L. 863 ; *Bhausing* v. *Choganiram Hurchand*, 45 Ind. Cas. 552 ; 42 B. 363 ; 20 Bom. L. R. 348 ; *Ramchandra Govind Thamare* v. *JayantaRavji*, 59 Ind. Cas. 715; 45 B. 503 at p. 507; 22 Bom. L.R. 1409; *Krishnaswamy Naidu* v. *Chengalraya Naidu*, 76 Ind. Cas. 836 ; 47 M. 171 ; 18 L. W. 870 ; 45 M. L. J. 813 ; 33 M L. T. 207 ; (1924) A. I. R. (M) 114 ; *Sabitri Thakurain* v. *Sari*, 60 Ind. Cas. 274 ; 48 C. 481 at p. 491 ; 40 M. L. J. 308 ; (1921) M. W. N. 159 ; 19 A. L. J. 281 ; 48 I. A. 76 ; 33 C. L. J. 307 ; 25 C. W. N. 557 ; 23 Bom. L. R. 681 ; 14 L. W. 362 ; 3 U. P. L. R. (P.C.) 57 (P. C.), relied on.

Civil revision from the order of the Munsif, Haveli, Aligarh, dated the 26th January 1924.

Messrs. *P. L. Banerji* and *S. N. Gupta*, for the Appellant.

JUDGMENT.—This is an application for revision of an order passed by the Court below restoring an application for cancellation of a sale. The application was originally dismissed for default. The application to restore was not made within the time allowed by law. The Court below has, however, allowed it in the exercise of its inherent powers under section 151 of the Code. It is established by ample authority that section 151 is not intended to override the

express provisions of law. In other words where the law provides a period of limitation for a particular class of application the Court cannot ignore the provisions of the law of limitation by appealing to section 151 of the Code. That section is intended for cases for which the strict letter of the law provides no remedy. This was the view taken by this Court in a very recent case, *Joshi Shib Prakash* v. *Jhinguria* (1). There are also decisions of the Patna *Ajodhya Mahton* v. *Phul Kuar*(2) Lahore, *Bissa Mal* v. *Kesar Singh* (3) Bombay, *Bhausing* v. *Chaganiram Hurchand* (4) and *Ramchandra Govind Thomare* v. *Jayanta Ravji* (5), and Madras *Krishnasamy Naidu* v. *Chengalraya Naidu* (6) High Courts to the same effect. There are observations to the same effect in the judgment of their Lordships of the Privy Council in *Sabitri Thakurain* v. *Sari* (7).

I accordingly set aside the order of the Court below. The application for cancellation will stand dismissed with costs in both Courts.

N. H. *Order set aside.*

(1) 78 Ind. Cas. 416; 46 A. 144.
(2) 65 Ind. Cas. 341 ; 1 Pat. 277 ; (1922) Pat. 61 ; (1922) A. I. R. (Pat). 479.
(3) 53 Ind. Cas. 789; 1 L. 363.
(4) 45 Ind. Cas. 552; 42 B. 363; 20 Bom. L. R. 348.
(5) 59 Ind. Cas. 715; 45 B. 503 at p. 507; 22 Bom. L. R. 1409.
(6) 76 Ind. Cas. 886 ; 47 M. 171 ; 18 L. W. 870 ; 45 M. L. J. 813; 23 M. L. T. 207; (1924) A. I. R. (M.) 114.
(7) 60 Ind. Cas. 274; 48 C. 481 at p. 491; 40 M. L. J. 808; (1921) M. W. N. 159; 19 A. L. J. 281; 48 I. A. 76 ; 33 C. L. J. 807 ; 25 C. W. N. 557 ; 23 Bom. L. R. 681; 14 L. W. 362; 3 U. P. L. R. (P.C.) 57 (P.C.).

LAHORE HIGH COURT.

SECOND CIVILL APPEAL NO. 1831 OF 1919.

April 16, 1923.

Present:—Mr. Justice Campbell and Mr. Justice Moti Sagar.

THAKUR DAS AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BISHAN DAS—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908) Sch. I, Arts. 57, 85—Mutual account, what are—Creditor and debtor—Cash advances and repayments in kind—Account, nature of—Suit to recover balance—Limitation.

An account is said to be mutual within the meaning of Article 85 of schedule I of the Limitation Act when there are transactions on each side creating independent obligations on the other. When the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account cannot be said to be mutual.

Case-law discussed.

When it was found that the transactions between the parties where those of creditor and debtor and that the defendants borrowed money from the plaintiffs and sent them commodities, the proceeds of which were applied to re-paying cash loans, and the accounts disolosed no independent obligations on both sides or occasions for mutual demands.

Held (1) that the account was not a mutual one within the mening of Article 85 of Schedule I to the Limitation Act.

(2) that the case was governed by Article 57 of Schudule I to the Limitation Act.

Second appeal from the decision of the District Judge, Lyallpur, dated 4th July 1919.

Mr. *Mehr Chand*, for the Appellants.

Mr. *Tek Chand*, for the Respondent.

JUDGMENT.—The main question in this second appeal is one of limitation.

The plaintiffs sued the defendants on account claiming Rs. 1,450. The suit was instituted on the 30th of August 1918. The accounts showed a balance struck of Rs. 361-6-0 in favour of the plaintiffs on the 7th of Jeth

1970 corresponding with the 20th of May, 1913. Thereafter the accounts continued for another year and ended with a total in favour of the plaintiffs of Rs. 832-9-0. No second balance was struck formally. Interest at 1 *per cent per mensem* was claimed bringing the amount in suit, as already stated,up to Rs. 1,450-0-0.

The Trial Court gave the plaintiffs a decree for Rs. 1,210 made up of Rs. 832-9-0 principal and Rs. 377-7-0 interest. This order was affirmed on appeal by the learned District Judge.

The defendants have pleaded from the outset that the plaintiffs were their commission agents ; that the account was an open, current and mutual account within the meaning of article 85 of the Limitation Act, and that the claim was, therefore, time-barred since the limitation period under article 85 is three years from the close of the year in which the last admitted or proved item is entered.

Both the Courts below concurred in holding that the article applicable was article 57, for which the period is six years under the Punjab Loans Limitation Act of 1904, the balance being treated as an acknowledgment starting a fresh period of limitation under section 19 of Act IX of 1908.

The finding recorded by the learned District Judge is that the transactions between the parties were those of creditor and debtor and that the defendants were borrowing money from the plaintiffs and were sending them commodities, the proceeds of which were applied to repaying cash loans. He held that the accounts disclosed no independent obligations on both sides or occasions for mutual demands and, therefore, that the account was not a mutual one and article 85 did not apply.

In second appeal apart from an objection regarding the award to the plaintiffs of interest to which reference will be made later, the contentions of the appellants are confined to the point of limitation. *Diwan* Mehr Chand for the appellants has argued, firstly, that the balance of the 20th of May 1913, does not affect in any way the previous dealings between the parties and neither creates a fresh cause of action nor establishes the relation of borrower and lender in respect of each account. Secondly, he asks us to separate from the rest of the account three transactions in which the plaintiffs bought wheat in the market and sold it on the defendants' behalf to Louis Dreyfus and Co. at a lower price than that for which it was purchased. Two of these transactions were previous, and the third was subsequent, to the striking of the balance. *Diwan* Mehr Chand refers to a statement made before issues in the Trial Court by Diwan Chand the plaintiff's agent that the plaintiffs had actedas the defendants' commission agents in these transactions and he contends on the strength of what was ruled in *Manghi Ram* v. *Ram Saron* (1) that they fall under article 83 as contracts to indemnify. As for the remainder of the account *Diwan* Mehr Chand argues that its form shows it to have been mutual, open and current within the meaning of article 85.

The rulings relied upon by *Diwan* Mehr Chand on his first point regarding the effect of the balance are *Ganpat* v. *Daulat Ram* (2), *Pala mal* v. *Tula Mal* (3) *Jas Ram* v. *Attar Chand* (4). Mr Tak Chand, for the plaintiffs, has argued with much ingenuity that these authorities are obsolete. He points out that all three have a common source in *Chowksi Humutlal Harivulubhdas* v. *Chowksi Achrutlal Harivulubhdas* (5), which was afterwards affirmed in *Shankar* v. *Mukta* (6), and he has referred us to a later Bombay case, *Vasudeo Anant* v. *Ram Krishna Rao* (7), where the decision in *Shankar* v. *Mukta* (6), that an acknowledgment cannot form the basis of a suit, has been held to have been virtually overruled by their Lordships of the Privy Council in *Maniram Seth* v. *Seht Rup Chand* (8), a case not referred to in any of the Punjab rulings. We do not think it necessary to pursue this line of reasoning since in our opinion, we are bound in second appeal by certain findings by the lower Appellate Court which render the effect of the balance of slight

(1) 26 Ind. Cas. 415 ; 23 P. R. 1915 ; 218 P. W. R. 1914 ; 100 P. L. R. 1915.
(2) 68 P. R. 1901 ; 123 P. L. R. 1904.
(3) 119 P. R 1903 ; 206 P. W. R. 1908.
(4) 30 Ind. Cas. 491 ; 16 P. R. 1916 ; 178 P. L. R. 1915 ; 118 P. W. R. 1915.
(5) 8 B. 194 ; 4 Ind. Dec. (N. S.) 503.
(6) 22 B. 513 ; 11 Ind. Dec. (N. S) 923.
(7) 24 B. 394; 2 Bom L R. 122; 12 Ind. Dec. (N. S) 795.
(8) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501 ; 10 C. W N. 874; 1 M. L. T. 199; 8 A. L. J. 525; 16 M. L. J. 300; 2 N L. R. 130; 33 I. A. 165 (P. C.).

importance, except for the purposes of section 19 of the Limitation Act.

The learned District Judge had held in effect after considering the evidence and the accounts that the grain and other produce, the price of which is shown in the plaintiffs' accounts to the credit of the defendants, were sent by the latter to the former not for commission sale but as re-payment of cash loans. This is a finding of fact. It is true that in a case, which has some points in common with the present case and which is reported as *Ratan Chand Jwala Das* v. *Asa Singh Bogha Singh* (9), it was held that while the simple relation of creditor and debtor existed between the parties in regard to the cash advanced by the plaintiffs to the defendants, the relation of principal and agent existed between the defendants and the plaintiffs in regard to the sale of the former's grain. In that case article 85 was held to apply to the accounts in suit but the facts are not precisely the same. The learned Judge of this Court who delivered the judgment remarked that if it was shown that the plaintiffs had made advances to the defendants and that the defendants from time to time sent them consignments of grain in part payment, article 85 would not apply. He observed, however, that the plaintiff had admitted in the witness-box that the defendants were grain dealers and that he was their commission agent and further that the defendants' grain used to lie at his shop for more or less long periods after which he used to sell it and deducting his commission and other charges, used to credit the balance to the defendants' account. In the present case *Diwan* Mehr Chand wishes us to hold contrary to the lower Appellate Court that the plaintiffs throughout the dealings were commission agents for the defendants. At the same time he contends that we must view the accounts as a whole and that we should not determine the relationship between the parties by reference to one or two particular items. This contention is not quite consistent with his original argument that the three transactions with Louis Dreyfus and Co. should be separated from the others but in our opinion it is the correct view.

(9) 59 Ind. Cas. 669; 3 U. P. L. R. (L) 3; 26 P. W. R. 1921.

As regards the sales to Dreyfus and Co. of wheat purchased by the plaintiffs on the instructions of the defendants, the defendants' present assertion that there were transactions in which the plaintiffs acted as their commission agents is inconsistent with their original plea in the Trial Court that they had not authorised the transactions. We cannot say that the lower Appellate Court came to a decision contrary to law in regarding the transactions as mere incidents in the process of repayment of money borrowed by the defendants.

The other sales recorded in the account were of the defendants' own wheat, cotton, etc., sent by them to the plaintiffs. The charging of *arhat* against the defendants does not in itself prove the plaintiffs to have been commission agents. For all that we know the *arhat* may have been paid to third parties in the same way as other miscellaneous charges, such as those for weighment, obviously must have been paid and we have no reason to suppose that this point was overlooked by the learned District Judge. The isolated occasion on which the balance stood on the defendants' side for one day has been considered and explained by him. The plaintiffs may have been under the obligation to account for the produce received by them, but a creditor is always obliged to account. The learned District Judge is not shown to have disregarded anything indicating the existence of independent obligations on both sides.

We do not think it necessary to notice all the other numerous authorities cited before us since the nature of the particular accounts in question must always be the determining factor and no precisely identical case has been put before us. On the view that he takes of the facts the learned District Judge is supported by *Shine Gowda* v. *Fernandez* (10), and *Ishar Das* v. *Harkrishen Das* (11). In *Jas Ram* v. *Attar Chand* (1) quoted by *Dewan* Mehr Chand the contest was merely between article 85 and article 64 and the dealings between the parties are described

(10) 8 Ind. Cas. 141; 34 M. 513; 8 M. L. T. 412; (1911) 1 M. W. N. 1; 21 M. L. J. 391.

(11) 35 Ind. Cas. 577; 148 P. W. R. 1916; 7 P. L. R. 1917.

as being "of various kinds." In *Doger Mal* v. *Mula* (12) it had been admitted that the accounts had been mutual and to start with the plaintiffs had supplied goods as well as cash to the defendants. In *Imart Lal* v. *Lal Chand* (13), the balance had shifted frequently.

The test of a mutual account is set forth, among other authorities, in the case on which the defendants most strongly rely, *Ratan Chand Jwaler Das* v. *Aza Singh Bogha Singh* (9). An account is mutual when there are transactions on each side creating independent obligations on the other, and, where the transactions create obligations on one side only those on the other being merely complete or partial discharges of such obligations, the account is not mutual. Applied to the facts of the present case this test vindicates the decision of the lower Appellate Court that Article 85 does not govern the suit. As for Article 83 the account, as we have stated already, has to be taken as a whole. The case cited for the defendants in this connection *Mangi Ram* v. *Ram Saran Das* (1), was not one in which a few items were extracted and treated separately, but the decision was given on the whole account.

The second point argued in appeal is in regard to interest. The rate at which interest has been added to the principal in the decree was not attacked in the appeal to the District Judge and the grant of future interest at 6 *per cent. per annum* is an exercise of discretion with which we are not disposed to interfere.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(12) 54 Ind. Cas. 453 ; 17 P. W. R. 1920 ; 9 P. L. R. 1920.

(13) 7 Ind. Cas. 715 ; 75 P. R. 1910 ; 99 P. W. R. 1910 ; 124 P. L. R. 1910.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 954 OF 1922.

May 7, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

CHETAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SARTAJ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Brothers and sons—Mortgage by brothers—Mortgage by managing members—Presumption—Suit on mortgage—Sons, whether necessary parties.

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members.

Madan Lal v. *Kishan Singh*, 15 Ind. Cas. 138; 34 A. 572; 9 A. L. J. 844; *Krishna Jiva Tewari* v. *Bishnath Kalwar*, 16 Ind. Cas. 392 ; 34 A. 615; 10 A. L. J. 217, relied on.

In a suit on a mortgage executed by certain brothers, forming along with their sons a joint Hindu family, an objection was taken that the sons also should have been joined as parties. On the day, however, the latter were added as parties the suit against them stood barred by limitation. The Court accordingly dismissed the entire suit. There was no allegation in the plaint that the brothers were being sued as managers. On appeal :—

Held, that it should be taken that the brothers were being sued as managers and that the sons were sufficiently represented by their fathers and the suit ought not to have been dismissed.

Hari Lal v. *Manman Kunwar* 15 Ind. Cas. 126 ; 34 A. 549 ; 9 A. L. J. 819, followed.

Appeal from a decree of the District Judge, Shahjahanpur, dated the 18th April 1922.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for sale on a mortgage. The mortgage was executed in the year 1908 by three brothers the first two of whom are defendents Nos. 1 and 2 and the mother and heir of the third is defendant No. 3. The property mortgaged was

joint family property. On an application made by the defendants during the pendency of the suit the defendants Nos. 6 to 10 who are the sons of defendants Nos. 1 and 2 the original mortgagors were added as parties. At the time when they were so added more than twelve years had elapsed from the date when the mortgage-money became payable. On this ground both the Courts below have dismissed the entire suit with reference to O. XXXIV, r. 1, of the Code of Civil Procedure.

In appeal to this Court it is contended, as it was contended in the Courts below, that the added defendants are sufficiently represented in the suit by their respective fathers who are admittedly the managing members of the joint family. This plea is supported by the Full Bench ruling in *Hari Lal* v. *Munman Kunwar* (1). The same view was followed shortly afterwards in *Madan Lal* v. *Kishen Singh* (2). in a case in which the mortgagor was plaintiff; and in *Kriskna Jiva Tewari* v. *Bishnath Kalwar* (3) it was further held that where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members.

We find it impossible to distinguish the present case from *Hari Lal* v. *Munman Kunwar*.(1) All the material circumstances are the same. The suit was brought against the original mortgagors. Objection was taken that the sons ought to have been joined. At the time when the objection was taken a suit against the sons would have been barred by limitation. All these circumstances are present in the case before us. The learned District Judge has attempted to distinguish the case on the ground that it was not formally stated in the plaint that the defendants were being sued as managers. A perusal of the judgments in *Hari Lal* v. *Munman Kunwar* makes it sufficiently clear that this allegation was equally absent from the plaint in that case. As here it was at the instance of the defendants that the question whether the sons were represented by their fathers was raised. Following the ruling in that case we hold that the Courts below were wrong in dismissing the suit. The Trial Court decided all the issues before it except the issue of legal necessity. That issue must now be tried.

We accordingly set aside the decrees of the Courts below and remand the case through the lower appellate Court to the Court of first instance for decision after coming to a finding on the remaining issue. Costs here and heretofore will abide the result.

N. H. *Case remanded.*

(1) 15 Ind. Cas. 126 ; 34 A. 549; 9 A. L. J. 819.
(2) 15 Ind Cas. 198 ; 34 A. 572 9 A. L. J. 844.
(3) 16 Ind. Cas. 592 ; 34 A. 615 ; 10 A. L. J. 217.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 4 OF 1922.

January 8, 1924.

Present :—Mr. Baker, J. C., and Mr. Hallifax, A. J. C.

Sir G. M. CHITNAVIS AND OTHERS—DEFENDANTS—APPELLANTS

versus

NATHU SAO—PLAINTIFF—RESPONDENT.

Hindu Law—Time-barred debt of father—Son, liability of—Civil Procedure Code (Act V of 1908), O. XXI, r. 63 ; O. XXIII, r. 1—Limitation Act (IX of 1908) Sch. I, Art. 11—Objection to attachment—Withdrawal of objection—Order without investigation—Declaratory suit—Limitation.

A Hindu son is under no obligation to pay a time-barred debt of his father and his estate is not liable to be sold for the payment of such a debt.

Subramania Aiyar v. *Gopala Aiyar*, 7 Ind.Cas. 898; 33 M. 308 ; 8 M. L. T. 321 ; 20 M. L. J. 688 ; *Naro Gopal* v. *Paraganda*, 89 Ind. Cas. 28 ; 41 B. 347 ; 19 Bom. L. R. 69, relied on.

Chowdhury Chuttarsal Singh v. *The Government*, 3 W. R. 57, distinguished.

The period of limitation for a suit to set aside an order under O. XXI, r. 63 of the Civil Procedure Code is one year, even if the order is passed without any investigation or consideration of the merits of the claim or objection.

Venkataratnam v. *Ranganayakamma*, 48 Ind. Cas 270; 41 M. 985 ; 24 M. L. T. 197 ; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 885 (F.B.); *Nogendra Lal Chowdhury* v. *Kani Bhusan Das*, 44 Ind. Cas. 265; 45 C. 785; 23 C. W. N. 875, followed.

CHITNAVIS *v.* NATHU SAO

But where the objection is withdrawn and the proceedings are dropped in consequence the order is equivalent to one under O. XXIII. r. 1 of the Code granting permission to withdraw with liberty to institute fresh proceedings and is not under O. XXI, r. 63 of the Code so as to bar a subsequent suit not instituted within one year.

Appeal against the decree of the Additional District Judge, Nagpur, dated the 16th November 1921, in Civil Suit No. 21 of 1919.

Messrs. *V. Bose*, *W. R. Puranik* and *A. D. Mande*, for the Appellants.

Messrs. *R. B. N. G. Bose*, *D. W. Kathalay* and *K. V. Vazalwar*, for the Respondent.

JUDGMENT.—This was a suit brought by Nathu Sao Lad of Ellichpur for the enforcement of a mortgage by foreclosure. The mortgage was executed on the 15th of April 1915 on behalf of the first defendant Bhagwan Sao Lad, who is still a minor, by his mother Khushal Bai. The property covered by it is a house and *kotha* in Nagpur, and a *kotha* and two *malik makbuza* fields (9·43 and 9·08 acres in area) at Saoli, a village about eight miles from Nagpur. The first two matters mentioned in the petition of appeal of four of the defendants are simple and do not need any long discussion. The first appellant Sir Gangadhar Rao Chitnavis was impleaded as the ninth defendant on the ground that certain other defendants had purchased portions of the mortgaged property at sales in execution of decrees and had subsequently sold them to him. An unnecessary finding was recorded in the judgment of the lower Court that the ninth defendant had failed to prove these transfers by production of the sale-deeds; the decree however gives him the right to redeem. The first ground of appeal is that this finding is wrong, but that, in view of the decree, is more unnecessary than the finding itself; it was expressly abandoned in this Court.

The second matter is the due attestation of the execution of the mortgage bond. This was formally denied by some of the defendants but admitted by Khushal Bai for herself and for her son. The witnesses examined to prove due compliance with all the formalities of attestation were Yeshwant Rao Maratha (P. W. 1) the petition writer who wrote the deed, Ratan Sao Lad (P. W. 2) one of the attesting witnesses, Lakshman Puranik (P. W. 4) and Onkar Sao Lad (P. W. 13), agents of the plaintiffs who managed the affair, and Khushal Bai (P. W. 17) herself. Each of these witnesses was subjected to a cross-examination of portentous length of which the result could not possibly have been more than a few variations or contradictions as to details which would not affect their credibility in the least, and was much more likely to be what it was in fact, a very complete confirmation of the truth of their story of meticulously proper and formal attestation.

The sole reliance of the appellants is on statements made on the same subject in 1917 by the two attesting witnesses, in the course of proceedings to which reference will be made later. Copies of these depositions are filed as Exhibits IX D. 4 and IX D. 5. If they are read entirely by themselves it is possible to misunderstand them into statements that the execution was not duly attested, though even that is not easy. That possibility is, however, completely excluded by the statements now made by the witnesses, especially those in cross-examination. The earlier depositions are short but did not really differ in any of the details then given from the much fuller statements now made, which explain the ambiguities in them due to their shortness. At the most, these two statements would furnish reason for disbelieving the present statements of the two attesting witnesses; they are not substantive evidence. Even if they directly contradicted the present statements, it would be manifest from the evidence of the other witnesses and from the depositions now made by the two witnesses themselves that they were false. It is beyond doubt that the execution of the mortgage bond by Khushal Bai was duly attested according to law.

The whole consideration of the mortgage is the amount of debts due to the plaintiff on long standing current accounts by Ganga Sao, father of the minor Bhagwan Sao, and Ganga Sao's younger brother Jaman Sao. They formed a joint Hindu family with Bhagwan Sao till they both died in January 1915, Jaman Sao on the 12th and Ganga Sao on the 14th, during an epidemic of plague. The mortgage-deed was executed just three months later, and, apart from the pleas of trust and agency, it is admitted that recovery of the amounts due as the balance of the accounts was then

barred by time, unless the accounts were mutual as well as open and current. There are two accounts, the first in the name of the younger brother Jaman Sao, who was till his death an agent of the plaintiff and Gomashta or Manager of his cloth shop in Nagpur. He kept an account as between himself and the plaintiff, beginning from November 1896 (Exhibit P. 2) and continuing till his death in January 1915, or just over eighteen years.

This account opens with a credit of the amount of Jaman Sao's pay for one year, and all through there is no other item of credit except a very few of small sums not exceeding ten rupees. There was never a balance in favour of Jaman Sao, and it is perfectly clear that he was merely drawing against his salary. It is true that an account may be "mutual" although the balance is always one way, provided the parties contemplated that it might shift to the other side at times, but here the fact that practically the only credits to Jaman Sao are his wages and still more the fact that for so long as eighteen years there was never once a balance in his favour prove beyond doubt that the parties never did contemplate anything of the sort.

But the whole situation is explained by Onkar Sao (P. W. 13) the plaintiff's own Head Munim, who inspected the Nagpur shop and audited the accounts at least once a year. He speaks on behalf of the plaintiff himself, and is recorded as saying: "I found Jamansa used to borrow from this Nagpur shop moneys, and at the end of every year there was a balance against him in the accounts of the shop as debts due from him. I used to tell all these balances every year to my Malik. Malik believed in him and hence he did not say anything. The balance was thus due from him every year and continued up to his death."

In cross-examination this witness added: "Jamansa's pay was Rs. 600 per year. He never took his pay regularly per year in one lump sum. He used to borrow much more in excess, every year. I used to make reports every year. But Malik did not object as he was a confidential servant. No *ruzu* was got made from (sic) plaintiff. No interest was charged, as Malik had exempted him from interest. The were no debit transactions in my Malik's name, credit to Jamansa. In my presence Malik did not ask him to pay his dues. Malik asked me to dun him and I dunned him 25 or 30 times at least. When I was hard against him, he used to go to Malik and satisfy him. Every time I asked him to give him a promissory note or *Ruzu* or bond, and every time he said that if Malik asked him he would give one. I never asked him to give a mortgage deed. He never gave a *ruzu* or promissory note to me. He went to my master and satisfied him. I asked him several times why he borrowed so much. He said he had purchased fields and built a *Kotha* and houses. I did not enquire what were his annual family expenses. He had no family estate at all to begin with."

Even without this clear statement of the position by the plaintiff's own representative it would be impossible to suppose that Nathu Sao was borrowing money from the man he employed to look after his branch shop in Nagpur, who owned no property at all when he entered his service. It is hardly necessary to mention the plea taken here as well as in the lower Court that the position of Jaman Sao in respect of this account was that of a Trustee or of an Agent; he was obviously nothing of the sort. The recovery of Rs.10,378-11-0 of the debt of Rs. 12,000 which formed the consideration for the mortgage was therefore barred by time when the mortgage was executed.

Another matter of primary importance that has been left clear out of sight is that this account was Jaman Sao's private and separate account. Ganga Sao, the father of the minor had nothing whatever to do with it, and neither he nor the minor was liable for the excess over his salary drawn by Jaman Sao. Their shares in the property might possibly be so liable if it were proved that the whole property had been acquired by means of those overdrafts, but that has certainly not been proved nor even definitely alleged. Now on Jaman Sao's death, which occurred two days before Ganga Sao's, neither his brother nor his nephew, who became owners of his share in the property by survivorship, became liable for the debt as his legal representatives under section 53 of the Civil Procedure Code as Jaman Sao was not an ancestor of either of them. This debt therefore, which is more than six-sevenths of the total consideration of

the mortgage, was never a debt due by the minor's father at all.

The comparatively small balance of Rs. 1,621-5-0 was due on a separate account which was kept in the name of Gangasa only, though it was really the account of the joint family consisting of both brothers. It was opened in November 1901, beginning with a debit against the family of Rs 540, and ran for just over thirteen years. The two brothers owned a shop of their own for the sale of cloth and groceries, and took goods for it from the plaintiff's shop and also supplied goods from it to the plaintiff's shop on occasion. This account showed a balance in favour of the two brothers at the end of only the second, fourth and fifth years of the thirteen during which it ran. The plaintiff's agent Onkar Sao (P. W. 13) says: "Gangasa and Jamansa were joint. Jamansa was *Karta*. Gangasa was elder. He was not active at all. Jamansa did all work and business and hence he was *Karta* of the family." It seems therefore that any credit in this account would be regarded only as going to balance the debits in the other. But even if the account in Ganga Sao's name is to be treated as entirely separate, the three apparently accidental credit balances will not even indicate mutuality. The plea of agency or trusteeship is even less applicable to "Gangasa's" account than to "Jamansa's", and it must be held that the recovery of the whole of the debt which formed the consideration of the mortgage was barred by time when the mortgage was executed.

Now, though the decision really affects less than one-seventh of the total consideration of the mortgage, it has still to be decided whether the alienation of the minor's estate was justified by the fact that it was made for the payment of his father's debt of which the recovery was barred by time, that is to say whether a son is bound to pay such a debt under the Hindu Law. It has been consistently held that he is not. This proposition was taken almost for granted without discussion by the Madras High Court in *Subramania Aiyar* v. *Gopala Aiyar* (1) and by the Bombay High Court in *Naro Gopal* v. *Paraganda* (2).

(1) 7 Ind. Cas. 898 ; 33 M 308 ; 8 M. L. T. 321 ; 20 M. L. J. 633.

(2) 39 Ind. Cas. 23 ; 41 B. 347 ; 19 Bom. L. R. 69.

In *Dalip Singh* v. *Kundan Lal* (3) the Allahabad Court went further and held that a Hindu father cannot himself revive a time-barred debt of his own so as to authorise him to alienate his son's share in the joint property for its satisfaction, because there is no legal necessity for the revival of the debt. If the father's own powers of alienation were in question, this decision might be found to go too far in view of that of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (4), and of the remarks in the Madras case just mentioned as to the continued existence of a debt even after its recovery by suit is no longer possible. We are not however concerned with that, but the proposition that a Hindu is under no obligation to pay a time-barred debt of his father's was also mentioned incidentally as beyond controversy in *Sahu Ram Chandra* v. *Bhup Singh* (4). The appellants in that case sought to enforce against the sons of one Bhup Singh a mortgage executed by Bhup Singh alone for money lent to him, and their Lordships said: "Except under the mortgage all other remedies have long ago disappeared, and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh, because that debt as such cannot be successfully sued for."

The only case mentioned on the other side is that of *Chowdhry Chuttarsal Singh* v. *The Government* (5). That was decided as long ago as 1865 and does not state anything like the proposition in support of which it is cited. The matter seems to rest on the fairly obvious principle that even if a man's father owed a sum of money at one time but cannot, or could not if he were alive, be compelled to pay it now, either because he has paid it or because the recovery is barred by time or for any other reason, the man himself cannot be compelled to pay it, nor could it be called even his pious duty as a Hindu to do so. In this view it must be held that the consideration of the mortgage was not such as to justify any alienation of the estate of the minor by his guardian.

(3) 18 Ind. Cas. 726 ; 35 A. 207 ; 11 A. L. J. 244.

(4) 39 Ind. Cas. 280 ; 39 A. 437 ; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14 ; (1917) M. W. N. 439; 22 M. L. T. 22 ; 6 L. W. 213 ; 44 I. A. 126 (P. C.).

(5) 3 W. R. 57.

CHITNAVIS v. NATHU SAO

In the lower Court it was pleaded for the second, third and fourth appellants, Hira Sao and his two sons, that the suit on the mortgage was barred by time against them and in respect of the portion of the mortgaged property in their hands, by reason of an application made by the plaintiff under Rule 58 of Order 21 of the Civil Procedure Code and dismissed more than one year before he filed the present suit. Hira Sao obtained a decree against the minor Bhagwan Sao as the legal representative of his deceased father, and in execution of it attached and brought to sale the *kotha* in Nagpur and the *kotha* in Saoli, which he purchased himself.

On the 31st of July 1916 the present plaintiff put in a petition in the execution proceedings which ended in the sale, praying that the property might be sold subject to his mortgage lien under rule 62 of Order 21. The decree holder Hira Sao denied the validity of the mortgage, mainly on the ground that the execution of the bond had not been duly attested. Evidence was adduced by the mortgagee who called the two attesting witnesses. Copies of their depositions are filed here as Exhibits IX D. 4 and IX D. 5. The evidence was regarded as not proving due attestation because of " the confusion made by the attesting witnesses in their evidence about time of attestation, " though it is apparent now that the confusion in the matter was in the minds of the Judge and the pleaders on both sides, and it would have been cleared up if the witnesses had been examined with reasonable care. The pleader for the present plaintiff then prayed for an opportunity of calling further witnesses but this, for some reasons, was refused. Thereupon the plaintiff withdrew his objection and the Court recorded an order that " the proceedings will therefore be dropped." This was on the 18th of November 1916, and the present suit was filed on the 21st of August 1919.

In the lower Court it was held that as no order under r. 62 of O. XXI, was passed after investigation of the claim, the provisions of rule 63 do not apply to the case. This is based on the judgment in *Bhimrao* v. *Martand* (6), where it was held that an order on a claim preferred to property attached in execution or on an objection made to such an attachment was not an order " made under rule 98 or rule 99 or rule 101" of O. XXI of the Civil Procedure Code, so that rule 103 of the same Order and Article 11. A of the Limitation Act, should apply to it unless it was made after investigation, however slight, of the claim or objection itself ; that is to say, that a dismissal in default or for undue delay or for some similar reason is not an order to which rule 103 applies.

There is a marked difference in wording between rules 63 and 103 of O. XXI of the Civil Procedure Code and between Articles 11 and 11-A of the Limitation Act. Rule 103 contains specific mention of the rules preceding it, and each of those rules speaks of an order passed after investigation. The rules preceding rule 63 also speak of an investigation, but rule 63 does not mention them. That this omission is intentional is apparent by comparing the rule with the corresponding section of the old Code. These matters give strong support to the opinion expressed in *Venkataratnam* v. *Ranganyakamma* (7), and *Nogendra Lal Chowdhury* v. *Fani Bhusan Das* (8), that the period of limitation for a suit to set aside an order under r. 63 of O. XXI is one year, even if that order was passed without any investigation or consideration of the merits of the claim or objection.

In the present case, however, there was nothing to prevent the mortgagee making another application to exactly the same effect after the withdrawal of his first application. The order was, therefore, equivalent to one under r. 1 of O. XXIII, granting permission to withdraw from a suit with liberty to institute a fresh suit in respect of the same subject matter; the permission to withdraw was given and the liberty to institute fresh proceedings on the same grounds was there without being given. There was, therefore, no order made against anybody under r. 62 of O. XXI which could become conclusive under r. 63, and the present suit is not barred by time as against the objector claimant in those proceedings.

[The rest of the Judgment is not material for this report.]

N. H. *Appeal allowed.*

(6) 45 Ind. Cas. 102 ; 14 N. L. R. 66.

(7) 48 Ind. Cas. 270 ; 41 M. 985 ; 24 M. L. T. 197 ; (1918) M. W. N. 599 ; 8 L. W. 292; 35 M. L. J. 385 (F.B.).

(8) 44 Ind. Cas. 265 ; 45 C. 785 ; 23 C. W. N. 875.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1570 OF 1922.

April 2, 1924.

Present :—Mr. Justice Daniels.

TODAR MAL—PLAINTIFF—APPELLANT
versus
KISHEN LAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Female, alienation by—Consent of next reversioner—Alienation in favour of next reversioner—Legal necessity.

The consent of the nearest reversioners to an alienationby a Hindu female does not constitute an absolute proof of the validity of the transaction, but operates by raising a presumption that the alienation was made for legal necessity.

Rangasami Goundan v. *Nachiappa Goundan*, 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 528; 26 M. L. T. 5; 10 L. W. 105 (P. C.), followed.

When, however, the alienation is in favour of a person having a direct interest in obtaining it, *i.e.*, of the presumptive reversioner himself or his son, the presumption of the transaction being a proper one disappears, and it is necessary to adduce other evidence to establish the legal necessity.

Appeal against the decree of the Additional District Judge, Meerut, dated the 15th November 1922.

Mr. *P. L. Banerji*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to set aside a sale-deed executed by *Mst.* Shib Dei the mother of the plaintiff in the year 1909. *Mst.* Shib Dei inherited the property in suit from her father. Prior to this transaction she had married and had become a widow. Prior to the deed in suit she had entered into a *karao* marriage with a second husband. At the time when the deed was executed she had no children, but a son, the plaintiff, was subsequently born to her. At the time of the transaction the presumptive reversioner was one Hans Ram. The sale-deed was executed in favour of Hans Ram's son Rati Ram.

In both the Courts below a case was put forward on behalf of the plaintiff that the deed was obtained from *Mst.* Shib Dei by fraud. This case has been rejected by both Courts and is now abandoned. The second defence is that the deed was executed without legal necessity. On behalf of the defendants it was objected that the plaintiff was incompetent to challenge the deed on the ground that he was born after its execution. This plea has also now disappeared. The plaintiff's right to challenge it clearly depends on whether the deed was valid at the time of its execution. An issue was framed on the question of legal necessity but neither Court has come to a finding on it. The Courts have held that the deed was valid on the ground that it was executed with the consent of the next presumptive reversioner and that this dispenses with the necessity for proving legal necessity.

Now it has been held by the Privy Council in *Rangasami Goundan* v. *Nachiappa Goundan* (1), that the consent of the nearest reversioners does not constitute absolute proof of the validity of the deed but that it operates by raising a presumption that the deed was executed for legal necessity. Following thie principle it has been held that no consent of reversioners can validate a deed of gift because in such a case there can be no legal necessity *Abdulla* v. *Ram Lal* (2). It has also been held in an Oudh case decided by Mr. Scott and Sir Edward Chamier *Deputy Commissioner of Sitapur* v. *Ausari Singh* (3) that where the presumptive reversioner was a man of over eighty his consent was not sufficient to dispense with other evidence. Similarly, it appears to me that where the transaction is in favour of a person having a direct interest in obtaining it, *i. e.*, of the presumptive reversioner himself or as in the present case of his son, the presumption of the transaction being a proper one disappears. The deed in the present case being in favour of the son of the person whose consent is relied on, it was, in my opinion, necessary to

(1) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 528; 26 M. L. T. 5; 10 L. W. 105 (P. C.)
(2) 12 Ind. Cas. 601; 34 A. 129; 8 A. L. J. 1818.
(3) 9 O. C. 104.

offer other evidence in proof of the legal necessity. Evidence on this point was tendered but as no finding has been arrived at by the Court below I remit an issue under O. XLI, r. 25. Was the deed in suit executed for legal necessity ?

The finding should be submitted before the Judge's Court vacation. On receipt of the finding ten days will be allowed for objections.

N. H. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL
NO. 43 OF 1923.

January 7, 1924.

Present :—Mr. Daniels, J. C.

GAURI SHANKAR AND JAGANNATH —DEFENDANTS—APPELLANTS—
versus
JANG BAHADUR SINGH AND ANOTHER—PLAINTIFFS AND SHEO RATAN SINGH—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—Mortgage-decree—Sons, whether can challenge decree—Immorality or illegality, proof of.

A debt incurred by a Hindu father, secured by a mortgage containing a personal covenant to pay constitutes an antecedent debt equally with a debt secured only by a personal bond.

So long as a creditor is seeking to enforce a mortgage of family property executed by a Hindu father he is bound to prove as against the sons of the mortgagor that it was executed for valid necessity. But when once the mortgage has merged in a decree, it no longer subsists and the judgment-debt which the creditor is seeking to enforce is on the same footing as any other debt incurred by the father. When a decree for realisation of mortgage-money by sale of the mortgaged property has been obtained against a Hindu father, the sons of the mortgagor cannot get that decree set aside without alleging that the debt was of an illegal or immoral character

Case-law discussed.

Appeal against the order of the 4th Additional District Judge, Lucknow, dated the 5th July 1923 reversing the decree of the Munsif, North Lucknow, dated the 25th January 1922.

Mr. *Hakhmuddin*, for the Appellants.

Mr. *Ram Bharose Lal*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand passed by the learned 4th Additional Judge of Lucknow. The suit was one brought by Jang Bahadur Singh and Abbaran Singh for a declaration that a mortgage-decree passed against their father Sheoratan Singh was not binding on them or on the family estate. The mortgage in question was executed by Sheoratan Singh in favour of the predecessor-in-interest of the appellants Gauri Shankar and Jagannath, and the latter obtained a decree for sale on the basis of the mortgage on 14th February 1919 in the Court of the Munsif of Lucknow (North). At the time when the suit was brought, a sale of the property in execution of the decree had taken place but had not been confirmed. The plaintiffs, however, on a still later date got the suit restored to the file, and no point has been made before me of the fact of sale having taken place. The question which has been argued in this appeal is whether when a decree for realization of mortgage-money by sale of the mortgaged property has been obtained against the father, the sons can get that decree set aside without alleging that the debt was of an illegal or immoral character. The learned Munsif framed a preliminary issue on this point and decided it against the sons. They appealed, and the learned Additional Judge relying on the decision of a Judge of this Court in *Ganga Bakhsh Singh* v. *Raghubar Singh*, (1) since reported in 26 O. C. p. 299, took a contrary view and has remanded the suit for decision on the merits.

Before coming to the main point in the appeal, a subsidiary point raised by the learned pleader for the respondents may be dealt with. He has urged that, in substance, the plaintiffs did allege that the debt was of an immoral character and further that they alleged that the mortgage-deed was entirely fictitious. As regards the former point his contention cannot be sustained. The plaintiffs did in para. 3 of their plaint allege in general terms that their father was spendthrift and a man of loose character, but they made no definite allegation as to the purposes for

(1) 73 Ind. Cas. 27 ; 26 O. C. 299 ; 9 O. & A. L. R. 359 ; 10 O. L. J. 61 ; (1923) A. I. R. (O.) 182.

which the money was borrowed. The Court examined one of the witnesses under O. X, r. 1 for the purpose of clearing up these pleadings and he definitely stated that he could make no statement as to the purpose for which the money was borrowed. As regards the second point there was likewise a general allegation in the plaint that the father borrowed money by means of a fictitious mortgage-deed, but it was not followed up, and the plaintiffs took no objection to the form of the issue framed by the Trial Court which was :—

"Is the present suit maintainable in view of the fact that no allegation regarding the immoral purposes for which the money was borrowed is made in the plaint?"

Even in the Court below, where the plaintiffs were the appellants, this point does not seem to have been pressed. The only point on which the learned judge in remanding the case directed the Munsif to frame issues was on the question whether or not the mortgage had been executed for family necessity and was binding upon the plaintiffs. This objection therefore fails.

If the decision in *Ganga Bakhsh Singh* v. *Raghubar Singh* (1), is good law, the order passed by the learned Judge was undoubtedly right. If I differed from a reported decision of a Judge of this Court I should ordinarily feel it my duty to refer the case to a Bench. In this case, however, it appears to me unnecessary to do so because the decision is contrary to the Bench rulings of this Court and it is evident from a perusal of the judgment that the learned Judge's conclusion was based largely on a view of the decision in *Sahu Ram Chandra* v. *Bhup Singh* (2), which has now been declared by the Privy Council itself in the recent case of *Brij Narain Rai* v. *Mangla Prasad Rai* (3) to be incorrect. The learned Judge was aware that he was differing from a published Bench ruling of this Court, namely, the case of *Gur Narain* v. *Gulzari Lal* (4). He considered, however, that the force of that decision was shaken by the decision in *Sahu Ram Chandra's* case. The Privy Council has now ruled that *Sahu Ram Chandra's* case is only to be considered as authority for the actual point which it decided, namely, that where a mortgagee is suing on a mortgage executed by a Hindu father in respect of a contemporaneous advance he is not entitled to a decree against the joint family estate. Even while deciding this the Privy Council said:—

"A perusal of the numerous authorities will show that where a joint family property has ben sold out and out, or *where a decree in execution of the mortgage has been obtained against the property*, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

There is also another and very recent Bench ruling of this Court not noticed by the learned judge in which the view taken in *Gur Narain* v. *Gulzari Lal* (4), has been followed and approved. I refer to the case of *Rup Kishore* v. *Kanhaiya Lal* (5). That Judgment contains an elaborate examination of the authorities and reliance is placed on the well-known passage in Lord Hobhouse's Judgment in *Nanomi Babuasin* v. *Moddhun Mohun* (6) which runs "It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for antecedent debt or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liablity of the joint estate their

(2) 99 Ind. Cas. 280 ; 44 I. A. 126 ; 15 A. L. J. 437; 21 C. W. N. 698 ; 1 P. L. W. 557 ; 19 Bom. L. R. 498; 26 C. L. J. 1 ; 33 M. L. J. 14 (1917) M. W. N. 439 ; 22 M. L. T. 22 ; 6 L. W. 213 (P. C.).

(3) 77 Ind. Cas. 689 ; 21 A. L. J. 934 ; 46 M. L. J. 23; 5 P. L. T. 1 ; 28 C. W. N. 253 ; (1924) M. W. N. 68; 19 L. W. 72 ; 2 P. L. R. 41 ; 10 O. & A. L. R. 82. (1924) A. I. R. (P. C.) 50 ; 88 M. L. T. 457 ; 46 A. 95 26 Bom. L. R. 500 (P. C.).

(4) 25 Ind. Cas. 917 ; 17 O. C. 818 ; 1 O. L. J. 503.

(5) 74 Ind. Cas. 563 ; 26 O. C. 266 ; 9 O. & A. L. R. 384 : 10 O. L. J. 141 ; (1923) A. I. R. (O) 227.

(6) 18 C. 21 ; 18 I. A. 1 ; 10 Ind. Jur. 151 ; 4 Sar. P. C. J. 682 ; 6 Ind. Dec. (N. S.) 510 (P. C.).

Lordships think that there is now no conflict of authority."

This passage has again been quoted and emphasised by their Lordships in their recent decision.

There is a pronouncement of the Privy Council itself in *Sripat Singh* v. *Prodyat Kumar Tagore* (7), in favour of the view taken by a Bench of this Court. In that case their Lordships say :—

"By that law (meaning the Mitakshara law) a judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. *In every other event* it is open to the execution creditor to sell the whole of the estate in satisfaction of the Judgment obtained against the father alone."

The learnd Judge who decided *Ganga Bakhsh, case* (1) considered that in view of the decision in *Sahu Ram Chandra's case* (2) the above quotation could only apply where the debt was a simple money-decree and not where it was a decree for the debt secured by a mortgage. That view has now been declaredby the highest authority to be erroneous. It is now established that a debt secured by a mortgage containing a personal covenant may constitute antecedent debt equally with a debt secured only by a personal bond. This was declared by the Madras High Court in *Armugham Chetty* v. *Muthu Goundan* (8) which has been expressly approved by the Privy Council in their recent judgment. The ground on which the learned Judge distinguished the ruling in *Sripat Singh's* case is, therefore, cut away and there is no longer any ground for not giving to the words of that judgment their natural meaning. So long as the creditor is seeking to enforce a mortgage executed by the father, he is bound to prove as against the sons that it was executed for valid necessity. But when once the mortgage has merged in a decree, it no longer subsists and the judgment debt which the creditor is seeking to enforce is on the same footing as any other debt incurred by the father. The rule laid down by Lord Hobhouse that the sons cannot set up their rights against the remedies of their father's creditors for their debts if not tainted with immorality still holds good. The view taken in 26 O. C. 299 must, therefore, be considered to have been overruled by the recent decision of their Lordships of the Privy Council, and it is contrary to two published Bench rulings of this Court which are binding on me as single Judge.

I accordingly allow the appeal, set aside the order of Court below and restore the decree of the Munsif with costs in all Courts.

Z. K. *Appeal allowed.*

(7) 39 Ind. Cas. 252 ; 44 I. A. 1; 15 A. L. J. 147 ; 32 M. L. J. 133 ; (1917) M. W. N. 193 ; 21 C. W. N. 442 ; 25 C. L. J. 220 ; 21 M. L. T. 222 ; 19 Bom. L. R. 290 ; 44 C. 524 (P. C.).

(8) 52 Ind. Cas. 525 ; 42 M. 711 ; 9 L. W. 565. (1919) M. W. N. 409 ; 37 M. L. J. 166 ; 26 M. L. T. 96.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 334 OF 1924.

March 24, 1924.

Present :—Mr. Justice Mukerji.

SANKET NARAIN PANDE —PLAINTIFF — APPELLANT

versus

RAM BHAROS AND OTHERS— DEFENDANTS —RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 126—Alienation by Hindu father—Suit by after-born son—Limitation, operation of.

A suit by a Hindu son governed by *Mitakshara* law to contest an alienation by his father is governed by Article 126 of Schedule I to the Limitation Act and the time begins to run from the date when the alienee takes possession of the property. The son does not get a fresh start of limitation on his birth, where the alienation to be contested took place before he was born.

Tulshi Ram v. *Babu*, 10 Ind. Cas. 908 ; 8 A. L. J. 783 ; 33 A. 654 ; *Lachmi Narain Prasad* v. *Kishan Kishore Chand*, 33 Ind. Cas. 913; 14 A. L. J. 25 ; 38 A. 126, distinguished.

Appeal against the decree of the Second Additional District Judge, Gorakhpur, dated the 17th of December 1923.

SRINIVASACHARIAR *v.* RAGHAVACHARIAR

Mr. *Haribans Sahai*, for the Appellant.

JUDGMENT.—The question before this Court is one of pure law.

The suit out of which this appeal arose was brought by an after-born son to set aside his father's alienation. The alienation took place on the 22nd of April 1901. At that date the plaintiff was not alive. He had, however, a brother living, who was a minor then. The suit was brought on the 23rd of August 1922.

The Court below dismissed the suit on the ground that as Article 126 of the Limitation Act applied to the suit, on the expiry of 12 years from the date on which the alienee took possession of the property, the right of suit became extinguished. This is the view which I myself took though not in this Court. Article 126 is specially applicable to a suit like this. The plaintiff is 'a Hindu governed by the law of *Mitakshara*' and his suit is 'to set aside his father's alienation of ancestral property. The period within which such a suit must be brought is 12 years and the time from which the period begins to run is 'the date on which an alienee takes possession of the property'. In this case the date of alienation and the date on which the alienee took possession are one and identical. It is not suggested anywhere that these two dates are different. A special rule of law being in existance, no other Article than Article 126 can be applied. Section 6 of the Limitation Act has no application. Limitation began to run before the plaintiff's birth and his birth did not give a fresh start to limitation. The view taken by the Court below and taken by me was also taken by two Judges of the Oudh Court in the case of *Chokhey Singh* v. *Hardeo Singh* (1).

Mr. Haribans Sahai has cited several cases before me including the cases of *Tulshi Ram* v. *Babu* (2) and *Lachmi Narain Prasad* v. *Kishan Kishore Chand* (3). None of the cases cited before me related to Article 126 and has any application.

The appeal fails and is dismissed under O. XLI, r. 11, Civil Procedure Code.

N. H. *Appeal dismissed.*

(1) 64 Ind. Cas. 757 ; 24 O. C. 330 ; 8 O.L.J. 667; 4 U. P. L. R. (O.) 10.
(2) 10 Ind. Cas. 908 ; 8 A. L. J. 783 ; 33 A. 654.
(3) 33 Ind. Cas. 913; 14 A. L. J. 25 ; 38 A. 126.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 578 OF 1921.

January 25, 1924.

Present :—Mr. Justice Wallace.

A. R. SRINIVASACHARIAR—PLAINTIFF—APPELLANT
versus
A. RAGHAVACHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow's estate—Bequest by widow—Legatee, position of—Title as against trespasser.

A bequest of her husband's property by a Hindu widow confers no title on the legatee to eject even a trespasser.

Durga Sundari Sen Gupta v. *Ramkrishna Poddar*, 21 Ind. Cas. 714; 18 C. L. J. 162; *Palchur Mahalakshmama* v. *Vemi Reddi Balu Reddi*, 69 Ind. Cas. 529 ; 17 L. W. 8; 44 M. L. J. 60; (1923) A. I. R. (M.) 367, **relied on.**

Bijoy Gopal Mukerji v. *Krishna Mahaishi Debi*, 34 C. 829; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 138; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.), **distinguished.**

Appeal against the decree of the Court of the Subordinate Judge, Chingleput in A. S. No. 20 of 1920 (A. S. No. 24 of 1920 on the file of the District Court, Chingleput) preferred against the decree of the Court of the Principal District Munsif, Chingleput, in O. S. No. 298 of 1918.

Mr. *M. Patanjali Sastri*, for the Appellant.
Messrs. *T. Narasimha Iyengar* and *S. Rangaswami*, for the Respondents.

JUDGMENT.—The suit site in this case was a vacant site of which no effective physical possession was feasible. In such a case there is no doubt that the presumption is, that when there has been no effective physical possession, possession will follow title. The lower Appellate Court found in this case that plaintiff had no title, and that he had not been in possession within 12 years of suit. The decision on the question of title was one in law, and thus open to argument in Second Appeal. As there was no very clear finding by the lower Appellate Court that defendants had

been in physical possession and that, therefore, the presumption that possession follows title could not be called in aid on behalf of plaintiff, it was necessary to have the question of law *i.e.*, the question of the existence of any title in plaintiff argued.

The plaintiff claims title to the property as legatee under the will of a Hindu widow bequeathing her husband's property. It is conceded, of course, that as against a reversioner plaintiff could have no title at all, but it is argued that as against any one but a reversioner, *e.g.*, as against alleged trespassers like defendants, the will would convey a title to plaintiff. For this position a Privy Council ruling in *Bijoy Gopal Mukerji* v. *Krishna Mahaishi Debi* (1) is relied on; wherein it was held that an alienee-not for necessity—from a Hindu widow took with his alienation sufficient title to resist or eject a trespasser. The alienation in that case was before the widow's death, and naturally is voidable, on good cause shown by the reversioners. But until the reversioners choose to attack it there is no obvious reason why the title, valid at its commencement, if not avoided, and *ex hypothesi* not yet avoided, should not remain valid until avoided. This seems to me a very different proposition to that of holding that the Hindu widow has the power over her husband's estate of alienation after her death, that she has the right to say to any one. "After my death you shall enjoy my husband's estate," when at her death her interest in that estate and, therefore, her power of disposition over it came to an end. The ruling in *Durga Sundari* v. *Ramakrishna Poddar* (2) is clear authority that she has no such power of disposition whatever, and, in my view, a Bench of this Court in *Palchur Mahalakshmama* v. *Vemi Reddi Balu Reddi* (3) has taken the same point, see also *Raghava Mudaliar* v. *Narayanaswami Mudaliar* (4).

The right of a trespasser to devise his possessory title so far as it has reached, is cited by way of analogy, but in the case of a trespasser, his estate, such as it is, is not a limited estate and the analogy seems to me to fail.

I, therefore, hold that the lower Appellate Court's decision on the question of title is correct. I have been urged to refer the question to a Bench but the 34 Calcutta case seems to me hardly strong enough foundation for holding that that case made any change in the law on this point as it has been up till now understood, though the interesting argument of the appellant's vakil gave a certain plausibility to his view.

As plaintiff, therefore, has no title, he cannot, therefore, fall back on any legal possession resting solely on title, and actual physical possession by him within 12 years of suit has been negatived by the lower Appellate Court. This appeal must fail.

I dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 34 C. 329 ; 11 C. W. N. 424 ; 5 C. L. J. 334 ; 9 Bom. L. R. 602 ; 2 M. L. T. 133; 17 M. L. J. 154 ; 4 A. L J 329 ; 34 I. A. 87 (P. C.).
(2) 21 Ind. Cas. 714 ; 18 C. L. J. 162.
(3) 69 Ind. Cas 529 ; 17 L W 8 ; 44 M. L. J. 60 ; (1923) A. I. R. (M.) 367.
(4) 4 M. L. J. 89.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 51 OF 1923.

December 4, 1923.

Present:— Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

THE BANK OF MORVI, LIMITED—DEFENDANTS—APPELLANTS
versus
BAERLEIN BROS.—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 83—Sale of goods—C. I. F. Contract—Property when passes—Bill of lading endorsed to agent of seller, effect of—Construction of document—Delivery, time for extension of—Seller, duty of.

Whether the property in the goods has passe in the case of a C. I. F. contract depends entirely on the question whether the seller has parted with the

control over the disposal of the goods. He may intend to do this if he endorses the bill of lading over to the purchaser. But if he endorses the bill of lading in blank and hands it over to his own agent for delivery with instructions that he shall not hand it over until the goods are paid for, the intention of the seller is to retain the disposal of the goods under his own control.

Case-law discussed.

Defendant in Bombay agreed to purchase certain goods from plaintiffs in England. Plaintiffs wrote to the defendants :—

"In the present state of our market it is impossible to guarantee delivery, and it must be understood, in case any of the yarns are a little late, there must be no claim for late delivery. You can, however, rely on our shipping the yarns to time, if this is at all possible."

To this the defendant replied ;—

"We note that it is impossible to guarantee delivery in the present state of your market. We however hope that you will do your best to expedite the shipment as early as you can and will cable us the name of the steamer, carrying our goods ;

Held, that the parties had agreed to extend the time of shipment and as no particular period for extension was mentioned in the letters, the plaintiffs were bound to deliver the goods within a reasonable time beyond the contract time.

Sir *Chimanlal Setalvad* and Mr. *M. C. Setalvad*, for the Appellants.

Messrs. *O'Gorman* and *Binning*, for the Respondents.

JUDGMENT.—This suit arises out of a contract by which the defendant Bank in Bombay agreed to purchase from the plaintiffs in Manchester fifty bales of American bleached yarn double 40 c. i. f. Bombay on certain terms. The contract itself is contained in two telegrams, *viz.*, one dated December 17, 1919, despatched by the Bank to the plaintiffs at Manchester and the second despatched from Manchester by the plaintiffs on December 24, 1919.

On December 24, 1919, the plaintiffs also wrote to the Bank in Bombay as follows :—

"We duly received your two telegrams of the 17th instant asking us to place sundry orders at the best possible prices, for which we thank you. We beg to confirm our cable informing you that we had placed." [Then they set out the price of the goods.] "We may say that we have booked these prices at the lowest possible prices and earliest shipment. In the present state of our market it is impossible to guarantee delivery, and it must be understood, in case any of the yarns are a little late, there must be no claim for late delivery. You can, however, rely on our shipping the yarns to time, if this is at all possible."

To that letter the defendants replied on January 23, 1920, as follows :—

"We are duly in receipt of your favour of the 24th ultimo together with your sale notes for which we thank you.

"*Shipments.*—We note that it is impossible to guarantee delivery in the present state of your market. We, however, hope that you will do your best to expedite the shipment as early as you can and will cable us the name of the steamer, carrying our goods."

Under the terms of the contract thus entered into the defendants had agreed to purchase fifty bales 40|2 bleached yarn at 76½*d.* per lb. nom c. i. f. Bombay less 2½ *per cent.* discount. shipment June—July. When the bales arrived in Bombay the defendants refused to take delivery of forty bales on the ground that they were not shipped within the shipment months. Consequently the plaintiffs filed this suit asking for a decree against the defendants for the price of the goods.

The third issue was, whether according to the terms of the contract the goods were to be of June—July shipment. The plaintiffs' contention was that by virtue of the letter of December 24, 1919, written by them and the defendants' letter of January 23, 1920, it had been agreed that the time for shipment might be extended beyond the time contained in the original contract. We agree with the conclusion which the learned Judge has arrived at, that the parties had agreed to extend the time, and as no particular period for extension was mentioned the plaintiffs were bound to deliver their goods within a reasonable time beyond the contract time. We do not think that any other construction can possibly be placed on the letters I have referred to. The goods in the suit arrived in three instalments on October 10, 17 and 27, 1920, and we also agree with the learned Judge that the plaintiffs tendered delivery within a reasonable time beyond the contract time, the goods having been shipped at different dates up to

BANK OF MORVI LTD. *v.* BAERLEIN BROS.

August 20. We think, therefore, that the defendants were not justified in their refusal to take delivery of the goods.

The next important issues were: '(7) whether the plaintiffs were entitled to recover the price of the goods, and (9) to what damages, if any, were plaintiffs entitled. The plaintiffs had not claimed in the alternative in their plaint for damages and accordingly they were allowed to amend their plaint after the hearing had commenced. The learned Judge says on these issues:—

"The bills of lading in this case were endorsed in blank and sent to the National Bank with instructions not to hand over the shipping documents to the defendants unless they accepted the bills drawn upon them and paid them within the time specified in these bills. There is the clearest authority for saying that in these circumstances the property in the goods had not passed to the defendants. It is sufficient here to refer to the case of the *Ford Automobiles (India) Ltd.* v. *The Delhi Motor and Engineering Co.* (1) where the leading authorities on the question are mentioned and discussed. There was consequently no assent to the appropriation of these bales by the defendants so as to bring the case under section 83 of the Indian Contract Act. Mr. Binning eventually did not dispute this proposition and applied to amend the plaint so as to sue in the alternative for damages though for other reasons he did not formally withdraw his contention that the property in the goods had actually passed. The Court allowed the plaint to be amended accordingly, subject to reservation of the question of costs.

In this Court it has been argued for the respondents on their cross-objections that the learned Judge erred in holding that the property in the goods had not passed to the appellants and that, therefore, the respodents were not entitled to sue for the price of the goods. The contention is that under a c. i. f. contract as soon as the goods have been placed on board, the property passes to the buyer because the goods have been appropriated to them. Section 83 of the Indian Contract is as follows:—

"Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

We do not think that on this qustion there is any material difference between the English law of contract and the law as laid down in the Indian Contract Act. Whether the property in the goods has passed in the case of a. c. i. f. contract depends entirely on the question whether the seller has parted with the control over the disposal of the goods. He may intend to do this if he endorses the bill of lading over to the purchaser. But if he endorses the bill of lading in blank and hands it over to his own agent for delivery with instruction that they shall not hand it over until the goods are paid for then clearly the seller has shown his intention to retain the disposal of the goods under his own control. See page 482 of the last edition of Pollock and Mulla's Indian Contract Act, where a reference will be found to a passage from M. Benjamin's treatise of the Sale of Goods which now appears at page 420 of the sixth edition. I need not cite it at length but merely refer to it as it has been mentioned with approval in *In re Cargo ex s. s. Rappenfels* (2). That no doubt was a case before the Prize Court, but the remarks of the Chief Justice with regard to the method in which the sellers dealt with the bill of lading in the ordinary course of their dealings appear to me to be appropriate to ordinary transactions in times of peace, and the fact that the learned Chief Justice had a claim before him arising out of the seizure of a ship after the outbreak of hostilities makes no difference to the pertinence of his decision and the remarks he made on the point we have to determine. In that case the goods had been shipped under a. c. i. f. contract from Calcutta by a British subject on a German ship, the goods being consigned to British merchants in London although the ultimate destination of the goods was Hamburg, a German Port. In accordance with the custom of the trade, the consignors received advances of money against the docu-

(1) 70 Ind. Cas. 138; 24 Bom. L. R. 1140 at p. 1148; 1923) A. I. R. (B) 125.

(2) 30 Ind. Cas. 174; 42 C. 334.

ments of title from a Bank carrying on business in Calcutta, whose agents in London would, in the ordinary course of business, have realised the moneys due on the contracts from the consignees and then have made over to the consignees the documents of title to enable them to obtain delivery of the goods. At page 341 the learned Chief Justice remarks :—

"The conclusion then to which I come is that in determining the question of liability to confiscation even in the case of a subject I must have regard to the property in the goods and not the risk except so far as it may assist me in determining where the property is. To whom then did the goods belong at the time of capture?

They were no doubt sold under a c. i. f. contract, but it was a contract 'to arrive' and it was an expresss term that it should be 'considered cancelled for any portion not arriving owing to loss of vessel or other unaviodable causes.'

So, even if risk be regarded as a valuable clue to property in this case the risk during the voyage was on the seller to the extent indicated by this qualification.

But what appears to me to be decisive of this case, in view of the well-known mercantile usage that prevails in Calcutta, is the mode in which the sellers dealt with the bills of lading. They were taken to their own order and after the dealings I have already described, still are in the seller's possession.

The fair presumption in the circumstances of this case is that the sellers intended to retain and in fact did retain the property in the goods. This was a necessary reservation for the purpose of securing that method of commercial finance commonly employed by Calcutta shippers."

Then follows a reference to the remarks of Benjamin on Sale to which I have referred above. That passage after dealing with the method of doing business proceeds thus (p. 343) :—

"It is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that although he may write to A, and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in accordance with A's ordor, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A."

There is a decision to the same effect of Mr. Justice Atkin in *Stein Forbes and Co.* v. *County Tailoring Company* (3.) The headnote runs thus :—

"By a contract of sale the defendants agreed to buy from the plaintiffs certain shipments of sheep skins. Payment was to be 'net cash against documents on arrival of the steamer.' On the arrival of the third shipment the defendant refused to take up the documents. In an action by the plaintiffs for breach of contract, the learned Judge was of opinion that the defendants had in these circumstances been guilty of breach of contract. The plaintiffs in the action claimed the price of the goods, and on this point.

Held, that the price of the goods was not recoverable since it was not a sum payable to the plaintiffs on a day certain irrespective of delivery, and since the property in the goods had not passed to the defendants."

The learned Judge said at page 217 :—

"It was said that the property passed to the buyer on shipment, but the seller only reserved his unpaid vendor's lien. That view seems to me inconsistent with the section (section 19 of the Sale of Goods Act of 1893) I have read and with every business probability. In the majority of cases where the seller takes the bill of lading to his order the goods come forward through a banker, and it seems to me very improbable that the seller means to give to the banker or the banker to take a document representing goods the property in which is in some third person, the only security given being a right to retain possession till the fine is paid. I think the intention is to keep the property in the seller till payment."

Respondents' counsel relied very strongly on *Biddell Brothers* v. *E. Clemens Horest Co.* (4). Apart from the fact that the

(3) (1916) 115 L. T. 215.

(4) (1911) 1 K. B. 214 Reversing (1911) 1 K.B. 934 ; 16 Com. Cas. 197.

point now in issue was not in issue in that case, it seems to me that the judgment of Lord Justice Kennedy, dissenting from the judgments of other members of the Court, which was approved of in the final appeal, so far from supporting the contention of the learned counsel is against him. In that case a contract for the sale of hops to be shipped from the *Pacific* coast to this country provided that the buyers should "pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c. i f. to London, Liverpool, or Hull. Terms net cash." The contract contained no term expressly providing for payment against shipping documents. Mr. Justice Hamilton had been of opinion that on a contract in the above terms, the buyers were not bound to pay for the hops on tender of the shipping documents, but were entitled to refuse payment until upon the arrival of the hops, they had been given an opportunity for inspection of them. This decision was reversed by the Court of Appeal. Kennedy L. J. dissenting said at page 956 :—

"Under the Sale of Goods Act, 1893, s. 18 by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, aud by virtue of s. 32 the delivery of the goods to the carrier —whether named by the purchaser or not—for the purpose of transmission to the purchaser is *prima facie* to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser against which he has protected himself by the stipulation in his c. i f. contract that the vendor shall, at his own costs, provide him with a proper policy of marine insurance intended to protect the buyer's interest,and available for his use, if the goods should be lost in transit ; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative. It passes unconditionally where the bill of of lading is made out in favour of the purchaser or his agent or representative, as consignee."

Then at page 957 his Lordship refers to a passage in he judgment of Bowen, L. J., in *Sanders* v. *Maclean* (5) which is as follows :—

"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door at the warehouse, floating or fixed, in which the goods may chance to be."

There was, therefore, no question in that case whether the plaintiffs were entitled to the price of the goods. The suit was one for damages. The only question was whether the defendants were justified in refusing to pay for the goods until they had been given an opportunity of inspecting them. We think, therefore, on the facts of this case that the property in the goods did not pass to the defendant Bank and, therefore, the plaintiffs were not entitled to sue for the price.

The only question remaining to be decided is the question of the measure of damages. The learned Judge has found that the market rate at the dates of breach should be taken at Rs. 2-8-0 per lb. and the decretal amount has been calculated on that basis. The defendant Bank have appealed against that finding and we must, therefore, consider the evidence on

(5) (1883) 11 Q. B. D. 827 at p. 341 ; 52 L. J. Q. B. 481 ; 49 L. T. 462 ; 31 W. R. 698 ; 5 Asp. M. C. 160.

which it is based. His Lordship then proceeded to consider the evidence on this point and continued : —

I think on the evidence which has been recorded in the case, defendants were entitled to a decision that the market rate prevailing at the relevant dates was Rs. 2-15-0 instead of Rs. 2-8-0. Therefore, the decretal amount in favour of the plaintiffs must be amended in accordance with our decision.

There is no substance in the other objections which appear in the grounds of appeal or in the respondents' cross-objections, and it is not necessary for me to refer to them.

As regards the order in the Court below that interest should be allowed to date of suit we cannot interfere with the discretion which the learned Judge has exercised under section 34, Civil Procedure Code. The appellants, therefore, being successful only with regard to their contention in ground No. 12 in their memorandum of appeal, and having otherwise failed in their appeal, we think that there should be no order as to costs on either side in the appeal.

With regard to the cross-objections they have failed and, therefore, the appellants are entitled to their costs of the cross-objections.

Z. K. *Decree modified.*

Attorneys for the Appellants—Messrs. *Motichand & Devidas.*

Attorneys for the Respondents—Messrs. *Little & Co.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 9 OF 1923.

October 24, 1923.

Present :—Sir Walter Salis Schwabe, K. C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

SATTAYA PADAYACHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SOUNDRATHATCHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. IV, r. 1—Presentation of plaint—Presentation to Judge outside office hours and away from Court—Validity of.

There is nothing in r. 1 of O. IV of the Civil Procedure Code to show that the presentation of a plaint must be within office hours, or must be to the officer appointed at the Court or at any particular place, and there is no reason why, if a Judge so chooses, he should not constitute himself the officer to receive a particular plaint at any place that he chooses.

Din Rem v. *Hari Das*, 14 Ind. Cas. 744; 34 A. 482 ; 9 A. L. J. 743, relied on.

Where, therefore, a Judge accepts a plaint outside office hours away from the Court, the suit must be deemed to have been instituted on the day on which the plaint is so accepted.

A Judge is not, however, bound to accept a plaint in such a manner, and it is within his discretion to refuse to do so.

Letters Patent Appeal under clause 5 of the Letters Patent against the judgment of Mr. Justice Venkatasubba Rao, in A. A. O. No. 226 of 1922 preferred against the order of the District Court, East Tanjore at Negapatam, in A. S. No. 1 of 1922 (O. S. No. 11 of 1921, on the file of the Court of the Additional Subordinate Judge, East Tanjore at Mayavaram).

Mr. *K. Bhashyam Aiyengar* (with him Mr. *K. Narasimha Aiyengar*) for Appellants :— Under O. IV, r. 1, Civil Procedure Code and under r. 14 of the Civil Rules of Practice a plaint must be presented to the Court as such, or the person authorised by the Court to receive the same such as the Chief Ministerial officer. In the former case there is no restriction as regards the hours during which it ought to be presented and in the latter case it must be presented within the stated hours—office hours.

In this case the Judge sitting in his club and reading newspapers was not a Court and as such the presentation to him at that hour was not a valid presentation either as to a Court, because he had ceased to hold Court for the day, or as to an officer duly empowered to receive plaint because it was presented out of the stated hours. Moreover a Judge sitting in club cannot be a Court because he can hold Court only in the Court House and that ordinarily within office hours 11 A. M. to 5 P. M,

SATTAYA PADAYACHI *v.* SOUNDRATHATCHI

See also Rules and Orders compiled by Chandra Sekhara Iyer r. 220. Even assuming that the Judge has constituted himself a Court at that time to receive the plaint there is no indication in the proceedings in this case that he did so as there is no direction to the office or anybody to file it as on that date by directing the putting of the Court date stamp of that date and the mere mention of the fact of presentation at that hour and cancelling of the stamp and the initalling by the Judge is not enough to prove the same.

The acceptance of plaint at that hour being capable of being done only by a Court and, therefore, being a judicial act cannot be done if it prejudicially affects the other side as in this case it deprives the other side of the valuable plea of Limitation.

Observations in *Venkatesa Iyengar* v. *Kamalammal* (1), relied on.

See also *Sheo Ram Tiwari* v. *Thakur Prasad* (2) and *The Receiver of the Nidadavole* and *Medur Estates* v. *K. Suraparazu* (3).

The case in *Din Ram* v. *Hari Das* (4), (F. B.) has no application to the present case as that related to the presentation of an appeal to which section 5 of the Limitation Act applied.

Even if it applied to the case of presentation of plaint it cannot apply to Madras as it rests on some peculiar course of practice in that province.

Thus the presentation on that day being invalid as such it must be taken as a presentation on the following day and the suit was therefore, barred under section 3, Limitation Act.

Mr. *S. Ramaswamy Aiyar* for Mr. *T. V. Muthukrishna Iyer*, for Respondent was not called on to reply.

(1) 13 Ind. Cas. 463; 22 M. L. J. 212 at p. 215; (1912) M. W. N. 65; 11 M. L. T. 84.
(2) 29 A. 562; A. W. N. (1907) 168.
(3) 29 Ind. Cas. 449; 38 M. 295.
(4) 14 Ind. Cas. 744; 34 A. 482; 9 A. L. J. 748.

JUDGMENT.

Schwabe, J.—This is an appeal under the Letters Patent, Oldfield and Venkatasubba Rao, JJ. having differed in A. A. O. No. 226 of 1922.

The point is a very short one. The Judge of a Court in the Moffusil having risen for the day went to his club. At his club he was approached by a Vakil who asked him to receive a plaint, it being the last day for the expiration of the period of limitation. The learned Judge accepted the plaint and cancelled the stamp on it by writing upon it the words "presented to me by" giving the name of the Vakil "at 7-30 p. m." and signed and dated it. It is argued that nevertheless that suit is barred, because it has not been instituted within the period of limitation. Section 3 of the Limitation Act runs thus :—"Subject to the provisions contained in sections 4 to 25 inclusive every suit instituted, appeal preferred and applications made after the period of limitation prescribed therefore, by the first schedule shall be dismissed." It is argued that the suit was not instituted on that day. Now turning to the Civil Procedure Code, O. IV, r. 1, provides that "every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf." The Judge of the Court could appoint himself or anyone else as the Officer to whom a particular plaint was to be presented. There is nothing in the Rule to show that the presentation must be within office hours, or must be to the Officer appointed at the Court or at any particular place and I see no reason at all why if a Judge so chooses, he should not constitute himself the Officer to receive the particular plaint at any place that he chooses. It is a matter which is not without authority, for precisely the same circumstances arose in *Din Ram* v. *Hari Das* (4). In that case the memorandum of appeal was presented to the District Judge at his private residence after office hours and he accepted it taking the precaution to state that it would be admitted subject to his having got the power to do so. The Full Bench of Allahabad held that he had the power. The Division Bench here differs, Oldfield, J. stating that the ruling in *Din Ram* v. *Hari Das* (4) had no application to Madras, because although in Allahabad it

might be the custom for a Judge to be approached outside Courts, in his experience it has not been so in Madras. Venkatasubba Rao, J. on the other hand, gave instances of numerous kinds of applications to his knowledgethat had been made to Judges in Madras when away from the Court and outside or during office hours.

I agree with the Full Bench decision in 34 All. 482 and I see no reason at all to say that the same principle should not be applied in Madras. The appeal will be dismissed with costs.

Coutts Trotter, J.—I am of the same opinion. I think that what pressed Oldfield, J. was the idea that, if you state that a Judge may receive plaints in this way out of office hours, you are committed to the further proposition that he must. With great respect to the learned Judge, I think that that is a fallacy. I think, that it is in the discretion of the Judge to act as he did on this case or refuse to do so; and, if the thing became a nuisance, I have no doubt that Judges would refuse to oblige litigants by taking documents in this way. I should like it to be understood that, so far as I am personally concerned, any such application would be received by me with disfavour.

Ramesam, J.—I agree with the judgments just delivered.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1499 OF 1922.

March 5, 1924.

Present :—Mr. Justice Daniels.

DHANRAJ RAI AND ANOTHER —DEFENDANTS —APPELLANTS

versus

RAM NARESH RAI AND OTHERS— PLAINTIFFS AND DEFENDANTS— RESPONDENTS.

Hindu Law—Joint family—Alienation by all adult members—Necessity—Presumption—Sons, failure of, to contest alienation, effect of—Limitation Act (IX of 1908) s. 6, Sch. I, Art. 126—Suit to challenge alienation — Limitation, commencement of — After-born son, position of.

An alienation of joint family property by the representatives of all the branches of the family, and by all the adult male members of the family living at the time, raises a presumption of legal necessity.

Balvant Santaram v. *Babaji*, 8 B. 602 : 9 Ind. Jur. 227; 4 Ind. Dec. (N. S.) 778; *Anant Kalwar* v. *Ram Prasad Tewari*, 78 Ind. Cas. 619 ; 22 A. L. J. 182 ; *Hari Prasad Singh* v. *Surendra Mohan Sinha*, 66 Ind. Cas. 945; 3 P. L. T. 709 ; 1 Pat. 506; (1922) A. I. R. (Pat) 450, relied on.

Peare Lal v. *Sundar Singh*, 68 Ind. Cas. 805; 20 A. L. J. 658; (1922) A. I. R. (A) 436; 44 A. 756, relied on.

The failure of the sons of a Hindu who has alienated joint family property to contest the validity of the alienation, supports an inference in favour of the validity of the transaction.

Chuttan Lal v. *Jai Ram*, 8 Ind. Cas. 719 ; 8 A. L. J. 15; 33 A. 283, followed.

A right to challenge an alienation of family property is not co-parcenary property in which a son acquires an interest by birth.

Every co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth.

Under Article 126 of Schedule I to the Limitation Act, limitation for a suit to challenge an alienation of family property runs from the date on which the alienee takes possession of the property.

If the plaintiff is a minor on the date when limitation commences this period will be extended in virtue of section 6 of the Limitation Act, but section 6 cannot be pleaded by a plaintiff who was not in existence when the alienee took possession. He is entitled to take advantage of the existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years from the date of his birth.

Chokhey Singh v. *Hardu Singh*, 64 Ind. Cas. 757; 24 O. C. 330; 8 O. L. J. 667; 4 U. P. L. R. (O) 10, relied on.

Second appeal against the decree of the District Judge, Ghazipur, dated the 10th July 1922.

Mr. *U. S. Bajpai*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

DHANRAJ RAI *v.* RAM NARESH RAI

JUDGMENT.—This is an appeal in a suit in which the plaintiffs sought to set aside on the ground of want of legal necessity two sales of joint family property made in the years 1904 and 1910 respectively. The deed of 1910 has been held by both Courts to be binding on the plaintiffs and the dispute is now confined to the deed of 1904. The two issues to be decided are :—

1. Is the suit within time ?

2. Was the alienation justified by legal necessity or antecedent debt ?

The family to which the plaintiffs belong consists of four branches headed by the four sons of the common ancestor Jhingur Rai. The deed in suit was executed by the heads of all four branches. Two of the sons of Jhingur Rai, namely Jharap Rai and Dhanraj Rai, were alive and executed it. The other two Jadu Rai and Dhanoki Rai were dead but the deed was executed by the two sons of Jadu Rai and by the only son of Dhanoki Rai. The executants also admittedly included all the adult male members of the family at the time when the deed was executed. The plaintiffs are all minors born after the execution of the deed. They are respectively a grandson of Jadu Rai, two grandsons of Jharap Rai and one grandson of Dhanraj Rai. Their suit has been held to be within time because in 1904 a grandson of Jharap Rai named Sita Ram was in existence. This lad died in 1912 at the age of thirteen.

The consideration for the deed in suit was Rs. 423 and the whole of it except Rs. 25 was taken for payment of antecedent debts. A list of these debts is given in the judgments both of the Subordinate Judge and of the District Judge. The learned District Judge says that in order to establish the necessity for the sale "it is necessary to show that these prior debts were in existence and that they themselves were binding on the family," and he considers that there is no evidence apart from the recital in the deeds that such necessity existed. If the learned District Judge means by this that in order to support an alienation an antecedent debt incurred by an ancestor must have been incurred for purposes constituting legal necessity in the narrow sense his statement is clearly erroneous. With regard to the four of the items which he has marked (*b*), (*c*), (*d*) and (*g*) the learned District Judge says that "there is not even any proof on the record that the deeds are genuine." If the learned District Judge means by this that in order to prove that the sale consideration was taken in lieu of prior debts, it is legally essential that the prior deeds which were paid off out of the consideration must be produced and formally proved he is again in error. Indeed such a requirement would render proof in respect of an old transaction impossible. Deeds which have been paid off are not retained with the same care as deeds which are still in force. It is not surprising if after a lapse of nearly twenty years such deeds are not forthcoming, and it is quite open to the defendants to prove by other evidence that these debts existed and that the consideration was paid in satisfaction of them.

But the radical error which vitiates the judgment of the learned District Judge is his failure to realise the legal significance of the fact that the deed was executed by the representatives of all four branches of the family, and by all the adult male members of the family living at the time. Each of these circumstances separately has been held sufficient to raise a presumption of legal necessity. As to the latter see *Balvant Santaram* v. *Babaji* (1). When combined they certainly do so. The presumption is still further strengthened by the fact that two of the original vendors Jharap Rai and Dhanraj Rai had sons who died long after attaining the age of majority but who did not during their life-time make any attempt to contest the validity of the deed. One of the sons of Dhanraj Rai is still alive and is defendant No. 5. In a similar case which came up under the Letters Patent, *Chuttan Lal* v. *Jai Ram* (2), this was held to support an inference in favour of the validity of the transaction.

This presumption applies to the whole deed and not merely to the items so far considered. There is considerable evidence to support it in regard to most of the items, and there is absolutely nothing to rebut it. One of the deeds which was paid off goes back as far as 1899 and it is not to be expected that after 21 years the defendants should be able to produce definite and positive evidence regarding the necessity for it. This is a very much

(1) 8 B. 602 ; 9 Ind. Jur. 227: 4 Ind. Dec. (N.S.) 778.
(2) 8 Ind. Cas. 719 ; 8 A. L. J. 15 ; 33 A. 268.

stronger case than *Peare Lal* v. *Sundar Singh* (3), which has been referred to in argument, as in that case the alienation was effected by the manager alone. The learned Subordinate Judge accepted all these items as being shown to be for legal necessity and the finding of the learned District Judge to the contrary is vitiated by manifest errors of law which entitle me to set it aside. In dealing with item (*f*) which he has accepted, the learned District Judge notices the fact that the deed was executed by the leading representatives of every branch of the family, but he seems to think that the only inference which can be drawn from it is that the debt was not illegal or immoral. The inference in reality goes much further than this. The presumption is that the deed represented a valid transaction which would bind the family estate. The finding of the learned Subordinate Judge on this issue was correct and should have been upheld.

In view of my finding on the above issue it is not necessary to say very much on the question of limitation. In view of the fact that Sita Ram was alive at the execution of the deed, the plaintiffs who were born during his life time and within twelve years of the alienation undoubtedly obtained a right to challenge it under the ruling of this Court in *Tulshi Ram* v. *Babu* (4). A right to sue is not, however, co-parcenary property in which a son acquires interest by birth, *Lachman Das* v. *Sundar Das* (5). Limitation under Article 126 runs from the date when the alienee takes possession of the property, which in this case was the date of the sale. If the plaintiff is a minor on the date when limitation commences this period will be extended in virtue of section 6 of the Limitation Act, but it has been held in the Punjab case above referred to that section 6 cannot be pleaded by a plaintiff who was not in existence when the alienee took possession. He is entitled to take advantage of the existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years from the date of his birth. (The same view was taken in Oudh in a judgment in which the question is fully discussed; *Chokhey Singh* v. *Hardeo Singh* (6). I am informed that the same view has also been taken in Bombay). If it were otherwise limitation might run on for ever. Suppose there is in existence at the time of the alienation an infant co-parcener. He clearly can sue within the period of his minority and three years thereafter. Just within three years after his attaining majority another co-parcener is born in another branch of the family and a fresh period of 21 years commences. It has been suggested in answer to this argument that the right to sue devolves like property on the legal representative of the minor, but a right to challenge an alienation is not property which devolves in this way. Every co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth. It was so held in *Padarath Singh* v. *Raja Ram* (7). Limitation reckoned from the date when the alienee took possession would have expired in 1916. Section 6 of the Limitation Act not being applicable, the plaintiffs cannot claim any extension beyond that date. For the same reason they cannot rely on section 7 as there was no joint right when the period of limitation commenced *Bhagat Bihari Lal* v. *Ram Nath* (8). If Sita Ram had lived he would have attained his majority in 1917. If that date is material, which I do think it is, it would be for the plaintiffs to show that their suit was brought within three years of it. The suit was not filed till August 1920. The appellants are in my opinion entitled to suceed also on the question of limitation though as I have said they are so clearly entitled to succeed on the other issue that it is almost superfluous to go into the question.

I may note in conclusion that there is a very recent decision of the Letters Patent Bench in *Anant Kalwar* v. *Ram Prasad Tewari* (9), that where a deed was executed by the father and uncle in lieu of antecedent debt the plaintiffs were bound by the acts of their own ancestor and could not challenge the deed.

(3) 68 Ind. Cas. 805 ; 20 A. L. J. 658 ; (1922) A. I. R. (A.) 436 ; 44 A. 756.
(4) 10 Ind. Cas. 908 ; 33 A. 654; 8 A. L. J. 738.
(5) 59 Ind. Cas. 678 ; 1 L. 558.
(6) 64 Ind. Cas. 757 ; 24 O. C. 330 ; 8 O. L. J. 667 ; 4 U. P. L. R. (O.) 10.
(7) 4 A. 295 ; 2 A. W. N. (1882) 29 ; 6 Ind. Jur. 542 ; 2 Ind. Dec. (N. S.) 868.
(8) 27 A. 704 ; 2 A. L. J. 463 ; A. W. N. (1905) 163.
(9) 78 Ind. Cas. 619 ; 22 A. L. J. 182.

The same view was taken by the Patna High Court in *Hari Prasad Singh* v. *Sourendra Mohan Sinha* (10).

For the reasons given above I allow the appeal with costs including in this Court fees on the higher scale and restore the decree of the Subordinate Judge.

Z. K. *Appeal allowed.*

(10) 66 Ind. Cas. 945 ; 3 P. L. T. 709 ; 1 Pat. 506; (1922) A. I. R. (Pat.) 450.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 8 OF 1924.

April 28, 1924.

Present :—Mr. Pullan, A. J. C.

SHEONANDAN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAI RAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Ex-proprietary tenancy—Relinquishment—Transfer.

A Hindu widow inheriting her husband's exproprietary tenancy has not the rights of a tenant but possesses merely a life-interest and cannot relinquish a part of the tenancy in favour of the landlord Any such relinquishment, if made, can be set aside on her death by the reversioners.

The relinquishment of a holding amounts to a transfer of property and is one of the various forms of alienation.

Appeal from the decree of the Additional Subordinate Judge, Lucknow, in C. A. No. 7 of 1923, dated the 12th October 1923, preferred against the decree of the Munsif, North Lucknow, dated the 14th October 1922.

Mr. *Ishwari Prasad*, for the Appellants.

Mr. *L.S. Misra*, for the Respondents.

JUDGMENT.—This is a second appeal from an order of the Additional Subordinate judge of Lucknow, allowing an appeal from a decree of the Court of first instance and remanding the case for trial on its merits. The facts are clearly stated in the judgment of the lower Appellate Court and the only question which this Court is required to determine at the present stage is whether the widow of an ex-proprietary tenant is able to relinquish a part of the ex-proprietary tenancy in favour of the landlord, or whether such a transaction can be set aside on her death by the reversioners. It has been argued in appeal that a widow inheriting her husband's tenancy under the Oudh Rent Act has the rights of a tenant and not merely a life-interest. If she becomes a tenant in her own right, she can undoubtedly deal with the property like any other tenant, and one of the rights of a tenant is the right of relinquishment. It is not, however, clear that a widow under the Oudh Rent Act has a position analogous to a widow under the Agra Tenancy Act. In that Act a regular table of succession is laid down quite contrary to the order of succession in the *Mitakshara* law. Consequently rulings of the Board of Revenue and of other High Courts dealing with the position of a widow under the Agra Tenancy Act must be confined to that Act, and they cannot be extended to Oudh, for, under the Oudh Rent Act there is no table of succession, and where there is no table of succession, it must be assumed that the personal law of the parties is in force. If the personal law of the parties, namely, the *Mitakshara* law, is said to govern this case, it would appear that a widow inheriting a tenancy inherits no more than a life-interest and the property will devolve on her death on the reversioners. She would be bound by all the laws of *Mitakshara* restricting the transfer of property and as a tenancy is property, she will not be able to alienate the holding inherited from her husband except for family necessity. It has been alleged on behalf of the appellant that the relinquishment of a holdihg is not a transfer, and also that as a right of this nature in an agricultural tenancy was not contemplated by the *Mitakshara* law it is improper to make that law apply. In my opinion, the relinquishment of a holding amounts to a transfer and it is certainly an alienation. There are many forms of transfer and alienation which were not contemplated upwards of a thousand years ago, but no difficulty has been

experienced in other cases in applying the *Mitakshara* law to modern conditions. The only Oudh ruling on this point, to which I am referred is the ruling reported in *Genda Singh* v. *Fateh Singh* (1). It was held in that case, "that as the Oudh Rent Act lays down no rule of succession, the rule of succession is palpably the personal law of succession applicable to the parties. The right of a Hindu widow to ex-proprietary rights ..... cannot on the face of it be greater than her title to proprietary rights." Carried to its logical conclusion, this ruling would place a Hindu widow inheriting ex-proprietary rights in exactly the same position as regards the ex-proprietary rights as one who had inherited proprietary rights. The reversioners, therefore, would have a right to challenge any alienation which she may have made, and she will not have the full rights of an ex-proprietary tenant to relinquish any part of the holding. This is the view which has been recently taken by the Patna High Court in a ruling, reported in *Jumra Prasad Singh* v. *Basdeo Singh* (2). No doubt, the Bengal Tenancy Act s as separate from the Oudh Rent Act as the Agra Tenancy Act, but the conditions of the two resemble each other closely, and although the ruling is not binding on this Court it offers a very valuable argument by analogy. In my opinion the view taken by the lower Appellate Court in this case is correct on the only point which has so far been decided and I dismiss the appeal with costs.

G. H. *Appeal dismissed.*

(1) 38 Ind. Cas. 258; 18 O. C. 377 ; 3 O. L. J. 135.
(2) 50 Ind. Cas. 872 ; 4 P. L. J. 548 ; (1919) Pat. 245.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 304 OF 1924.

March 24, 1924.

Present :—Mr. Justice Mukerji.

MADHO SINGH—DEFENDANT—APPELLANT
versus
MANGAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malicious Prosecution—Conviction by Trial Court—Acquittal on appeal—Bona fide *prosecution—Civil Court, position of.*

A suit for malicious prosecution does not necessarily fail where there has been a conviction by the Court of first instance and an acquittal by the Appellate Criminal Court, if on the evidence the Court is convinced that the charge was utterly false and therefore, malicious.

Sadubar Singh v. *Sheo Saran Singh*, 21 A. 26 ; A W. N. (1898) 161 ; 9 Ind. Dec. (N.S.) 728, distinguished.

Appeal against the decree of the Additional Subordinate Judge, Mainpuri, dated the 5th of November 1923.

Mr. *Shambhu Nath Choube*, for the Appellant.

JUDGMENT.—This appeal is entirely concluded by the findings of the Appellate Court. The findings are as clear as any Judge sitting in second appeals would desire.

The suit was brought on account of an alleged malicious prosecution. The lower Court found that the plaintiffs-respondents purchased some lands, and got possession over the *Sir* lands which belonged to their vendors, after obtaining mutation of names in their favour and that, when they went to till the lands the defendant resisted and caused hurt. It further found that the appellant made a false report to the police and took steps to bring about the conviction of the plaintiffs. It came to the conclusion that the charge brought by the defendant appellant was utterly false and was, therefore, malicious.

It was urged that, the fact that, the plaintiffs had been convicted by the Court of

first instance of criminal jurisdiction, although they were acquitted by the Sessions Judge, was a clear and conclusive evidence to show that the charge brought by the defendant was a *bona fide* charge. In support of this argument the case of *Sadubar Singh* v. *Sheo Saran Singh* (1) has been cited. That case was decided on the peculiar facts of it and it does not lay down that a suit for malicious prosecution is not maintainable where there is a conviction by the Court of first instance and an acquittal by the Appellate Criminal Court. The evidence in the case was gone into by the lower Appellate Court and this Court is bound by the findings already mentioned.

In my opinion there is nothing in this appeal. It is dismissed under O. 41, r. 11 Civil Procedure Civil

N. H. *Appeal dismissed.*

(1) 21 A. 26 ; A W. N. (1898) 161 ; 9 Ind. Dec (N. S.) 728.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 181 OF 1924.

February 24, 1924.

Present :—Mr. Neave, A. J. C.

BADRI SINGH—PLAINTIFF—APPLICANT
versus
LALTA SINGH AND OTHERS—DEFENDANTS
—OPPOSITE PARTY.

Code of Civil Procedure (Act V of 1908), O. 43, r. (a) —Appellate order returning plaint for presentation to proper Court—Appeal—Competency of Revision against —appealable order.

Order XLIII, r. 1 (a) of the Code of Civil Procedure applies not only to orders passed by the Trial Court but also to similar orders passed by the Appellate Court.

Where an order returning a plaint for presentation to the proper Court passed by the Subordinate Judge is confirmed by the District Judge in appeal, an appeal lies against the latter order.

Wahidullah v. *Kanhaya Lal*, 25 A. 174 ; A. W. N. (1902) 222; *Gur Bakhsh Sahoo* v. *Birj Lal Benka*, 26 C. 275; 3 C. W. N. 248; 13 Ind. Dec. (N.S.) 80, followed.

No revision lies where an appealable order has not been appealed from within the time allowed by law.

Petition for revision under section 115, Civil Procedure Code against the order of the District Judge, Fyzabad in C. A. No. 77 of 1923, dated the 9th August 1923, modifying the order of the Subordinate Judge, Fyzabad, in O. S. No. 214 of 1922, dated the 5th April 1923.

Mr. *Naimat Ullah*, for the Applicant.

Mr. *Salig Ram*, for the Opposite Party.

JUDGMENT.—This is an application under section 115, Code of Civil Procedure for the revision of an order of the District Judge of Fyzabad, modifying the order of the Subordinate Judge of Fyzabad by returning the plaint for presentation to the Revenue Court.

A preliminary objection has been taken that no revision lies. The suit was instituted on the 12th October 1922, in the Court of the Subordinate Judge of Fyzabad which dismissed it on the 5th of April 1923, holding that it ought to have been filed in the Revenue Court. The plaintiff appealed to the District Judge who concurred with the Subordinate Judge on the question of jurisdiction, but held that the suit should not have been dismissed, but that the plaint ought to have been returned for presentation to the Revenue Court and passed an order accordingly. The plaintiff submitted to this order and taking back his plaint filed it in the Revenue Court, which after hearing the suit dismissed it. The plaintiff now comes up to this Court for revision of the order of the District Judge, and contends that the suit is cognizable by the Civil Court.

The opposite party's pleader raises several objections, one of which is that as an appeal lay against the order of the District Judge directing the plaint to be returned, the appellant should have appealed within the period allowed by the law of limitation and cannot now apply under section 115. The learned Advocate for the appellant maintains that O. XLIII, r. 1 (*a*), Civil Procedure Code applies only to cases in which the first Court returns the plaint. But in a Full Bench case of *Wahidullah*

v. *Kanhaya Lal* (1), the Allahabad High Court held that an appeal will lie in such a case. The same view has been taken by the Calcutta High Court in *Gur Bakhsh Sahoo* v. *Birj Lal Benka* (2). These cases were both under the Code of Civil Procedure of 1882 but no material change has been made in this matter by the new Code. We are of opinion that the preliminary objection taken is well founded and we dismiss this application with costs.

G. H. *Application dismissed.*

(1) 25 A. 174; A. W. N. (1902) 222.
(2) 26 C. 275; 3 C. W. N. 243; 13 Ind. Dec. (N. S.) 780.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1559 OF 1922.

April 2, 1924.

Present:—Mr. Justice Daniels.

LAGAN RAI—PLAINTIFF—APPELLANT
versus
RAJA RAI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 79, Ex-proprietary tenant, whether tenant of entire proprietary body—Ejectment by one member of proprietary body—Ejectment by landlord—Suit to contest ejectment—Limitation.

A holder of Sir land who sells his share becomes an ex-proprietary tenant of the entire proprietary body and not merely of his vendee, and a dispossession by any one member of the proprietary body, even though he is not the *lambardar*, is to be treated as ejectment by the landholder within the meaning of section 79 of the Agra Tenancy Act, which must be contested by a suit brought within six months of the ejectment.

Debi Prasad v. *Bhagwan Din*, 16 Ind. Cas. 399; 75 A 27; 10 A. L. J. 437; *Rani* v. *Aidal Singh*, 78 Ind. Cas. 1041; 22 A. L. J. 113, relied on.

Appeal against the decree of the District Judge, Ghazipur, dated the 13th July 1912.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—The two plots in suit situated in khata Nos. 1 and 2 of a joint mahal were originally the joint *sir* of the plaintiff Lagan Rai, and the defendant Raja Rai. The plaintiff sold his share to a third party and became ex-proprietary tenant in the plots in suit under an order passed under section 36 of the Land Revenue Act. The defendant Raja Rai contested the order right up to the Court of appeal but the matter was finally decided in the plaintiff's favour in 1919 only one year before the present suit. It appears, however, that Raja Rai managed to retain possession of the plots and the plaintiff brought the present suit to eject him as a sub-tenant under section 58 read with section 34 of the Tenancy Act. I have always entertained doubts whether section 34 was really intended to support a suit for ejectment but this appears to be the accepted view of the law since the decision of *Balli* v. *Naubat Singh* (1), and has not been contested before me. The defence raised in the Courts below was that as the defendant is a member of the proprietary body this is a case of a tenant being wrongfully ejected by his landlord within the meaning of section 79 of the Act and, therefore, the plaintiff's remedy is barred by reason of his not having sued within six months. This defence was rejected by the Assistant Collector but accepted by the learned District Judge and this is the sole issue argued in the appeal. It is now settled law since the Full Bench case of *Debi Prasad* v. *Bhagwan Din* (2), that a sir-holder who sells his share becomes an ex-proprietary tenant of the entire proprietary body and not merely of his vendee. The question therefore, resolves itself into this whether dispossession by one member of the proprietary body, not being the *lambardar*, is to be treated as ejectment by the landholder, within the meaning of section 79. The point is covered by a very recent decision of Mr. Justice Mukerji, *Rani* v. *Aidal Singh* (3). The matter is fully discussed in his judgment and it is sufficient to say that I am not prepared to dissent from the law laid down therein.

The result is that the present appeal must succeed. I set aside the decree of the Court below and restore that of the Trial Court with costs in all Courts.

N. H. *Appeal allowed.*

(1) 16 Ind. Cas. 120; 9 A. L. J. 771.
(2) 16 Ind. Case. 399; 35 A. 27; 10 A. L. J. 437.
(3) 78 Ind. Cas. 1041; 22 A. L. J. 113.

AGNES HARRIET DAVID *v.* MURRAY & CO., LTD.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 28 OF 1923.

March 6, 1924.

Present :—Mr. Wazir Hasan, J. C.,
and Mr. Kendall, A. J. C.

MRS. AGNES HARRIET DAVID AND OTHERS—DEFENDANTS—APPELLANTS

versus

MESSRS. MURRAY & CO., LTD.—PLAINTIFF AND ALLAHABAD BANK LTD. —DEFENDANTS—RESPONDENTS.

Wills, construction of—English rules—General principles—Intention of testator—Surrounding circumstances—Court, duty of—Bequest to daughter and her children—Daughter, whether takes absolute estate—Succession Act (X of 1865), s. 84, illus. (a)—Statutes, construction of—Illustrations, value of.

English rules of construction of wills are purely an English product based on English necessities and English habits of thought and there can be no justification for taking them as a guide in the case of Indian wills. There are, however, certain fundamental principals which are true alike of wills of every nationality and every religion or rank of life. These are that in all cases it is the primary duty of a Court to asertain from the language of the testator what were his intentions, *i.e.*, to construe the Will. In so doing it is entitled and bound to bear in mind other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. "The Court is entitled to put itself into the testator's armchair.' Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed and none other. The Court is in no case justified in adding to testamentary dispositions. "If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a will anything which needs to be done by testamentary disposition.

Venkata Narasimha Appa Row v. *Parthasarathy Appa Row*, 23 Ind. Cas. 166 ; 37 M. 199 : (1914) M. W. N. 299 ; 12 A. L. J. 315 ; 18 C. W. N. 554 ; 26 M. L. J 411 ; 15 M. L. T. 285 ; 16 Bom. L. R. 328 ; 41 I. A. 51 (P. C.), relied on.

The will of an Indian Christian, after giving a life interest to the testator's wife, stated that on the death of the latter, the property would devolve on the testator's daughter and her children, and that failing these the property would go to the Church Missionary Society :—

Held that the daughter took an absolute estate in the property and the devise directly fell under the first illustration of the illustrations, (*a*) of s. 84 of the Succession Act.

In the construction of the text of the sections of an enactment it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired.

Muhammad Sycdol Ariffin v. *Yeoh Col Gark*, 39 Ind. Cas. 401 ; 43 I. A. 256 ; 21 C. W. N. 257; (1917) M. W. N. 162 ; 19 Bom. L. R. 157 ; (1916) 2 A. C. 575 ; 86 L J. P. C. 15 ; 115 L. T. 564 ; 33 T. L. R. 678 (P. C.), relied on.

Appeal against the decree of the Subordinate Judge, Mohan Lal Gunj, Lucknow, dated the 28th February 1923.

Mr. *J. Jackson*, for the Appellants.

Mr. *R. L. Banerji* and Sir *Henry Stanyan*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Mohan Lal Ganj dated the 28th February 1923. It arises out of a suit brought by the respondent, Messrs. Murray & Co., Limited, against Mrs. Agnes Harriet David and others for specific performance of a contract of sale in respect of a house situate in the city of

Lucknow, entered into between Mrs. Agnes Harriet David as the vendor and Messrs Murray & Co., Ltd. as vendees. The suit has been decreed by the Court below. The present appeal is preferred by Mrs. Agnes Harriet David and other defendants, who are alleged to be interested in the property in suit. The pleadings in the case gave rise to a large number of issues. The decision of the Court below on all those issues has been accepted by the parties before us except the decision on issue No. 3. The point involved in that issue was the only point argued on behalf of the appellants in support of the appeal.

The property in dispute originally belonged to one Mr. Emmanuel Phillips, who died by his own hand on the 7th November 1914, having just before his death killed his wife. Emmanuel Phillips made a testamentary disposition of all his properties by his will dated the 7th September 1911. This will was admitted to probate by the High Court of Allahabad under its judgment, dated the 2nd June 1915. It is argued that under the will mentioned above, Agnes Harriet, daughter of Emmanuel Phillips, obtained only a life-interest in the property in question and that her children, who are also parties to the present litigation, took the remainder absolutely.

It will be seen from what has been stated above that the construction now placed on behalf of the appellants on the will of Emmanuel Phillips in respect of the disposition relating to the house in question is different from the one which was sought to be placed on it in the Court below and which was embodied in issue No. 3. That issue is as follows:—

"Was the property in suit owned by the defendant No. 1 and her children (defendant Nos 3 to 8) jointly, as alleged" If so, is the contract of sale invalid and not enforceable"? The appellants are, however, not bound to adhere to the construction which they placed on the will in question in the first instance. We have, therefore, to examine the contention now put forward on their behalf.

At the hearing of the appeal some aid as to the interpretation of the provisions of the will was taken from certain English rules of construction by way of analogy and in this connection reference was made to the discussion of "gifts over" in Jarman on Wills. As observed by Lord Moulton in the case of *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (1) English rules of construction "are purely an English product based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian Wills." We must decline to be swayed by the rules of construction applied to English Wills as our primary guide in the task of interpreting the will before us. There are, however, certain fundamental principles which are "true alike of Wills of every nationality and every religion or rank of life." These principles may be stated in the language of Lord Moulton used in the case mentioned above. "In all cases the primary duty of a Court is to ascertain "from the language of the testator what were his intentions, i.e., to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair.' Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed and none other. The Court is in no case justified in adding to testamentary dispositions.

"If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succes

(1) 23 Ind. Cas. 166 ; 37. M 199 ; (1914) M. W. N. 299 ; 12 A. L. J. 815 ; 18 C. W. N. 554 ; 26 M. L. J. 411 ;15 M. L T. 285 ; 16 Bom. L. R. 828 ; 41 I. A. 51 (P C.)

sion of property in the absence of testamentary directions applying thereto. But the Court never adds to a will anything which needs to be done by testamentary disposition.

Emmanuel Phillips was a native of India. He was a Christian by religion and it is agreed that the present case is directly governed by the provisions of the Indian Succession Act, 1865. In construing this Will, therefore, we are bound to rest our decision mainly upon those provisions without losing sight of general principles to which we have already made reference. The house in question is admittedly in the first instance devised to the testator's wife, Sophia Phillips, with a limited interest, which interest for the sake of brevity may be characterised as a life interest. Then it is "to devolve after the death of my wife Sophia Phillips in the following way :— on my daughter Agnes Harriet, married to Moel Cornelius David and her children" Now if there were nothing else in this Will it would follow by the effect of section 84 of the Indian Succession Act that Agnes Harriet took an absolute estate in the property in question. Section 84 is as follows :—

" Where property is bequeathed to a person and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the Will." The devise as set out above directly falls within the first illustration of the illustrations (*a*) appended to that section. As to the importance of the illustrations in the construction of the text of the section we may quote the observations of Lord Shaw in the case of *Mahommed Syedol Ariffin* v. *Yeoh Ool Gark*. (2). "On the second point their Lordships are of oinion that in the construction of the Evidence Ordinance it is the duty of a Court of law to accept, if that can be done the illustrations given as being both of relevance and value in the construction of text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as " helpful in the working and application of the statute, should not be thus impaired." Relying on the text of the section itself the learned Counsel argues that the children of Agnes Harriet are " direct " objects of a distinct and independent gift " " and further that " a contrary intention " appears by the Will."

As to the first line of argument much need not be said. There are no words in the Will denoting the children as direct objects of a distinct and independent gift. The only words of gift are " to Agnes Harriet and her children." The last three words are nothing more than an addition describing a class of persons. Those words cannot be construed as denoting the children as objects of a distinct and independent gift. Indeed there is no gift in favour of the children apart from what may be implied from the gift to Agnes Harriet.

The second line of argument is sought to be supported mainly by three provisions of the will in question. The first is the provision contained in the devise to the testator's wife of the *pacca* house in Bareilly cantonments It is as follows :—

" I devise and bequeath to my wife Sophia Phillips the large *pacca* house No. 62 Bareilly cantonments for her exclusive use and benefit. She will have the power to deal with it as she chooses." It is argued that similar words are not attached to the devise of the house in suit in favour of Agnes Harriet. In our opinion the argument is inconclusive for the reason that where a limited interest is intended to be conferred by the testator he specifically uses words to that effect as is the case with regard to the devise of the house in question in the first instance in favour of his wife, Sophia Phillips which we have pointed out in a previous part of this judgment. The result is that as regards the devise of the house in suit in favour of Agnes Harriet the testator does not use words which he had used previously

(2) 39 Ind. Cas. 401; 43 I. A. 256; 21 C. W. N. 257 (1917) M. W. N. 162 ; 19 Bom. L. R. 157 ; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678 (P. C.).

for the purpose of expressing the intention of devising an absolute estate nor such words which he had employed for expressing the intention of conferring only a limited interest.

The second provision of the will on which reliance is placed relates to the disposition in favour of the testator's son, James William. The devise in favour of James William stands on a peculiar footing. The judgment in the probate case shows that James William turned out to be a "*mauvais subject*" and consequently the testator was highly displeased with him and gives him Rs. 25 per month for his life out of the rent of house No. 67 situate in Bareilly cantonments. On his death the same amount is directed to be paid to William's widow for so long "as she leads a good life and remains his widow." Then provision is made to the issue or issues of William, if any, by directing the same amount to be spent on their education and on their coming of age the house is to be sold and the proceeds to be divided amongst William's issues. Finally, in the event of William's widow remarrying or not leading a good life and there being no issue the house is to be sold and the proceeds to be divided equally "among my other children or grandchildren." On the strength of these provisions, it is argued that the intention of the testator was to give only a limited interest to all his children.

We are unable to yield to this argument. We have already pointed out that William had lost all affection of his father. The bequest to him, therefore, stands on a separate basis altogether and from it we cannot infer that a similar bequest was intended in favour of Agnes Harriet, who is shown to be the most beloved of all the children of the testator.

The third provision, which is brought into requisition in favour of the appellants' case, is the one which has been called as constituting "a gift over." Shortly put it is as follows:—"Failing all the persons named above as beneficiaries under this Will, I bequeath all "my property to the Church Missionary Society." It is argued that there being a gift over as contained in the provision quoted above the intention of the the testator was to create only a life-estate in favour of the first recipients of his bounty. We do not agree with this argument. In the first place, the gift to the Missionary Society is expressed in a vague language. The contingencies on which it is to come into effect are not definitely stated. In the second place, it does not come into conflict with an absolute estate previously created. If all the contingencies contemplated by the clause fail to happen then the clause would operate by way of defeasance of the prior gift which would be absolute were the contingencies not to occur.

The appeal, therefore, fails and is dismissed with costs.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1563 OF 1922.

April 7, 1924.

Present :—Mr. Justice Daniels.

SETH BEHARI LAL—DEFENDANT—APPELLANT
versus
AMIN CHAND AND ANOTHER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XLI, r. 2—Document, admissibility of—Objection before Appellate Court—Discretion of Court—High Court, whether will interfere.

Where a document has been admitted without objection in the Trial Court and even in appeal no question of its admissibility is raised till the time of arguments, the Appellate Court is entitled to refuse to entertain the objection, having regard to the provisions of O. XLI, r. 2 of the Civil Procedure Code, and the High Court will not interfere with the discretion of the lower Appellate Court in second appeal.

Charitter Rai v. *Kailash Behari*, 44 Ind. Cas. 422; 3 P. L. J. 306; (1918) Pat. 145; 4 P. L. W. 218; *Shahzadi Begam* v. *Secretary of State for India*, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 628; 2 M. L. T. 439; 34 I. A. 194 (P. C.); *Chinnaji Govind Godbole* v. *Dinkar Donder Godbole*, 11 B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S.) 209, relied on.

Appeal against the decree of the Subordinate Judge, Muzaffarnagar at Meerut, dated the 5th July 1922.

BEHARI LAL *v.* AMIN CHAND

Messrs. *Iqbal Ahmad* and *M. A. Aziz*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT :— This appeal arises out of a suit for possession of the site of a house. The claim was disputed on the ground of adverse possession. It has been found that the plaintiff is the owner of the site. It has also been found that the defendant's predecessor-in-interest occupied the land in 1885 under an agreement which allowed him to build a house on it but required him to vacate it and remove the materials when asked to do so by the owner. It is further found that from that time ground-rent has been regularly paid and that the appellant, when he bought the house knew of the plaintiff's rights, that is, he knew that the site belonged to the plaintiff and that his vendor had no transferable interest in it.

Two pleas are taken in the grounds of appeal :—

1. That no decree for ejectment should have been given but only a decree for arrears of rent.

2. That the lease or counterpart executed by the defendant's predecessor required registration.

The first plea has not been seriously pressed. On the facts found the plaintiff was entitled to a decree for ejectment.

As to the second plea the Court below held that it was not open to the appellant. It further held that even if the plea was open there was no force in it.

If it were necessary to support the second finding the plaintiff-respondent admits that he would not be in a position to do so. The question which has been argued is whether this Court ought to interfere with the discretion of the Court below in holding that the plea could not be raised by the appellant. The document was admitted without question in the Trial Court, and even in the appeal to the Court below no question of its admissibility was raised. It was only at the time of arguments that the point was taken. Under these circumstances the Court below was, in my opinion entitled to refuse to entertain it. The Code (O. XLI, r. 2) expressly lays down that except by leave of the Court no party shall be entitled to urge any objection not taken in the memorandum of appeal. It has also been held in several cases that where a document is admitted without objection in the trial Court, it cannot be objected to afterwards. The point arose in a recent case in the Patna High Court *Chartiter Rai* v. *Kailash Behari* (1). Certain papers had been admitted without objection in the trial court. The special judge in first appeal and a Judge of the High Court in second appeal rejected them as inadmissible. In Letters Patent it was held that the objection should not have been entertained. The learned Judges support their view by reference to a dictum of the Privy Council in *Shahzadi Begam* v. *Secretary of State for India* (2)where their Lordships say :—

> "It is now too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial".

The same view has been taken in another case *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (3), where a copy of a copy had been admitted without objection in the Trial Court, as also in *Kishori Lal* v. *Rakhal Das* (4).

Even if the document in dispute were rejected for want of registration this would not result in the dismissal of the suit. Quite apart from this document there is a finding of fact based on oral evidence that ground-reut has been regularly paid for the site by the appellant's predecessor and that the appellant took his sale deed with full knowledge of the plaintiff's rights.

For the reasons already given I dismiss the appeal with costs including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

(1) 44 Ind. Cas. 422 ; 3 P. L. J. 306 ; (1918) Pat. 145 ; 4 P. L. W. 213.
(2) 34 C. 1059 ; 9 Bom. L. R. 1192 ; 6 C. L. J. 678 ; 2 M. L. T. 430 ; 34 I. A. 194 (P. C.)
(3) 11 B. 320 ; 11 Ind Jur. 342 ; 6 Ind. Dec. (N. S.) 209.
(4) 31 C. 155.

RAJINDRA PURI *v.* BENI MADHO

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION NO. 188 OF 1923.

January 23, 1924.

Present :—Mr. Daniel, J.C.

Mahant RAJINDRA PURI—DEFENDANT—APPLICANT
versus
BENI MADHO—PLAINTIFF—OPPOSITE PARTY.

Code of Civil Procedure (Act V of 1908), S. 115, O. XXIII r. 1—Withdrawal of suit—Legal defects alleged by defendant, whether sufficient—Formal defect—Judicial discretion—Revision.

In order to give a Court jurisdiction to act under O. XXIII, r. 1 of the Civil Procedure Code, it is not sufficient that the defendant should allege legal defects but the Court must be satisfied either from the plaintiff's admission or otherwise that there really is some formal defect which must lead to the failure of the suit or some other sufficient cause within the meaning of the rule.

Failure on the part of a Court to exercise judicial discretion in allowing withdrawal of a suit with liberty to bring a fresh suit may be made the subject of revision.

Rameshwar Baksh Singh v. *Mirza Rasul Beg*, 45 Ind. Cas. 603; 21 O. C. 66 ; *Donda* v. *Dwarka Prasad*, 78 Ind. Cas. 121, relied on.

Application against the order of the Munsif, Fatehpur, District Bara Banki, dated the 25th October 1923.

Messrs. *M. Wasim* and *Salig Ram*, for the Applicant.

Mr. *Bisheshwar Nath Srivastava*, for the Opposite Party.

JUDGMENT.—This is an Application for revision of an order of the Munsif of Bara Banki granting permission to the plaintiff respondent under O. 23. r. I to withdraw a suit with permission to file a fresh suit. The order is one which cannot be defended on the merits and the question I have to decide is whether the case is a fit one for the exercise of the revisional jurisdiction of this Court. The case was instituted on 19th September 1922. A large number of documents were filed on both sides. The recording of evidence commenced in February 1923. At the time when the order complained of was passed the whole of the plaintiff's evidence had been examined and eighteen witnesses had been examined on behalf of the defendant. A Commissioner had also been appointed to make a local inquiry. The defendant was proposing to examine sixty-five more witnesses. At this point the plaintiff filed an application to amend his plaint. The points in which he asked for amendment were three in number :—

1. He wished to delete certain words from para. 8 of his plaint as being superfluous.
2. He wished to alter the valuation of his claim from Rs. 500 to Rs. 1,000.
3. He wished to make an addition to the description of the property in respect of which he had asked for a declaration of proprietary right.

The first two alterations were entirely unimportant and might well have been allowed. No question of jurisdiction was involved in the alteration in the valuation.

The third relates to certain plots as to which he had brought a prior suit in 1916. This suit had been withdrawn with liberty to bring a fresh suit but the plots were not included in the claim in the present suit on the express ground, explicitly stated in the plaint, that the plaintiff was in possession of them and, therefore, no relief was necessary in respect to them. The defendant opposed the amendment on the ground that the application was filed late, and the Munsif disallowed the application. The plaintiff, thereupon, on the same date put in the application now in question to withdraw his suit altogether. The grounds stated in the application are three in number :—

1. That there are certain legal flaws pointed out in para. 12 of the written statement on account of which he apprehends that his suit may be dismissed.

2. That he has omitted to include in his claim numbers in respect of which he sued in 1916 and he, therefore, apprehends that a future suit in respect of these numbers may be barred.

3. That he has not been permitted to amend his plaint. The third of those reasons is

merely ancillary to the first two. The second is not a ground on which the suit could fail within the meaning of O. XXIII. r. 1. There remain only the legal flaws alleged to have been pointed out in para. 22 of the written statement. The objections taken in this para were :—

1 That the plaintiff had not stated in what order the houses and chabutras standing on the disputed plots were constructed.

2. That he had not stated clearly whether he claimed certain dues described as chungi and kiraya.

3. That he had not stated whether the plot numbers given in his plaint were those of the settlement record or of the partition record.

4. That he should have stated in respect of each plot what his cause of action was and when it arose.

All these objections were of the nature of requests for further and better particulars of the statement of claim and could have been met by an order under O. VI, r. 5, Civil Procedure Code or by the examination of the plaintiff or his pleader under O. X, r. 1. They were not formal defects of the kind contemplated by O. XXIII. They were none of them matters in respect of which the plaintiff had asked leave to amend his plaint in the petition which he had previously presented. The learned Munsif does not even refer to them in his order except under the general remark that the written statement runs to over ten pages and that it would be a lengthy task to embody it in his order. It is impossible to gather from the Munsif's order what were the defects which he regarded as justifying the order that he passed. All that he has done is to enumerate the leading pleas taken in the written statement, to state, quite inaccurately, that the plaintiff in his amendment application wanted to remedy "these and other defects" and to conclude by saying.

"I think there cannot be any better proof of the existence of irregularities and defects formal in this case than the defects pointed out by the defendant himself in his written statement.".

The plea to which the learned Munsif refers in his summary of the pleadings are :

(*a*) That the suit as framed is not maintainable.

(*b*) That the defendants are in adverse possession.

(*c*) That the suit is barred by O. II, r. 2.

(*d*) That the Court-fee paid is not sufficient.

(*e*) That the suit is beyond the pecuniary jurisdiction of a Court.

Plea (*a*) is a general plea which is quite valueless until the defendant shows in what way the suit is not maintainable. Of the remainder the only ones which could possibly be grounds for an order under O. XXIII, r. 1, are (*c*) and (*e*) and neither of these defects was admitted by the plaintiff. As regards (*c*), if this objection was pressed the proper course was to treat it as a preliminary issue and if it was found against the plaintiff to return the plaint for presentation to the proper Court.

In his amendment application the plaintiff did not allege that the present suit must fail under O. II, r. 2 but only that O. II, r. 2 might bar a future suit in respect of certain plots not included in the present claim. Moreover, the omission of these plots was deliberate and if the facts alleged by the plaintiff were true they were rightly omitted. As regards (*e*) the plaintiff in his amendment application put down an amended valuation which was still within the Court's jurisdiction. The Munsif has in fact never applied his mind at all to the question which, if any, of these defects really existed or would justify an order under O. XXIII, r. 1. He records the fact that numerous objections had been taken by the defendant as sufficient proof that the defects exist. This is an utterly wrong position to take. In order to give a Court jurisdiction to act under O. XXIII, r. 1 it is not sufficient that the defendant should allege legal defects but the Court must be satisfied either from the plaintiff's admission or otherwise that there really is some formal defect which must lead to the failure of the suit or some other sufficient cause within the meaning of the rule. The order passed by the Munsif in this case is nothing short of an abuse of the rules of procedure, and an examination of the record suggests that the Court permitted the suit to be withdrawn in order to clear its file of a troublesome case which had been pending for over a year and

in regard to which an explanation of delay would have to be submitted in the next quarterly statement.

In the view which I take of the Munsif's order it is hardly necessary to enter into the question of jurisdiction. There is ample authority of this Court and of other High Courts for the proposition that where a Court below has failed to exercise a judicial discretion an order under O. XXIII, r. 1, can be made the subject of revision. Leaving aside the numerous cases of other High Courts which have been cited *Rameshwar Baksh Singh* v. *Mirza Rasul Beg* (1), is a direct authority of this Court and I have very recently taken the same view in *Doula* v. *Dwarka Prasad* (2).

I allow this revision with costs, set aside the order of the Court below and direct the learned Munsif to restore the case to his file and dispose of it according to law. It will be open to him, notwithstanding his previous order, to allow any amendment of the pleadings which is admissible under the Code of Civil Procedure and which he considers necessary.

G. H. *Order set aside.*

(1) 45 Ind. Cas. 603 ; 21 O. C. 66.
(2) 78 Ind. Cas. 121.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION NO. 189 OF 1923.

May 22, 1924.

Present :—Wazir Hasan, J. C.

Raja MUHAMMAD EJAZ RASUL KHAN —DEFENDANT—APPLICANT
versus
MUBARAC HUSAIN—PLAINTIFF AND OTHERS — DEFENDANTS—OPPOSITE PARTY.

Code of Civil Procedure (Act V of 1908), s. 115, O. XXIII, r. 1 – Withdrawal of suit—Cause of action substantiated – Formal defect—Other sufficient grounds, meaning of—Jurisdiction, absence of—Erroneous withdrawal of suit—Material irregularity –Revision.

S. 115 of the Civil Procedure Code applies to jurisdiction alone, the irregular exercise or non-exercise of it or illegal assumption of it.

An order purporting to be made under O. XXIII. r. 1 of the C. P. C. in utter disregard of the procedure laid down therein is an order passed with material irregularity and is open to revision.

A suit which must fail by reason of the cause of action on which it is founded not being substantiated by evidence cannot be said to fail by reason of some formal defect within the meaning of Sub. cl. (a) of cl. (2) of r. 1 of O. XXII of the C. P. C.

A plea of jurisdiction raised in defence to a suit has no relation whatsoever to the frame of the suit. Consequently a suit instituted in a Court which has no jurisdiction to entertain it does not fail by reason of any formal defect in it.

The expression "other sufficient grounds" used in cl. (b) of Sub-rule (2) of r. 1 of O. XXIII of the Civil Procedure Code does not cover any ground wholly dissimilar to some formal defect.

Application for revision against the order of the Munsif, Fatehpur, dated the 25th October 1923, in regular suit No. 46 of 1923.

Mr. *A. P. Sen*, for Mr. *M. Wasim*, for the Applicant.

Mr. *Hakimuddin*, for the Opposite party.

ORDER.—This is an application in revision. The applicant was one of the defendants in a suit brought by the plaintiff opposite party for the relief of a declaration of title in respect of certain immoveable property. Eventually an application was made by the plaintiff on the 19th September 1923 to the Trial Court asking for the withdrawal of the suit with permission to institute a fresh suit in terms of the provision of O. XXIII, r. 1, sub-rule (1) of the Code of Civil Procedure. The application was allowed on the 25th September 1923. The applicant is aggrieved with that order. Hence this application in revision.

Before coming to the merits of the application, it is necessary to state certain connected circumstances. The suit was instituted on the 27th January 1923 and after several adjournments many of which were made on insufficient grounds. issues came to be framed on the 6th July 1923 and the case was fixed for the 28th August 1923 for evidence. The plaintiff's witnesses were absent on that date and it was found that he was not entitled to

get an adjournment on that ground. The result was that the plaintiff himself went into the witness box gave evidence in support of and closed his case. The 19th September 1923 was then fixed for arguments. The first thing done on that date was the presentation of an application by the plaintiff for amendment of his plaint. The application was based on the ground that the suit was merely for a declaratory relief and that the defendant had objected to the maintainability of the suit by reason of the provisions of section 42 of the Specific Relief Act. It was, therefore, prayed that the plaintiff be permitted to add to his plaint relief for the the recovery of possession. This application was opposed by the defendant. The Munsif thereupon passed the following order:—"I reject the application as, I think, it is too late now for amendment." To my mind this was the most improper order to pass in the circumstances of the case. The Munsif should have considered the grounds of the application and dealt with them in a judicial manner. It is obvious that any delay in amendment would have only resulted to some loss of costs to the defendant and no more. This loss could well have been compensated by an order for costs in his favour. Soon after the application was rejected another application was presented by the plaintiff for withdrawal of his suit with permission to bring a fresh suit and that application was granted as already mentioned and is the subject-matter of the present application for revision.

There could be no difficulty in deciding this matter in favour of the applicant, if I were entertaining it as a Court of appeal. The order passed by the Munsif which I shall state in some details hereafter, was on the face of it most improper to say the least of it, and betrays utter lack of grasp of the essentials. But my powers are restricted by the provision of section 155 of the Code of Civil Procedure. The first question, therefore, to consider is whether this application is maintainable in terms of that section. The matter could be approached from two points of view: first, that the order passed by the Munsif was passed without jurisdiction and, secondly, that the order discloses a material irregularity in the exercise of jurisdiction.

It is important to bear in mind the import of the several terms of section 115 of the Code in virtue of which the High Court acquires jurisdiction to entertain an application under that section. As observed by Lord Atkinson in the recent case of *Balkrishna Udayar* v. *Vasudeva Ayyar* (1) the section aplies to jurisdiction alone, the irregular exercise or non-exercise of it, or illegal assumption of it." An application under that section may, therefore, fall to be considered on the grounds: (1) absence of jurisdiction, (2) refusal to exercise jurisdiction and (3) where the Subordinate Court has not only had jurisdiction but has also exercised it but exercised it illegally or with material irregularity. The third ground stated above would clearly exclude erroneous conclusions of fact or law reached in the exercise of jurisdiction, but it would certainly to my mind, include such rules of procedure as lay down certain preliminary conditions on the fulfilment of which the exercise of jurisdiction one way or the other will depend. The order therefore which the Munsif passed in disposing of the application was an order passed within jurisdiction. But this merely disposes of the first term of section 115 of the Code. His jurisdiction in disposing of this application was however, controlled by the specific provisions of O. XXIII r. 1 of the Code of Civil Procedure. This leads logically to the conclusion that if the order purporting to have been passed under the rule mentioned above is made in disregard of the rules of procedure under which the jurisdiction to pass the order could be exercised such an order must be taken to have been passed with material irregularity if not illegally. Now an order under O. XXIII r. 1 of the Code granting a plaintiff permission to withdraw his suit with liberty to institute a fresh suit must be founded on one or the other of the grounds mentioned in the rule. If it is not so founded I have no doubt in my mind that a Court making such an order exercises its jurisdiction with material irregularity. The case-law on the interpretation of section 115 of the Code of Civil Procedure presents a formidable mass

(1) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J 143; 19 Bom L. R. 715; (1917) M. W. N. 623; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

and it is not easy by any means to reconcile the authorities as leading to one conclusion alone. In my judgment it is safer to depend for guidance on the decision of their Lordships of the Privy Council in the case mentioned above. The facts of that case are very helpful in grasping the true import of the decision of their Lordships on the interpretation of that section. It will serve no useful purpose, however, to recapitulate those facts in this judgment. The impression left on my mind is that their Lordships treated that case as one falling within the third ground of section 115. They clearly held that the Trial Court was a Court of Civil Jurisdiction and its determination was a judicial determination and that it had jurisdiction to deal with the matter before it under section 10 of the Religious Endowments Act (20 of 1863); but though in view of the terms of that section the Court had jurisdiction its jurisdiction was exercised with material irregularity or illegally. On this ground in my opinion Lord Atkinson held that the application under section 115 rightly lay to the High Court and that the order of the High Court in setting aside the order of the Trial Court was a proper order. The decision of Mr. Justice Mookerjee in the case of *Hariday Nath Roy* v. *Ram Chandra Barna* (2) given on behalf of himself and four other learned Judges who sat with him is also instructive on the general conception of 'jurisdiction' and its exercise at various stages of a litigation.

The next question, therefore, which remains to be considered is whether the Munsif in passing the order under revision has acted with material irregularity. Having regard to the circumstances of this case this question must be answered in the affirmative. In passing the order the Munsif has entirely ignored the ground of the application. Indeed I doubt whether he ever read it. The application is as follows:—" In the above noted case the plaintiff has not asked for the relief of possession on account of which it is apprehended that the suit of the plaintiff would be dismissed as it has a legal defect." On the face of it this application does not fall within the terms of O. XXIII, r. 1, clause (2), sub-clause (*a*) : that clause being "that a suit must fail by reason of some formal defect." A suit which must fail by reason of the cause of action on which it is founded not being substantiated by evidence cannot be said to fail by reason of some formal defect. The essential element of a cause of action for a declaratory relief is the fact that the plaintiff is in possession and if that fact is not established the suit fails on merits though the result is attracted by the provisions of section 42 of the Specific Relief Act. The Munsif, however, in his order impliedly refers to the defendant's allegations in his written statement in paragraphs 13 and 14 and expressly to the two issues 3 and 4 framed with respect to those allegations and concludes that the plaint is defective and cannot proceed. These allegations raise the plea of jurisdiction. Such a plea in defence has no relation whatsoever to the frame of the suit. A suit instituted in a Court which has no jurisdiction to entertain it does not fail by reason of formal defect in it. The order of the Munsif is not founded on clause (*b*) of sub-rule (2) of r. 1 of O. XXIII, which permits the withdrawal of a suit when the Court is satisfied that there are "other sufficient grounds." It may, however, be pointed out that "other sufficient grounds" would not cover any ground wholly dissimilar to some formal defect. I think the interpretation of the words "other sufficient grounds" in the clause mentioned above should be the same as that of the words "other sufficient reason" used by the Legislature in connection with an application for review of judgment in r. 1, sub-rule (1), clause (*c*) of O. XLVII of the Code of Civil Procedure. The word "sufficient" in the last mentioned clause was construed by Lord Haldane in the case of *Chhajju Ram* v. *Neki* (3) as "meaning sufficient of a kind analogous to the two already specified." Clause (*b*), therefore, of O. XXIII, r. (1), sub-rule (2) merely adds grounds *ejusdem generis* with some formal defect. Instances of such defects were given by their Lordships of the Privy Council in the well-known case of *Robert Watson & Co.*, v. *The Collector of Rajshahye* (4)

(2) 58 Ind. Cas. 806; 24 C. W. N. 723; 31 C. L. J. 482; 48 C. 188.

(3) 72 Ind. Cas. 566; 3 L. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435, (1922) A. I. R. (P.C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P.C.) 99; 36 C. L. J. 459 (P.C.).

(4) 13 M. I. A. 160; 3 B. L. R. P. C. 43; 12 W. R. P. C. 43; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 509; 20 E. R. 511 (P. C.).

as defects (1) of misjoinder of parties or of the matters in suit, (2) where a material document has been rejected for not having a proper stamp, and (3) if there has been an improper valuation of the subject-matter of the suit. In the same decision it was pointed out that a case where the issue has been joined and the plaintiff fails to produce the evidence he is bound to give to support the issue was not a case where a question of form was only involved.

I am happy to observe that the conclusion at which I have reached is generally in accord with previous decisions of this Court, for instance the cases of *Rameshwar Bahsh Singh* v. *Rasul Beg* (5), and *Mahant Rajendra Puri* v. *Beni Madho* (6).

On the above grounds, I allow this application, set aside the order under revision and direct the Court below to resume the case at the stage where it was left. It will be open to the plaintiff to move that Court again for the amendment of his pleadings if he thinks it necessary to do so, and the Court will then, I trust, exercise its jurisdiction in the matter of amendment in a proper manner. The opposite party must pay the costs of this application.

G. H. *Order set aside.*

(5) 15 Ind. Cas. 603; 21 O. C. 66.
(6) 79 Ind. Cas. 1031.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 848 OF 1922.

March 25, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Dalal.

CHANDRIKA RAM TIWARI AND OTHERS — PLAINTIFFS—APPELLANTS
versus
NARAIN PRASAD RAI AND OTHERS DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Civil wrong by father—Decree for damages—Benefit to family property—Sons, whether bound—Immoral or illegal debt.

Where a Hindu father governed by the *Mitakshara* law cuts trees which do not belong to him or demolishes another's house and a decree for money is passed against him, the sons are bound by it, if the family has benefited by the action of the father.

Durbar Khachar v. *Khachar Harsur*, 32 B. 348 ; 10 Bom. L. R. 227 ; distinguished.

Peari Lal Singh v. *Chandi Charan Singh*, 5 C. L. J. 80 ; 11 C. W. N. 163, followed.

A Hindu son is not bound to do anything to relieve his father from the consequence of his own vicious indulgences, but he is bound to do that which his father himself would do were it possible namely, to restore to those lawfully entitled money he had unlawfully retained.

There is a distinction between a debt which a Hindu father incurs as the result of an offence under the Criminal Law and a debt for which he is made liable on the ground of the breach of a Civil duty. In the former case the debt incurred would be immoral and illegal but not so in the latter case.

Appeal from the decree of the Second Additional District Judge, Gorakhpur, dated the 25th of January 1922.

Mr. *K. K. Verma*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—The three plaintiffs are the sons of one Ram Nandan against whom a money decree was passed in execution of which an ancestral house and grove were sold. The house and grove were purchased by the defendant Narain Prasad Rai, who was also the decree-holder. The purchase was made for a sum of Rs. 86. The suit which gave rise to the decree was brought against Ram Nandan and his two brothers for damages in respect of cutting trees and for demolition of a building which was alleged to be an encroachment. The plaintiffs were not parties to the suit. The decree was executed in 1914 and the sale took place on 16th January 1916. On the defendant Narain Prasad Rai not being able to obtain possession he brought a suit for possession and obtained a decree in 1920. The plaintiff thereupon brought the present suit for a declaration that the sale of 16th January 1916 and the subsequent decree for possession of 1920 to which they were no parties were not binding on them.

The defence was (1) that the debt of the father was not incurred for illegal or immoral purposes and that, therefore, the sons were bound under the decree, and (2) that the suit of the sons was time-barred. Both these defences were accepted by the two Subordinate Courts and the plaintiffs' suit was dismissed. This is a second appeal from the appellate decree of the learned District Judge of Gorakhpur.

We are of opinion that the learned Judge was correct in holding that the debt was not incurred for illegal or immoral purposes. The father had cut certain trees which did not belong to him and the value of those trees was assessed at Rs. 50. The rest of the damages he had to pay for breach of a civil duty in demolishing a house. It is apparent that the family had benefitted to a large extent by the action of the father. On behalf of the appellants the authority of *Durbar Khachar* v. *Khachar Harsur* (1) was quoted. It was held there that the sons were not liable under the decree obtained against the father for a wrongful act and for a liability incurred for an illegal purpose when the estate that had come into the hands of the sons did not derive any benefit from the act of the father. As we have already pointed out the present case is distinguishable because the family estate did benefit by the act of the father. This ruling of the Bombay High Court was considered by the Calcutta High Court in *Chakouri Mahton* v. *Ganga Proshad* (2). In that case the decree was passed against the father for damages caused to another person by the father closing a channel of water and thereby causing injury to the crops which used to be irrigated by that water. In that case it was held that the sons were liable to pay the money due under the decree as it could not be said that the decree obtained was due to an act of the judgment-debtor which was a wanton interference with the rights of the decree-holder and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt. At page 874 of the Report the Judges pointed out the distinction suggested by the Madras High Court between a debt which follows as the result of an offence under the Criminal Law and a debt for which one is made liable on the ground of a breach of civil duty. In the former case the debt incurred by the father would be immoral and illegal but not in the latter case. In the present case damages were due in consequence of a breach of civil duty by the father. At page 875 of the Report the Judges quoted with approval the observations of the Calcutta High Court in *Peari Lal Singh* v. *Chandi Charan Singh* (3).

"The son is not bound to do anything to "relieve his father from the consequence of "his own vicious indulgences, but he is *surely* "bound to do that which his father himself "would do were it possible namely, to restore "to those lawfully entitled money he had "unlawfully retained. Upon any intelligible "principle of morality, a debt due by the "father by reason of his having retained for "himself money which he was bound to pay "to another would be a debt of the most "sacred obligation, and for the non-discharge "of which punishment in a future state "might be expected to be inflicted, if in any."

We think that the law is correctly laid down here.

In *Gursaran Das* v. *Mohan Lal* (4) a Bench of the Lahore High Court held that it was incumbent on a Hindu son to discharge a debt of his father which consisted of money improperly retained by him when dealing with the property of a third person. A decree passed in such a case against the father to indemnify the person with whose property he had improperly interfered was held to create a debt for which the ancestral property in the hands of the sons may justly be held to be liable. We think that the view of law taken by the lower Appellate Court was correct.

When the debt is held by us to be legal and binding on the plaintiff's sons it is not necessary to decide the question of limitation. We dismiss this appeal with costs including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

(1) 32 B. 348 ; 10 Bom. L. R. 297.
(2) 12 Ind. Cas. 609 ; 39 C. 862 ; 10 C. W. N. 519 ; 15 C. L. J. 228.
(3) 5 C. L. J. 80 ; 11 C. W. N. 163.
(4) 76 Ind. Cas. 907 ; 4 L. 93 ; (1923) A. I. R. (L.) 399.

KALI PROSANNA BHADURI *v.* HEMANTA KUMARI DEBI

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 2361 OF 1921.

February 28, 1924.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Chotzner.

KALI PROSANNA BHADURI AND OTHERS —DEFENDANTS—APPELLANTS

versus

RANI HEMANTA KUMARI DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Thak and Survey maps—Evidentiary value—Boundary line—Landlord and Tenant—Ejectment suit against trespassers—Suit against rival landlord—Tenants whether necessary parties.

Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct.

Jagadindra Nath Roy v. *Secretary of State for India in Council*, 30 C. 291; 30 I. A 44; 7 C. W. N. 193; 5 Bom. L R. 1 (P. C.).

In finding the boundary line between the estates there is no reason to suppose that greater weight should be attached to the thak map than to the revenue survey map. If the evidence supports the survey map it is open to a Court of fact to consider its evidentiary value in connection with other evidence in the case.

It cannot be said as an abstract proposition of law that where land is in occupation of tenants the landlord has no right to maintain a suit against a trespasser or if the land is in the occupation of the trespasser's tenants he cannot being a like suit against him alone.

Bazlul Karim v. *Satish Chandra Giri*, 10 Ind. Cas. 325; 15 C. W. N. 752; 13 C. L. J. 418 *Bisseswari Dhacca* v. *Baroda Kanta Roy*, 10 C. 1076; 9 Ind. Jur. 226; 5 Ind. Dec. (N. S.) 719; *Sita Ram* v. *Ram Lal*, 18 A. 440; A W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999 (F.B.) *Jogendra Nath Singh* v. *Secretary of State for India*, 17 Ind. Cas. 921; 16 C. L. J. 385; 17 C. W. N. 835, followed.

The question whether a suit for possession is maintainable by the landlord against a rival claimant depends very much upon the status of the tenants.

When one landlord is dispossessed by another landlord it is not necessary that the plaintiff should make all the tenants of the defendant parties to the suit.

Appeal against the decree of the Subordinate Judge, 3rd Court, Mymensingh, dated the 3rd August 1921 affirming the decree of the Munsif, Pingna, dated the 7th June 1920.

Babu *Dwarkanath Chakraburty* (with him Babu *Jatindranath Sanyal*), for the Appellants.

Babu *Brojolal Chakravarty* (with him Babu *Hemendra Nath Basu*, *Debendra Nath Bajchi*, *Bansorilal Sarkar*), for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen relates to some plots of *char* lands in the bed of the river Boiran. Both the Courts below have decreed the plaintiffs' suit mainly on the finding that that part of the river was within the *Zemindari* of the plaintiff and the *pro-forma* defendants. The defendants have appealed and three points have been urged in support of the appeal.

In the first place, it is contended that the Court of appeal below has not only not given due weight to the Thak map but on the contrary has attached undue weight to the revenue survey map. It is conceded that according to the Thak map this part of the river would be included in the *Zemindari* of the defendants which is contiguous to that of the plaintiff. According to the Revenue survey map the position would be otherwise. With reference to the Thak map the learned Subordinate Judge has accepted the reasons given by the Munsif for accepting the revenue survey map as correct in including the river in question within *mouza* Alamnagar the plaintiffs' taluk. The reason given by the Munsif for his view is that he was so satisfied on a consideration of the whole evidence in the case which consisted of Government Batwara Chittas of 1846, several chittas from 1275 to 1315 filed by the plaintiff, the *pottas* and *jamabandi* papers. Giving due consideration to all these items of evidence, the learned Munsif records his conclusion in the following words: "Considering the circumstances the thak loses much of the value usually attached to it." The Court of Appeal below has also attached great weight to the report of the Commissioner appointed in the case who held a local investigation and whose report

has not been successfully challenged by any party. It is, however, pressed upon us that all other evidence should be subordinated to the thak map which was prepared so long ago as 1851. The survey map was prepared the next year, namely 1852 and in laying down the boundaries between the plaintiff's *mouza* Alamnagar and the defendants' *mouza* Mirzapur it makes some deviation from the line as shown in the Thak map. The thak map is only a piece of evidence. It has been held in the case of *Jagadindranath Roy* v. *Secretary of State for India* (1), that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made They are not conclusions and may be shown to be wrong; but in the absence of evidence to the contrary they may be properly judicially received in evidence as correctly made." In fixing the boundary line between the estates there is no reason to suppose that greater weight should be attached to the thak map than to the Revenue survey map. If any evidence supports the survey map, it is open to a Court of fact to consider its evidentiary value in connection with other evidence in the case. We have been referred to several cases in which the evidentiary value of thak maps has been considered. These cases are appeals from original decrees in which the Court was invited to consider the evidence on the record, one of which was the thak map and in the special circumstances of each case relative value was attached to those maps. This matter, however, comes before us in second appeal. We are not in a position to say in considering the judgment of the lower Appellate Court in second appeal that that Court ought to have given more weight to one piece of evidence than to any other. The question with regard to the weight of evidence to be attached to thak maps is a question of fact. Such a question went up to their Lordships of the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Secretary of State for India* (1), which was an appeal from the decree passed in second appeal by this Court. The learned Judges who heard the second appeal differed on some points from the District Judge but as they were of opinion that he had not committed an error of law affecting the issues which related to the position of the disputed land they dismissed the appellant's appeal. Special leave to appeal was granted by their Lordships of the Judicial Committee. After considering several cases in which questions like these were sent back for further enquiry, their Lordships observed that in the case before them the same course might have been taken ; but as no error in point of law was committed in deciding the case on the evidence as it stood, the decision of the District Judge must be upheld. The appeal was accordingly dismissed. We are unable to hold that we would be justified in second appeal in interfering with the conclusion arrived at by the Court below.

It is next contended that the lower Appellate Court has erred in law in holding that the onus of proof of adverse possession was on the defendants. The plaintiff's case was that she was in possession of the disputed land for some time before she was dispossessed by the defendants in 1318. The Court of first instance held that the plaintiff was in possession at least in the years 1315, 1316 and 1317 and that she was dispossessed about the time of the settlement in 1318-19. The suit was brought in 1919 and, therefore, was within time. The learned Subordinate Judge while not displacing that finding of the Munsif that the plaintiff was in possession up to 1318 records his finding on this point in the following sentence. "The plaintff's evidence is that she was dispossessed at the time of the last cadastral survey in 1318 B. E. This appears to be probable." In another part of his judgment he observes as follows ; "The *asli* lands of the tenants of the contending defendants are near to the disputed lands. So they got a golden opportunity to get forcible possession of the newly formed lands within the period of limitation." The learned Judge then goes on to consider the law laid down by the Privy Council in the case of *Basanta Kumar Roy* v. *Secretary of State for India* (2), and he com-

(1) 30 C. 291; 30 I. A. 44; 7 C. W. N. 193 ; 5 Bom. L. R. 1 (P. C.).

(2) 40 Ind. Cas. 937 ; 44 C 859 ; 1 P. L. W. 593 ; 32 M. L. J. 505 ; 21 C. W. N. 642 ; 15 A. L J. 398 ; 25 C. L. J. 487; 19 Bom. L. R. 480 ; (1917) M. W. N. 492; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P.C.).

ments over the absence of evidence on the part of the defendants that they were in possession for more than 12 years. The cumulative effect of the findings of both the Courts is that both the Courts believed that the plaintiff was dispossessed in 1318; and moreover, there is the presumption of law in favour of the rightful owner and the defendants having taken forcible possession within the period of limitation it must be presumed that the plaintiff was in possession up to the date of the dispossession unless the defendants can show that they were in wrongful possession for more than 12 years before the date of the suit. In recording his conclusion on this point the learned Judge says "I therefore hold that Article 142 I. L. A. applies to the case." When read along with the context it appears that it was a slip of the pen and the learned Judge meant to say that Article 144 I. L. A. applies to the case. It seems immaterial as to which Article is applicable to the case. The finding of fact is that the dispossession by the defendant was within 12 years of the suit.

Lastly, it is argued that the plaintiff has no right to sue in ejectment and for mesne profits. This argument is based on objections under two heads. It is stated in the first place that the plaintiff's tenants having been in actual possession of the land in suit, they alone were entitled to maintain a suit in ejectment; and, secondly, it is maintained that as the tenants of the defendants are not joined as defendants in the suit the plaintiff is not entitled to obtain a decree for khas possession as against the defendants who are the proprietors of the *mouza*.

With regard to this objection, we find that this point was not taken in the Court below. There is no mention of this objection in the written statement of the defendants. No doubt the learned Munsif in discussing the issue as to the maintainability of the suit in its present form which was raised on the other grounds has remarked that the absence of the tenants of the plaintiffs would not affect its maintainability. On appeal the learned Subordinate Judge has not considered this point. It may fairly be presumed, considering the care and attention that he has paid to this case, that this point was not pressed before him. But an affidavit has been filed in this Court in which the defendant's pleader swears that the point was urged before the learned Judge. The learned Vakil for the respondent says that his client is unable to controvert this statement as the case was argued before the lower Appellate Court more than two years ago. The appeal was heard by the lower Appellate Court on the 3rd August 1921. The appeal to this Court was filed on 15th November 1921. The affidavit was sworn on the 17th July 1923 and a copy of it was served on the respondent on the 6th February 1924. In the grounds of appeal filed in this Court one of the grounds refers to the defect in the suit by reason of the absence of the plaintiffs tenants. So if the appellants' case is that the point was argued before the lower Appellate Court they should have filed an affidavit along with the memorandum of appeal, or, at any rate, before the respondent entered appearance. The respondent may justly contend that the matter having been dealt with so long ago as August 1921, it is not possible for her or her pleaders to remember what exactly happened at the time of the hearing of the appeal. Be that as it may, the point not having been taken specifically in the written statement and no issue having been framed on it, we are not in a position now to say that the lower Appellate Court was wrong in not considering it. It is a point which depends largely on evidence; and it cannot be said as an abstract proposition of law by that where land was in occupation of tenants the landlord has no right to maintain a suit for possession against the trespasser or if the land is in the occupation of the trespasser's tenants he cannot bring a like suit against him alone with regard to the first point alone. We may refer to the case of *Buzlul Karim* v. *Satis Chandra Giri* (3), and with reference to the second point the principle of law is laid down in the cases of *Bissesuri Dabeea* v. *Baroda Kanta Roy* (4), *Sita Ram* v. *Ram Lal* (5), *Jogendra Nath Singh* v. *Secretary of State for India* (6). It

(3) 10 Ind. Cas. 325; 15 C. W. N. 752; 13 C. L. J. 418.

(4) 10 C. C. 1076; 9 Ind. Jur. 226; 5 Ind. Dec. (N. S.) 719.

(5) 18 A. 440; A. W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999 (F. B.).

(6) 17 Ind. Cas. 921; 16 C. L. J. 885; 17 C. W. N. 885.

CHANDRADIP TEWARI *v.* JADUNANDAN SINGH

appears that the question whether a suit for possession is maintainable by the landlord against a rival claimant depends very much upon the status of the tenants. In this case, as has been observed by the pleader for the respondent, the tenants grew *boro* paddy on this land. We are told that the paddy is grown on lands which are not fit for growing more valuable crops. It is sown sometime before the rainy season and reaped before the floods set in. Ordinarily they are done by tenants having no permanent right to the land but who take it temporarily for the purpose. Then when one landlord is dispossessed by another landlord it is not necessary that the plaintiff should make all the tenants of the defendant parties to the suit; for, in the first place, it is difficult to ascertain the tenants who have got any tangible interest in the land, and, secondly, a suit may always be defeated by the defendant settling up new tenants to serve his purpose. Reference may also profitably be made to O. I, r. 9 and section 99, Civil Procedure Code. The plaintiff is entitled to get such possession as he may be found entitled to as between parties to the suit.

All the contentions raised on behalf of the appellant fail and this appeal is dismissed with costs.

M. B. *Appeal dismissed.*

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL NO. 917 OF 1922.

March 25, 1924.

Present :—Mr. Justice Daniels and
Mr. Justice Dalal.

CHANDRADIP TEWARI AND OTHERS—DEFENDANTS—APPELLANTS
versus
Babu JADUNANDAN SINGH—PLAINTIFF AND BALNARAIN SINGH—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Mortgage decree against father—Legal necessity—Sons whether bound.

A mortgage-decree obtained against a Hindu father governed by the Mitakshara law is binding on the sons, if the mortgage was executed for legal necessity, whether the sons are formally impleaded in the suit or not.

Brij Narain Rai v. *Mangala Prasad Rai*, 77 Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457 (P. C.), relied on.

Appeal against the decree of the District Judge, Ghazipur, dated the 21st of March 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by the plaintiff Jadunandan Singh to set aside a mortgage and mortgage-decree obtained against his father Bal Narain Singh on the ground of fraud and want of legal necessity. The plaintiff's father executed a mortgage in favour of the ancestor of the answering defendants. The latter brought a suit on the mortgage impleading both the plaintiff and his father. The plaintiff was at the time a minor. His father was at first named as his guardian *ad litem* but refused to act. The Nazir of the Court was then appointed guardian. Although notices had been served in connection with the nomination of the plaintiff's father as his guardian, it appears that no second notice was served on the minor when the Nazir of the Court was appointed nor were any funds provided for the latter to defend the suit. Both the Courts have found that there was no fraud on the part of the defendants but the learned District Judge has held on the authority of *Bhagwan Dayal* v. *Param Sukh* (1), that the plaintiff was not properly represented in that suit and on this ground has set aside the decree against him. We may note that the Patna High Court in *Pande Satdeo Narain* v. *Ramayan Tewari* (2), has taken a somewhat different view of the effect of failure to serve notice in connection with the appointment of a guardian *ad litem* but if we follow the ruling in *Bhagwan Dayal* v. *Param Sukh* (1), this does not conclude the matter. If the mortgage executed by the

(1) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.
(2) 71 Ind. Cas. 705; 2 Pat. 385; 4 P. L. T. 147; (1923) A. I. R. (Pat.) 242.

plaintiff's father was executed for legal necessity then the mortgage is binding on the joint family property and would be equally binding even though the plaintiff had not been formally impleaded in the suit. A similar plea of the minor not having been represented was taken in the recent Privy Council case of *Brij Narain Rai* v. *Mangala Prasad Rai* (3). In that case it was admitted before their Lordships that the minors were not properly represented and that the decree was not binding on them but as the mortgage was found to have been duly made for antecedent debt their Lordships nevertheless granted a declaration that it was binding on the joint family property. In this case although no separate issue on the question of necessity was framed the parties went into evidence on the point in connection with the issue of fraud. Indeed apart from limitation and *res judicata* the issue of fraud was the only issue raised and it was on this issue that the evidence was adduced on which the respondent succeeded in the Court below.

The question of limitation was not seriously argued either before me or in the Court below and there can be no doubt that the suit was within time

We accordingly remit the following issue to the Court below :—

Was the mortgage in dispute executed for legal necessity or antecedent debt ?

The parties will be at liberty to adduce additional evidence. The finding should be submitted within two months. On receipt of the finding ten days will be allowed for objections.

N. H. *Case remanded.*

(3) 77 Ind. Cas. 689 ; 21 A. L. J. 934 ; 46 M. L. J. 23 ; 5 P. L. T. 1 ; 28. C. W. N. 258 ; (1924) M. W. N. 68 ; 19 L. W. 72 ; 2 P. L. R. 41 : 10 O. & A. L R 82; (1924) A. I. R. (P. C.) 50 ; 33 M. L. T. 457 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 152 OF 1923.

November 13, 1923.

Present :—Sir Lancelot Sanderson, Chief Justice, and Justice Sir Thomas William Richardson.

MAHARAJAH SIR MANINDRA CHANDRA NANDI—APPELLANT

versus

HON'BLE PROVAS CHANDRA MITTER AND OTHERS—RESPONDENTS.

Specific Relief Act, (I of 1877) s. 45—Mandamus—Erroneous exercise of jurisdiction—High Court, power of.

The power given to the High Courts under section 45 of the Specific Relief Act is not to be used if the tribunal whose decision is impugned has exercised the discretion entrusted to it *bona fide* not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally: they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous consideration in arriving at their conclusion or deciding a point other than those brought before them, in which cases the Courts have regarded them as declining jurisdiction.

The Returning officer for a constituency of the Bengal Legislative Council rejected the nomination paper of a candidate seeking election to the council who on the date of the filing of the nomination paper was a member of the Indian Council of State, but had resigned his seat thereon before the date of the scrutiny of the nominations. Under the Bengal Electoral Rules, a person was not eligible as a member of the Council if he was a member of the Council of State or any other legislative body constituted under the Government of India Act. The rejected candidate in an application under section 45 of the Specific Relief Act urged that the Returning Officer should have decided the question of his eligibility with reference to the date of the Scrutiny and not with reference to the date of the filing of the nomination paper ;—

***Held* that the High Court could not interfere as, although the Returning Officer may have put a wrong interpretation on the Electoral Rules, he had not refused a jurisdiction which was vested in him, nor, had he usurped a jurisdiction that he did not possess.**

MANINDRA CHANDRA NANDI *v.* PROVAS CHANDRA MITTER

Appeal against the order of Mr. Justice Page, dated the 2nd November 1923, under clause 15 of the Letters Patent.

Messrs. *Jackson*, *S. C. Roy*, *K. N. Chowdhury* and *D. N. Sen*, for the Appellant.

Sir *B. C. Mitter*, Messrs. *H. D. Bose* and *S. M. Bose*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Maharaja Manindra Chandra Nandi of Cassimbazar from the judgment of my learned brother Mr. Justice Page which was delivered on the 2nd of November last.

The notice of motion was in these terms, "An application will be made before the Vacation Judge.....for an order requiring the Returning Officer to accept the nomination of the applicant as valid and to include the applicant's name in the list of valid nominations and to publish the said list so rectified as aforesaid in such manner and in such time as to this Hon'ble Court may seem fit and proper, or in the alternative for the issue of a Rule calling upon the respondents to show cause within a time to be fixed by the Court why the said order or such further or other order or orders as may be deemed fit and proper should not be made."

The facts which it is necessary for me to state in this case are as follows: The Maharaja, apparently, on the 7th of October had decided that he would stand for election to the Bengal Legislative Council. At that time he was a member of the Council of State and on that date (the 7th of October) he sent a telegram and a letter to the Governor-General submitting his resignation as a member of the Council of State. The 8th of October was the date specified for filing the nominations for the election to the Bengal Legislative Council. On that date the Maharaja's nomination was filed. On the 9th the Maharaja telegraphed to the Governor-General asking that he should receive communication in answer to his application by telegram. On the 10th of October, a telegram was received by the Returning Officer stating that the Governor-General had accepted the resignation tendered by the Maharaja.—a copy of that telegram, as I understand, was communicated to the Maharaja himself. The 11th October was the date fixed for the scrutiny of the nomination. On that date (the 11th of October) an objection was taken by the respondent Mr. Provas Chandra Mitter that the Maharaja was not eligible for election on the ground that on the 8th of October the date of filing the nomination papers—the Maharaja was still a member of the Council of State. The Returning Officer acceded to that objection and came to the conclusion that the Maharaja was not eligible for election, and rejected his nomination. The decision of the Returning Officer was as follows, "I must refuse the nomination of this candidate the Maharaja of Cassimbazar. Under section 93 of the Government of India Act the seat in the Council of State becomes vacant on the acceptance of the resignation of the member. The Maharaja wired his resignation on the 7th instant and also sent a letter on that day. The only evidence of the acceptance of the resignation is a telegram from Simla from the Secretary, Legislative Department, dated 10th instant. If this evidence is accepted I must hold that the resignation takes effect from this 10th instant and that on the 8th instant when the nomination papers were filed the Maharaja was still a member of the Council of State. Accordingly at the time of his nomination he was not eligible for election [See r. 5 (1) (c)] and so the provisions of r. 11 (1) were not complied with. The nomination is, therefore, refused under Regulation XXI (1) (I) and (III)."

The Maharaja, as I have already stated, then moved this Court, and the learned Judge delivered his judgment dismissing the motion. It is from that judgment that this appeal has been filed.

The scrutiny which was held on the 11th of October was held by the Returning Officer in pursuance of the rules which are called the "Bengal Electoral Regulations."

The first point which the learned Counsel, who appeared for the Maharaja, has urged is that the question which the Returning Officer ought to have considered and decided was, whether the Maharaja was eligible for elec-

tion at the date of the scrutiny, namely the 11th of October, and that instead of doing that, the Returning Officer had considered the question whether the Maharaja was eligible for election at the date of the filing of the nomination paper, namely the 8th, and that accordingly the Returning Officer had assumed a jurisdiction which he did not possess.

The principle upon which in my judgment this matter should be approached has frequently been laid down, and there is no doubt about it. The Court is asked to exercise a jurisdiction which has been given to the Court by section 45 of the Specific Relief Act. If it had been clearly made out that the Returning Officer had assumed a jurisdiction which he did not possess I should have no doubt that this Court would have power to exercise the jurisdiction given to the Court by section 45 and to make such order as the Court might think fit. Reference may be made to the words of Lord Justice Farwell in the case cited: *Rex* v. *Board of Education* (1) the passage being "If the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous consideration in arriving at their conclusion or deciding a point other than brought before them, in which cases the Courts have regarded them as declining jurisdiction." In my judgment, in this case the Returning Officer has not assumed a jurisdiction which he did not possess. The question for his determination was whether the Maharaja was a person eligible for election, as a member of the Legislative Council; and, to my mind it is clear that he has decided that question. I have read his decision: he said, "Accordingly at the time of his nomination he was not eligible for election." Whether he was right or wrong in that conclusion it is not for us to decide in these proceedings, and I express no opinion upon that point: The Returning Officer relied upon r. 5 (1) (*c*) of the Bengal Electoral Rules, and upon r. 11 (1), which are as follows:

5 (I) (*c*)—'A person shall not be eligible as a member of the Council, if such person is a member of the Council or of any other Legislative body constituted under the Act and has already made the oath or affirmation as such member:"

II. (1)—" Any person may be nominated as a candidate for election in any constituency for which he is eligible for election under these rules."

The Returning Officer, in my judgment, considered the question which was for his determination, and in considering that question he had to put an interpretation upon the rules to which I have referred. He may have put a wrong interpretation upon them or he may have put a right interpretation upon them. In these proceedings it is not for us to say whether he was right or whether he was wrong. To my mind it is clear that he did not usurp a jurisdiction which he did not possess: He did not refuse a jurisdiction which was vested in him. Nor is it suggested that he was actuated by any *mala fides* or extraneous circumstances. The result is that in my judgment this Court should not interfere in these proceedings and under these circumstances. In my opinion that point alone is sufficient for the disposal of the appeal.

There are, however, two other matters to which I think it is right to refer: The first is that I am not at all satisfied that the appellant has no other specific and adequate legal remedy for the purpose of asserting his rights, if he has any,—as to which I express no opinion—within the meaning of section 45 proviso (*d*) of the Specific Relief Act.

The last point to which I think it is necessary to refer is, this: it appears that the election is now proceeding, there being another candidate besides Mr. Provas Chandra Mitter, for one vacancy, and the poll will be closed on the 15th of November. Even if we were to accede to the application of the Maharaja in this case, I am not at all satisfied that any order, which we might think fit to make in

(1) (1910) 2 K. B. 165 at p. 179; 79 L. J. K. B. 595; 102 L. P. 578; 74 J. P. 259; 8 G. L. R. 549; 26 T. L. R. 422.

respect of this matter, would not be infructuous.

For these reasons in my judgment this appeal must be dismissed with costs.

Richardson, J.—The objection taken to the Maharaja's nomination was of a technical character and may appear almost ungenerous. On the other hand, it is of course important that an intending candidate should be careful to comply precisely with the rules, if only to avoid subsequent discussion as to the validity of the tenure on which, if elected, he holds his seat. I do not know the circumstances, but at least no reason appears why if the Maharaja was going to stand for election to the Bengal Council he should have postponed the resignation of his seat in the Council of State to the very last minute. In business of an important character, dilatoriness and procrastination are very apt to lead to difficulty.

Now, this appeal comes before us at a time when, as it appears, the election is being held and the votes for the candidates whose nomination papers were accepted are being recorded. In a day or two the poll will be closed and in due course one or other of the two candidates in the field will be declared to have been elected. It will then be open to the Maharaja, if he feels that he has a grievance, to endeavour to obtain a remedy by the means which the rules contemplate and provide for. It will be open to him to present an election petition to be heard or decided by a tribunal consisting of three Commissioners whose qualifications the rules are careful to prescribe. I have heard nothing which leads me to suppose that recourse to this remedy would not be as convenient and effectual for the purpose which the Maharaja has in view as the remedy for which he is now seeking. That being so, it is at least doubtful whether the proviso to section 45-of the Specific Relief Act, which makes it a condition precedent to the making of an order under the section, that the applicant should have no other specific and adequate legal remedy, does not apply. But if on a narrow interpretation of the words, the proviso is not applicable for the mere reason that the remedy is not at this moment available, it still remains that the jurisdiction is discretionary. We should still have to consider whether it would accord with sound discretion to exercise the extraordinary jurisdiction of this Court to make an order in the nature of a *mandamus*—a jurisdiction intended to be of the last resort—when the remedy specifically provided will so very soon be at the Maharaja's disposal.

It appears to me that even assuming that the Maharaja makes out a good case it would be a strong thing to interfere with an election to a popular assembly which is actually in progress.

Moreover, as the learned Chief Justice has pointed out, it is not clear whether any order that we might now make would be a complete remedy within the meaning of clause (*e*) of section 45. It is not clear whether the order would bind any authority to stay the election and require the proceedings to be commenced *de novo*. Some reference has been made in this connection to the power conferred on the Local Government by rule 29. I am not at present prepared to say what is the precise extent of the power conferred by that rule or whether the Local Government, which is not a party to these proceedings, would be bound by any order that we might make, to take action under that rule. I will only observe that the power conferred, however wide its scope, appears to be a discretionary power, and that if there be a doubt as to the true intention of rule 29, that doubt under another Rule, to which I shall come later, is to be resolved by the Governor.

Learned Counsel has said to-day that we ought not to take into consideration the circumstance that an election is in progress. But the circumstance is before us by affidavit and I cannot follow the learned Counsel when he says that we ought to shut our eyes and leave it out of consideration.

There are, however, not wanting other considerations which at least induce hesitation. In this case the function of the Returning Officer was in the nature of a judicial function and his decision was in the nature of a judicial decision. No shadow of suggestion is made that the Returning Officer, who heard argument on behalf of the parties interested, did not act *bona fide* to the best of his judgment and to the best of his ability. The contrary is frankly and fully conceded. No man upon whom a statutory duty is cast can be expect-

ed to do more and in such a case it should certainly not be easy if at all possible to obtain an order in the nature of a *mandamus* for the purpose of setting aside the decision which has been thus given and obtaining a fresh decision. I quite appreciate the argument of the learned Counsel Mr. Chaudhuri. Learned Counsel said that the Returning Officer decided the point which arose on materials which it was not competent to him to consider and not on the materials which he ought to have considered. The Returning Officer ought, it is argued, to have had regard to the eligibility of the Maharaja for election not on the day on which the nomination paper was handed in to the Returning Officer but on the day on which the paper was scrutinized. As I have said, I quite appreciate the argument. If the Returning Officer did not decide the question which it was his duty under the Rules to decide and decided some other question, it may well be that, in the absence of other remedy, this Court would have power not to decide anything for him but to make an order that he should decide the question which he ought to have decided. The case of *Rex* v. *The Board of Education*(1), which has been cited, would appear to support the learned Counsel's argument to that extent but no further. If we were to make an order under section 45 the most, as it appears to me, that we could do, would be to direct the Returning Officer to decide whether the Maharaja was eligible for election on the day of the scrutiny. That is to say, a fresh decision by the Returning Officer would be necessary, and very probably in the meantime, before another decision could be obtained, the poll would be closed.

But apart from that, it is not, as it seems to me, so clear as to be beyond all dispute that the rules do not require that a candidate should be actually eligible for election when nominated. Rule II (1), to which the Returning Officer has referred, says that "any person may be nominated as a candidate for election in any constituency for which he is eligible for election under these Rules." It may be, though I am not to be taken as in any way expressing an opinion on the point that a candidate is to be regarded as eligible for election, if he fulfils the prescribed conditions, when his nomination paper is scrutinized or even when the poll is taken. But it cannot, I think, be said that no reasonable being could understand the words of Rule II in the sense in which the Returning Officer understood them. On a debatable question, we are not to substitute our opinion for that of the Returning Officer. That position is amply supported by authorities cited by Page, J. in the course of his judgment.

If as the Returning Officer thought the nomination was invalid and the Maharaja was not properly nominated, it would follow that the Maharaja was not eligibile for election. It appears to me that the point is at least arguable and if there be any doubt on the point of law arising on the construction of the rules as to the time or times to which the Returning Officer was to look in determining the Maharaja's eligibility, clearly this Court ought not to interfere. It is idle to ask for a mandamus when there has been no refusal to perform a statutory duty and the question whether in point of law it was properly performed is in doubt.

In the second place, the rules themselves provide the method by which questions of doubt or difficulty as to their interpretation are to be solved. Rule 48 prescribes that: "if any question arises as to the interpretation of these Rules otherwise than in connection with an election enquiry held thereunder, the question shall be referred for the decision of the Governor, and his decision shall be final." It seems that the Returning Officer was asked to make reference under this rule, but the request does not appear to have been pressed and the application which has since been made to the High Court, and which is now before us in appeal, is not that the Returning Officer should be compelled to make a reference. If in a proper case the Returning Officer should decline to make a Reference or, speaking with the very greatest respect in regard to a contingency so improbable, if the Governor should decline to decide a Reference properly made to him, it would then be time enough to have recourse to the provisions of section 45 of the Specific Relief Act.

For these reasons I agree with the learned Chief Justice that the application was rightly dismissed by Page, J. and that this appeal must also be dismissed, and with costs.

HARPAL KURMI *v.* MOHAN KURMI

I may add that we did not consider it necessary to hear the learned counsel for the respondents. I desire also to say that there has been no discussion before us on a question which has been adverted to in the course of the proceedings, namely, whether when the Court grants a Rule under section 45 to show cause why an order applied for under that section should not be made it has or has not the power to grant an *ad interim* injunction or to make an order in the nature of a suspensory order.

N. H. *Appeal dismissed.*

Attorneys for the Appellant—Messrs. *K. K. Dutt & Co., P. C. Ghose* and *B. N. Basu & Co.*

Attorneys for the Respondents—Messrs. *B. K. Basu* and *Kestiven Gooding & Co.*

———

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1018 OF 1922.

April 1, 1924.

Present :—Mr. Justice Daniels.

HARPAL KURMI AND OTHERS — DEFENDANTS—APPELLANTS
versus
MOHAN KURMI AND OTHERS— PLAINTIFFS—RESPONDENTS.

Adverse possession—Dispossession actual, under decree —Adverse possession, whether interrupted.

The delivery of actual possession under decree interrupts adverse possession.

Jang Bahadur Singh v. *Hanwant Singh*, 63 Ind. Cas. 212 ; 48 A. 520 ; 19 A. L. J. 469, distinguished.

Obiter :—

Even delivery of formal possession under a decree in a proper case is sufficient to give a new starting point for limitation.

Appeal against the decree of the Subordinate Judge, Jaunpur, dated the 24th of March 1922.

Messrs. *P. L. Banerji* and *Mushtaq Ahmad*, for the Appellants.

Mr. *S. N. Verma*, for the Respondents.

JUDGMENT.—The plot in dispute in this case originally formed part of an agricultural holding. The defendants took it on lease from the Maharaja of Benares to whom it belonged in the year 1887. During the currency of the lease the defendants built a house for agricultural purposes and they subsequently converted it into a residential house. In the year 1915 the Maharaja ejected them and on 9th July 1915 delivery of possession was made to him through an amin. I have read the *dakhalnama* and it purports to convey actual possession. The finding is that notwithstanding this the defendants never really gave up possession of the house. The question for decision is whether delivery of possession under the decree interrupts adverse possession and gives a fresh starting point for limitation. The present plaintiffs are lessees from the Maharaja under a lease subsequent to the ejectment of the defendants. Both the Courts below have found in their favour and I agree with this finding. There is no doubt that delivery of actual possession under a decree interrupts adverse possession. Indeed it has been held in *Lal Rajendra Kishore Singh* v. *Bhagwan Singh* (1) that even delivery of formal possession in a proper case is sufficient to give a new starting point for limitation and this has been held also by the Privy Council in *Radha Krishna Chanderji* v. *Ram Bahadur* (2). The appellants rely on the case of *Jang Bahadur Singh* v. *Hanwant Singh* (3). That case does not really assist them. It was a case in which the mode of delivery of possession appropriate to the circumstances was not resorted to and on this ground it was held that adverse possession was not interrupted. The person to whom possession was to be delivered was the auction-purchaser. Where the judgment-debtor was in possession of the property the proper procedure was for

(1) 39 Ind. Cas. 745; 39 A. 460; 15 A. L. J. 361.
(2) 43 Ind. Cas. 268 ; 16 A. L. J. 33; 23 M. L. T. 26 ; 4 P. L. W. 9 ; 34 M. L. J. 97; 7 L. W. 149 ; 22 C. W. N. 330 ; 27 C. L. J. 191 ; (1918) M. W. N. 168 ; 20 Bom. L. R. 502. (P. C.).
(3) 63 Ind. Cas. 212 ; 48 A. 520 ; 19 A. L. J. 469.

the Court to order actual delivery of possession to the auction-purchaser. Where, however, the property from its nature was not capable of being actually delivered the mode of giving possession was by proclaiming the sale certificate and by beating the drum. The case with which the Full Bench had to deal was one in which the former method should have been but the latter method actually was adopted. The present case is entirely dissimilar. Here the *dakhalnama* purported to give actual possession, which was the appropriate mode of relief though in the sequel it proved that the procedure adopted was not really effective. This must often be the case. An amin goes down to the spot and hands over possession to the decree-holder, the judgment-debtor keeping away. As soon as the amin and the decree-holder have gone the judgment-debtor quietly resumes possession. It would be destructive of all respect for law and authority of the Court if it were held that in such cases the judgment-debtor could treat the delivery of possession as a nullity and claim to be in adverse possession from the date of his original entry on the land. The suit has been rightly decided by the Courts below and I dismiss the appeal with costs.

As there is a deficiency of Rs. 18-4-0 on the part of the plaintiffs respondents in the Court below which has not so far been made good the decree passed in their favour will be subject to this condition that they will not be entitled to execute it until the deficiency has been paid.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 196 OF 1920.

March 7, 1922.

Present :—Justice Sir John George Woodroffe and Mr. Justice B. B. Ghosh.

JAMINI KUMAR SEAL AND ANOTHER—APPELLANTS

versus

THAKUR DHAN BAISHNAB AND ANOTHER—RESPONDENTS.

Hindu Law—Remarried widow—Son's property, succession to—Widow Re-marriage Act (XV of 1856).

Under the Hindu Law a widow after her re-marriage can inherit to her son by her first husband, whether she is governed by the Widow Re-marriage Act or not.

Akorah Sooth v. *Borcance*, 11 W. R. 82 ; 2 B. L. R A. C. 199 ; *Basappa* v. *Ragava*, 29 B. 91 ; 6 Bom. L. R. 779, followed.

Appeal against the decree of the Subordinate Judge, 1st Court of Sylhet, dated the 26th August 1919, affirming that of the Munsif, 3rd Court, Habiganj, dated the 24th February 1919.

Babus *Brojo Lal Chakravarty* and *Preo Nath Dutt*, for the Appellants.

Babus *Jogesh Chunder Roy* and *Birendra Kumar Dey*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of and declaration of title to lands and we deal with only one point in this case. The question which arises is this. It is admitted that the property which is the subject-matter of the suit belonged to a man of the name of Madan. The plaintiffs appellants are purchasers from the daughter's sons of the grandfather of Madan. The defendants claim under purchase from the mother of Madan. Madan, the son, died admittedly after the remarriage of his mother. Now, the question arises which of the parties has acquired title by their purchase ; and this depends upon the question whether the daughter's sons of the grandfather of Madan were the heirs of Madan or whether Madan's mother was his heir. Both Courts have

found in favour of the latter alternative and accordingly dismissed the suit and the appeal. The question, therefore, which we have to decide is whether or not Madan's mother who is *prima facie* his heir under the Hindu law was incapable of inheriting by reason of the second marriage. The learned Judges of the two lower Courts have decided the case after having referred to two decisions, one of this Court, namely, the case of *Akorah Sooth* v. *Boreanee* (1), and the other a Full Bench decision of the Bombay High Court, namely, the case of *Basappa* v. *Rayava* (2). The learned Vakil for the appellants has sought to distinguish these decisions on the ground that they deal with cases governed by the Widow Remarriage Act 15 of 1856, and his contention is this, that the Act was passed for the purpose of removing a bar or disqualification ; that if there is no bar to a re-marriage then the Act does not apply and that such is the case here according to the evidence which has been accepted, that widow re-marriage was permissible amongst the caste to which Madan belonged.

On the other hand it is contended for the respondents that the Act is of universal application and authority is relied upon in support of the respective contentions of both sides. In our opinion it is not necessary to decide this point. Whatever view we accept as regards the argument addressed to us on this point this appeal must fail.

It is conceded that if the Act applies then the decision of this Court to which we have referred is conclusive on the point which is now before us. We are of opinion that that decision is also an authority in favour of the respondents and against the appellants even on the assumption of the appellants' argument that the case is not one under the provisions of that Act, because, in our opinion, it must be taken that apart from any special provisions of that Act, it was decided in that case that a mother may inherit from her son after her re-marriage, assuming that the son had died after her re-marriage. It has thus been held that under the general Hindu Law the widow is entitled to succeed to the estate of her son. That case was followed by a Full Bench of the Bombay High Court and we agree in the decision of the learned Chief Justice in that case when he states that whatever might have been his view, had the matter been uncovered by authority it would (in his opinion) be wrong to disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in the case of *Akorah* v. *Boreanee* (1).

In our opinion, therefore, the appeal fails and it is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 11 W. R. 82; 2 B. L. R. A. C. 199.
(2) 29 B. 91; 6 Bom. L. R. 779.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 91 OF 1922.

April 1, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

Lala JWALA PRASAD AND OTHERS—DEFENDANTS—APPELLANTS
versus
HOTI LAL—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 73, illus. (n)—Interest Act (XXXII of 1839) s. 1—Interest, when allowable.

The claim for interest on a sum of money due from one person to another depends upon contract, express or implied, or on some rule of law allowing it. If there is no contract allowance of interest can only be made as a matter of law.

Kalyan Das v. *Maqbul Ahmed*, 46 Ind.Cas. 548; 40 A. 497 ; 22 C. W N. 866 ; 16 A. L. J. 693 ; 5 P. L. W. 159 ; 35 M. L. J. 169 ; 28 C. L. J. 181 ; 8 L. W. 179 ; (1918) M. W. N. 585 ; 24 M. L. T. 110 ; 20 Bom. L. R. 861 (P. C.), followed.

In the absence of a contract to that effect, the only grounds on which a person can claim interest on money due to him from another, when the liability for the sum is established, are to be found either in section 73 illus. (n) of the Contract Act or in section 1, of the Interest Act.

Nathu v. *Ghansham Singh*, 49 Ind. Cas. 737 ; 17 A L. J. 177 ; 41 A. 259, followed.

Appeal from a decree of the Subordinate Judge, Aligarh, dated the 21st December 1921

JWALA PRASAD *v.* HOTI LAL

Mr. *Gulzari Lal* and Dr. *K. N. Katju*, for the Appellants.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This is an appeal from a final decree passed by the learned Subordinate Judge of Aligarh in a suit for accounts. The grounds of appeal are :—

(1) That the amount of profits alleged to have been recovered by the defendant between the years 1904 to 1907 as fixed by the Commissioner who took accounts was excessive.

(2) That the defendant was wrongly refused credit for three items :—

(*a*) of Rs. 2791.

(*b*) of Rs. 1505 and

(*c*) of Rs. 608-10.

(3) That the defendant was not liable to pay interest on the taking of accounts and he was wrongly saddled by the lower Court with the payment thereof.

The ground of appeal No. 5, was abandoned.

As regards the calculation of profits of the two markets which it is now decided was received by the defendant we think that the Commissioner has correctly assessed them. The Commissioner did not trust for valid reasons the account books produced by the defendant and his opinion was that the safest way of assessing the income for the period from 1st January 1904 to 30th April 1907 was to apply the average of eight months from May to December 1907. This is as good a way of valuing the profits as any other that may be suggested. We, therefore, affirm the finding of the lower Court on this point.

The item of Rs. 2791 is made up of several items, a detail of which will be found at page 10 of part 3 of the printed book under the heading statement C. As regards only one item of Rs. 600 there is evidence that this money was paid by the defendant on behalf of the plaintiff, when the plaintiff was a minor, to one Jwala Prasad son of Khareg Sen. There was a partnership firm of which this Jwala Prasad and the plaintiff were partners and, on dissolution of that partnership, certain sums were paid to this Jwala Prasad who undertook the liability to pay himself the debts due from the firm. The agreement executed by Jwala Prasad is Ex. K. It is stated in the agreement that he received Rs. 600 from Mihin Lal father of the defendant. The defendant is entitled to set off this sum of Rs. 600 The other items the defendant claims are on the basis of entries in his account books which have been found to be untrustworthy. There is, further, no other evidence to render the plaintiff liable and so under section 34 of the Evidence Act the entries in the account books by themselves are not sufficient to saddle the plaintiff with the liability for the payment of these sums.

Coming next to the item of Rs. 1505 we find it made up of different items of statement D at page 10 of part 3 of the printed book. As regards a sum of Rs. 200 a receipt alleged to have been given by Kalyan Das (Ex. N.) was put in by the defendant but it has not been proved in the ordinary way. There is no proof of the payment by defendant of any of the many items making up the sum of Rs. 1505. We, therefore, disallow this claim of the defendant.

The payment of the third item by the defendant on behalf of the plaintiff, when the plaintiff was a minor, is proved. The agreement referred to above declares that Jwala Prasad received Rs. 500 from Mst. Sukha widow of Tota Ram. The evidence of Makhan Lal a munim of the firm of Nathu Ram Jwala Prasad had proved that Mst. Sukha obtained this money by pledging her ornaments with that firm and that subsequently the defendant paid this money, got the ornaments redeemed and returned them to Mst. Sukha. It was pointed out by the respondent's learned Counsel that Jwala Prasad defendant was one of the partners of this firm. This fact is not sufficient to make us distrust the testimony of Makhan Lal. We are satisfied that the sum really came out of the pocket of the defendant. He is entitled to credit for this sum.

Finally there remains the question of interest. In two judgments of a Bench of this Court of 1918 it was pointed out that the only grounds upon which interest can be claimed upon a sum of money when the liability for the sum is established, are to be found either in section 73 of the Contract Act, illustration (n) or in the Interest Act, No, 32 of 1839. In the present case interest is not recoverable on either ground. Obviously there was no contract between the parties for the payment of interest. The Interest Act provides that

interest would be payable if debts or sums are due by virtue of some written instrument or, if payable otherwise, then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest shall be claimed from the date of such demand until the term of payment *Lalman* v. *Chintamani* (1). This principle was affirmed by the same Bench in *Nathu* v. *Ghansham Singh* (2). The judgment in the second case was delivered by the other learned Judge constituting the bench. At page 187 of the Report the same principle was affirmed. There is a Privy Council authority which has not been cited in either of these rulings.There was such authority for the opinion of the Bench of this Court. In *Kalyan Das* v. *Maqbul Ahmed* (3) their Lordships of the Privy Council observed at page 504 of the Report that interest depends on contract, express or implied, or on some rule of law allowing it. If there is no contract allowance of interest can be made only as a matter of law. In the present case the money in the hands of the defendant was not demanded till 6th January 1920 and there was no contract for the payment of interest. It was pointed out that the plaintiff was a minor. If it be argued that for that reason he could not make a demand the reply would be that the defendant would not know to whom to make the payment upon a sufficient receipt during the infancy of the plaintiff. We think that the plaintiff is not entitled to receive any interest up to 6th January 1920.

In the result we allow the appeal for the principal sum of Rs. 1,203-10-0 and direct that interest at 6 per cent. per annum shall be charged from the 6th January 1920 till the date of realisation. The lower Court granted a decree for Rs. 12,300-4-7½, so that decree shall be altered to one of principal amount of Rs. 11,091-10-7½ and interest on it shall run from 6th January 1920 till the date of realisation. In the decree the plaintiff shall be allowed a further sum of principal of Rs. 1,194 with interest at 6 per cent. per annum from the date of the final decree of the lower Court till the date of realisation. These are the only sums decreed to the plaintiff. Parties shall receive and pay costs of both Courts according to their success and failure. Costs in this Court will include fees on the higher scale.

N. H. *Decree modified.*

(1) 49 Ind. Cas 696; 17 A. L. J. 169 ; 41 A. 254.
(2) 49 Ind. Cas. 737 ; 17 A. L. J. 177 ; 41 A. 259.
(3) 46 Ind. Cas. 548 ; 40 A. 497; 22 C. W. N. 866 ; 16 A. L. J. 693 ; 5 P. L. W. 159 ; 35 M. L. J. 169 ; 28 C. L. J. 181 ; 8 L. W. 179 ; (1918) M. W. N. 535 ; 24 M. L. T. 110 ; 20 Bom. L. R. 864 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 25 OF 1923.

February 12, 1924.

Present :—Mr. Kendall, A. J. C.

Thakur JAI INDAR BAHADUR SINGH—PLAINTIFF—APPELLANT
versus
Thakur BACHUN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 107E, cl. (a), s. 107H—Declaration by Revenue Court that guzaradars are under-proprietors—Suit in Civil Court to challenge decision, whether maintainable-Jurisdiction of Civil and Revenue Courts—Guzara land, whether can be regarded rent free.

Where a Revenue Court in proceedings for resumption of land held in lieu of maintenance under cl. (*a*) of section 107E of the Oudh Rent Act makes a declaration under section 107H of the Act that the *guzaradars* are under-proprietors in relation to the said land, a Civil Court is debarred from entertaining a suit by the taluqdar for a declaration that they are not under-proprietors and do not possess heritable and transferable rights in the land.

Rup Narain v. *Badri Prasad*, 3 Ind. Cas. 667 ; 12 O. C. 225, followed.

Land held in lieu of guzara-maintenance—is land held as rent free and as such is within the exclusive jurisdiction of the Revenue Courts.

Appeal from the decree of the Additional District Judge, Sitapur, dated the 30th October 1922 in Civil Appeal No. 161 of 1921 (No. 85 of 1922) preferred against the decree of the Subordinate Judge, Kheri, dated the 30th July 1921, in Original Suit No. 23 of 1921.

Messrs. *Chaudhuri Niamatullah* and *B. Salig Ram*, for the Appellant.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Respondents.

JAI INDAR BAHADUR SINGH *v.* BACHUN SINGH

JUDGMENT.—The plaintiff-appellant is the taluqdar of Mahewa Estate, who has brought the present suit for a declaration that the respondents are mere *guzaradars* of the land in suit, and that they have no heritable or transferable right in it, and that certain transfers made by them are invalid. The circumstances out of which this suit arose are as follows :—

The plaintiff-appellant filed a suit in the Revenue Courts for resumption of some land. In this he referred to the respondents as *mauſidars* holding free of rent at the pleasure of the grantor, and praying for resumption of the land. The suit in fact was evidently filed under clause (*a*) of section 107E of the Oudh Rent Act, but there was also a prayer, as alternative relief, for assessment of the lands in suit to rent. In short, the suit was filed under chapter 7 of the Oudh Rent Act. The respondent defended the suit in the Revenue Court, and as a result that Court decided that the land was not liable to resumption, and declared that the respondents were under-proprietors in accordance with section 107H of the Oudh Rent Act. This decision was given by an Assistant Collector in 1915 and no appeal was made at the time to the Superior Revenue Courts, owing, it is said, to the fact that the plaintiff's estate was then under the management of the Court of Wards. The plaintiff has now applied in the Civil Courts for the declaration described above. Both the Courts below have dismissed the suit.

There is no doubt that the plaintiff-appellant's suit was presented in the Revenue Court as one under chapter 7 of the Oudh Rent Act. It was dealt with by the Revenue Court as a suit under that chapter. The decision arrived at was, that the land had originally been given to the predecessor of the defendants in lieu of maintenance, but that the provisions of section 107H of the Oudh Rent Act applied. It is argued in appeal that the Revenue Court had no jurisdiction to deal with the suit, and, that as soon as that Court had decided that the grant in question was originally made in lieu of maintenance, it should have stopped the proceedings and referred the plaintiff to the Civil Courts. It is admitted that if the Revenue Court had jurisdiction, its decision must be conclusive. In support of this argument reference has been made to *Bhagwan Singh* v. *Bisheshar Nath* (1). In this decision the learned Judicial Commissioner held as follows:—There is a distinction between *muafi* and *guzara* in Oudh. Without essaying an exhaustive pronouncement as to the distinction, it is sufficient to say that where the relationship of land-holder and tenant does not exist between the parties, there may be a *guzara*, but where the relationship of land-holder and tenant does exist between the parties, there is a *muafi*. In a decision of the Board of Revenue in 1909.....it was laid down that a Revenue Court alone had jurisdiction to entertain suits for resumption of all land held rent-free. Possibly that decision goes too far. . . The decision in question might be held to ignore the distinction between *guzara* and *muafi* and I do not accept the authority as absolute."

In that appeal it was decided that the land in question was *muafi* and that the Civil Court would be usurping a jurisdiction it did not possess if it were to deal with it. It is sought to infer from this that if the land in suit had been *guzara* and not *muafi*, the Civil Courts would have had jurisdiction to deal with it. It is sought further to infer that the Revenue Court would have had no jurisdiction to deal with it, and that the Revenue Courts have no jurisdiction to deal with land that is held in lieu of *guzara*. Reference has also been made on behalf of the appellants to *Shankar Sahai* v. *Gajadhar Prasad* (2), where a Bench of this Court decided that "If underproprietary rights have existed from before (*i.e.*, before resumption proceedings) either under a settlement-decree or under a grant from a superior proprietor or otherwise, the Civil Court is not debarred from granting a declaration in respect thereof, in spite of an order of the Revenue Court assessing him to rent under section 107 G." This decision is quoted in support of the proposition that where an underproprietor has been treated by the Revenue Courts as a *muaſidar*, the Revenue Courts have no jurisdiction.

It seems to me that the learned Counsel for the appellant has been at great pains to strain the case-law on the subject so as to bear an

(1) 38 Ind. Cas. 677 ; 20 O. C. 37.
(2) 40 Ind. Cas 250 ; 20 O. C. 171 ; 4 O L.J. 409.

interpretation that the learned Judges who pronounced these decisions would certainly have disowned. The lower Court has referred to the decision in *Shankar Sahai* v. *Gajadhar Prasad* (2), and quoted a passage which strongly supports the respondents, but the clearest decision on the point seems to me to be that contained in *Rup Narain* v. *Badri Prasad* (3). "Under section 107 A of the Oudh Rent Act of 1886, the proprietor of a *mahal* is entitled to apply to the Revenue Court for the assesment of *musfi* land, or to get, it assessed to rent, or for an enhancement of the rent thereof.

"Under section 108, clause 5 A, (which has been added to by section 6 of Act IV of 1901) except in the way of an appeal as provided in Act XXII of 1886 (and no appeal is provided in resumption cases), Courts other than Courts of Revenue are debarred from taking cognizance of suits for resumption of, or assessment or enhancement of rent on land held rent-fee or at a favourable rate of rent. The Courts of Revenue have been vested by law with exclusive jurisdiction to deal with such matters."

In the present instance the plaintiff appellant was undoubtedly suing in the Revenue Court for the resumption of land or for the assessment of rent on land held rent-free. He refers in his plaint to the respondent as *Muafidars* and he undoubtedly considered the land to be *muafi* land. It was found as a fact in the Revenue Court, that the land had originally been granted in lieu of maintenance or *guzara*. There is some authority for considering that all lands held rent-free are not *muafi*. The decision of the Board of Revenue has been questioned in the decision in *Bhagwan Singh* v. *Bisheshar Nath*. (1) It has, however, never been held so far as I have been able to discover, that land held as *guzara* is not to be considered as land held rent-free and there is nothing in the provisions of Chapter 7 of the Oudh Rent Act to show that land which is held as *guzara* at the time of the resumption proceedings or which has been so held in the past is excluded from the jurisdiction of the Revenue Courts. It is beyond question that the Revenue Court in the present case had jurisdiction to initiate proceedings on the pleadings. If it was proved that the land, whether it had originally been held as *guzara* or not, had been held rent-free or at a favourable rate since February 13th, 1856 or for 50 years, and by two successors to the original grantee, etc., as provided under section 107 H, then the Revenue Court not only had jurisdiction to declare the holder of the land to be an under-proprietor but was bound in law to do so. I hold, therefore, that the lower Courts rightly decided that the Revenue Court has jurisdiction to dispose of the suit, and that the present declaratory suit is not maintainable in the Civil Courts. The appeal is dismissed with costs.

G. H. *Appeal dismissed.*

(3) 8 Ind. Cas. 667; 12 O. C. 225.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 282 of 1923.

June 6, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

MUHAMMAD ABDUL RAHMAN KHAN—PLAINTIFF—APPELLANT

versus

MUHAMMAD AYYUB KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pre-emption—Demands by pre-emptor—Transfer of pre-emption property—Fresh demands, whether necessary—Pre-emption right, nature of.

Under the Muhammadan Law it is not necessary for a pre-emptor to make fresh demands when the vendee, to whom he has already made the demands required by law, transfers the property sought to be pre-empted to another person.

The right to claim pre-emption is not affected by any intermediate dealings with the property. The proceedings must in any case be taken against the original purchaser, but when a decree has been obtained against him it can be enforced against any person deriving title from him by purchase, gift, inheritance, or otherwise.

Appeal from a decree of the Additional District Judge, Saharanpur, dated the 25th November 1922.

MUHAMMAD ABDUL RAHMAN KHAN *v.* MUHAMMAD AYYUB KHAN

Mr. *Nehal Chand*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. On the 1st of June 1918 Farzand Ali Khan sold some lands to Pir Khan. On the same date Pir Khan sold these lands to Abdul Aziz Khan. It was the plaintiff's case that within a few days of the sale news of it was brought to him by his *karinda* Maqbul Husain and that there and then he made the first demand in the presence of three witnesses, Faiyaz Ali Khan, Maqbul Husain and Abdul Rahman. It was his case that he then took these three witnesses with him to the house of Abdul Aziz and made his second demand in the presence of Abdul Aziz and in the presence of the same three witnesses. Subsequent to these demands the property along with other properties was sold by Abdul Aziz to Abdul Karim by a sale deed dated the 3rd of May 1919. The claim was based both on the alleged custom of pre-emption as recorded in the *wajib-ul-arz* of *mauza* Raipur. The defendant vendee took a large number of pleas and resisted the claim. No less than six issues were framed by the trial Court. With the exception of the issue relating to the existence of the custom of pre-emption, all the other issues were decided in favour of the plaintiff and the claim was decreed.

The defendant-vendee appealed to the lower Appellate Court which has reversed the decree of the first court and dismissed the claim. There are, however, only two points decided by the learned District Judge. The other points have been left altogether untouched.

The learned District Judge has come to the conclusion that Abdul Aziz wanted to defeat the plaintiff's right of pre-emption and that in pursuance of that idea he transferred the property *bona fide* for valuable consideration to Abdul Karim. He however found that the transaction in favour of Abdul Karim was not fictitious but a real one, though he thought that it was a device adopted to defeat the right of pre-emption. The other finding was that even if the statement of the plaintiff be taken to be true it fell short of establishing the performance of necessary demands.

Taking up the second point first, we are of opinion that the learned Judge is in error. The point made against the plaintiff is that when he went to make the second demand at the house of Abdul Aziz, although he had the three witnesses with him, he neither referred to the first demand nor invoked those witnesses to bear witness. The learned Judge is not correct in saying that at the time of the second demand there was no reference to the first demand. In the words used by the plaintiff which are quoted by the learned Judge himself the following words occur :—

"Aur yih bhi kah diyathaki main nein gecahy gawahon ke samhne bhi apne maken par peshtar kah diya tha ki tum gawah rahna main dawa karunga." We are of opinion that these words contain a very clear and specific reference to the first demand at the time when he received the news of the sale. As to the second point made against his statement, it is certainly true that in the record of his statement in Urdu there is no express sentence which says that on the occasion of his making the second demand he had asked the witnesses to bear testimony. We, however, find that in the English notes made by the learned Munsif there is a clear statement in the deposition of the plaintiff to the effect "I again told the above persons to bear witness to the above facts." It is apparent that there is an omission in the deposition recorded in the vernacular. The two cannot be said to contradict each other. It is possible that what happened was that the Reader (*peshkar*) either omitted to record this part of the plaintiff's statement or might have considered it a superfluous repetition to be recorded. It is inconceivable that the learned Munsif would have noted it down in English unless the statement had actually been made by the plaintiff. The ground on which the second demand was held to be defective, therefore, altogether fails.

The substantial question which arises in this case is whether the plaintiff was bound to make fresh demands when the vendee Abdul Aziz had transferred the property to Abdul Karim. The learned Judge has himself conceded that this transfer took place in order to defeat the plaintiff's right of pre-emption. Having regard to the dates alleged by the plaintiff it is also clear that the pre-emption

demands must have been made before the transfer to Abdul Karim. The question which arises then is whether it was incumbent on the plaintiff pre-emptor to make fresh demands when the vendee, to whom he had already made the demands required by law, transferred the property to another person.

Mr. Wilson in his book 'on Anglo-Muhammadan Law paragraph 390 says that the right to claim pre-emption is not affected by any intermediate dealings with the property. The proceedings must in any case be taken against the original purchaser, but when a decree has been obtained against him it can be enforced against any person deriving title from him by purchase, gift, inheritance, or otherwise.

This view is supported by Baillie on Muhammedan Law (Vol. I, p. 503) and Hamilton's Hidaya (Vol. III, p. 586) Mr. Tyabji in his book on Principles of Muhammedan Law, paragraph 551 says that the claim to pre-emption is not affected by any act on the part of the buyer purporting to transfer or alienate the land, nor by his death ; provided that any such act takes effect (holds good) until the Court decrees the claim to pre-emption. In the illustration attached he says that if the buyer B purports to sell the land to BA, the pre- emptor can claim it either from B or BA and similarly if B purports to make a gift or wakf of it or to convert it into a mosque or cemetery or to let it on hire the pre-emptor may annul the said acts.

In a case arising under a *wajib-ul-arz* reported in *Kamta Prasad* v. *Mohan Bhagat* (1) it was held that a subsequent transfer by a vendee was subject to the pre-emptor's right of pre-emption. In the case of *Khettar Chandra Basu Mallik* v. *Nabinkali Devi* (2), which was a case under a custom governed by the Muhammadan Law, it was pointed out that the second sale must be taken to have been made subject to the right of pre-emption, and the plaintiff was only bound to pre-empt the first sale, making of course the subsequent vendee a party to the suit so as to bind him by the proceedings. No authority to the contrary has been cited before us. We are accordingly of opinion that the plaintiff's right to pre-empt the property was complete after the demands had been duly made by him and that it was not at all incumbent on him to make fresh demands when Abdul Aziz transferred the property to Abdul Karim. The sale to Abdul Karim must be deemed to have been effected subject to any right of pre-emption in force by the plaintiff.

The lower Appellate Court has not recorded any finding as to whether the oral evidence produced by the plaintiff with regard to the making of the demands should or should not be believed, nor has it decided any other question which arose in the case. We accordingly allow this appeal and setting aside the decree of the lower Appellate Court remand the case for disposal of the remaining issues according to law. Costs here and hitherto will abide the event.

N. H. *Appeal allowed ; Case remanded*

(1) 3 Ind. Cas. 782 ; 32 A. 45 ; 6 A. L. J. 966.
(2) 20 Ind. Cas. 424 ; 11 A. L. J. 527 ; 35 A. 385.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION APPEAL NO. 14 OF 1924.

July 3, 1924.

Present :—Mr. Kendall, A. J. C.

HARIHAR PRASAD AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

MAHABIR PANDEY—DECREE-HOLDER—RESPONDENT.

Hindu Law—Personal decree against father or grandfather—Joint family property in hands of sons and grandsons—Whether liable—Pious obligation.

The whole of the Hindu joint family property in possession of the sons and grandsons of the deceased judgment-debtor is liable to be attached and sold in execution of a personal decree passed against the fathers or the grandfather.

Bhagwant v. *Tursi Ram*, 51 Ind. Cas. 180 ; 1 U. P. L. R. (A) 48, relied upon.

HARIHAR PRASAD *v.* MAHABIR PANDEY

Appeal against the order of the Sub. Judge, Fyzabad, dated the 13th December 1923 in Miscellaneous Appeal No. 6 of 1923 preferred against the order, of the Munsif, Fyzabad, dated the 30th April 1923.

Messrs. *Wasi Hasan* and *Niamatullah*, for the Appellants.

Mr. *Hyder Husein* for the Respondent.

JUDGMENT.—This appeal is made by the judgment-debtors who are the son and grandson of Shiva Ram deceased. The latter had executed a promissory note in favour of the decree-holder. The latter obtained a decree by consent on 3rd Dec. 1920. In execution of that decree the joint ancestral family property has been taken in execution. The appellants raised the objection that the decree was illusory, but this plea was disallowed in both the lower Courts. The same plea is raised in second appeal though the matter has been put rather differently. It has been argued that the burden of proof has been wrongly thrown on the appellants, and secondly that in any case the whole of the joint family property could not be taken in execution of a personal decree against the father.

As regards the first point, the appellant's case is that no consideration passed for the promissory note. As the execution of the note was admitted, the burden of proving that it was illusory, or in other words that there was no consideration, clearly lay on the defendant. In the regular suit the defendant was the father who executed the note, and the present appellants seek to infer from the fact that the decree was a consent decree, that the father must have been colluding with the plaintiff, and that the burden of proof should have been thrown on the plaintiff. There is no force in this contention, and there is no reason to suppose that the appellant's father entered into a collusive decree. If there was any evidence for it, it was for the appellant to produce that evidence. Both the Courts have decided that the evidence is not sufficient to prove that there was no consideration, and this is really a question of fact on which there is no second appeal.

As regards the question of, whether the whole of the joint family property can be taken in execution of a personal decree against the father, it has been argued that if the decree had been executed in the father's lifetime, only his share could have been attached and sold, and that it follows from this that only that share can be attached and sold after his death. In support of this argument reference has been made to the famous case of *Sahu Ramchandra* v. *Bhup Singh* (1), in which it was held that the pious obligation of the sons to pay their father's debt does not arise until after the father's death. This proposition has been overruled by their Lordships of the Privy Council in the decision reported in *Bhagwant* v. *Tursi Ram* (2), in which it was held that there is no authority for holding that the pious obligation of sons does not arise until after the death of the father. In a Bench decision of this Court reported in 1 Oudh Weekly Notes 13, it was held that the whole of the ancestral property and not merely the father's share can be sold under a decree passed in terms of section 53 of the Civil Procedure Code. According to the reasoning of this latter ruling I think there is no doubt that the whole of the joint family property in the possession of the sons and grandsons of the deceased judgment-debtor can be attached and sold in execution of a personal decree passed against the father or the grand-father. The appeal is, therefore, dismissed with costs.

G. H. *Appeal dismissed.*

(1) 39 Ind. Cas. 280; 39A. 437; 15 A. L. J. 437; 19 Bom. L. R. 498; 21 C. W. N. 698; I. P. L. W. 557; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P.C.).
(2) 51 Ind. Cas. 130; 1 U. P. L. R. (A) 48.

END OF VOLUME 79.

GENERAL INDEX.

VOLUME 79—1924.

Abwab—Improvement of *dak* and *bhet* expenses if. *See* BENGAL TENANCY ACT, s. 84 **346**

Accounts—Dissolution of partnership—Partner, right of—Misconduct, effect of. *See* PARTNERSHIP, DISSOLUTION OF **944**

——, mutual, what are—Creditor and debtor—Cash advances and re-payments in kind. *See* LIMITATION ACT, SCH. I, ARTS. 57, 85 **998**

——, *suit for—Accounts rendered and accepted—Failure to produce relevant documents, effect of.*

In a suit for accounts it was found that defendant had constantly rendered accounts which had been accepted by the plaintiff, that there was no allegation of fraud and that the plaintiff was unable to produce accounts and documents relating to the transactions in dispute which should be in his possession:

Held, that the suit was liable to dismissal as the defendant could not, under the circumstances, be called upon to render accounts. L MOHAN LAL *v.* THE N. W. RY. CO-OPERATIVE STORES ASSOCIATION LTD., LAHORE, 5 L. L. J. 19 **275**

Acknowledgment, and promise to pay, difference between—Construction of document. *See* CONTRACT ACT, s. 25 **77**

—— Execution petition. *See* LIMITATION ACT, s. 19 **897**

——, essentials of. *See* CIVIL PROCEDURE CODE O. I, R. 10 **914**

Acts—General.

Act 1839—XXXII. *See* INTEREST ACT.
—— 1856—XV. *See* HINDU WIDOW'S RE-MARRIAGE ACT.
—— 1863—XX. *See* RELIGIOUS ENDOWMENTS ACT.
—— 1865—X. *See* SUCCESSION ACT.
—— 1869—IV. *See* DIVORCE ACT.
—— 1870—VII. *See* COURT FEES ACT.
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1873—X. *See* OATHS ACT.
—— 1875—IX. *See* MAJORITY ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.

Acts—General—concld.

Act 1882—II. *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT
—— 1882—V. *See* EASEMENTS ACT.
—— 1882—XV. *See* PRESIDENCY SMALL CAUSE COURTS ACT.
—— 1887—VII. *See* SUITS VALUATION ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1898—VI. *See* POST OFFICE ACT.
—— 1899—II. *See* STAMP ACT.
—— 1899—IX. *See* ARBITRATION ACT.
—— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.
—— 1913—VII. *See* COMPANIES ACT.
—— 1915—XII. *See* INDIAN SOLDIERS (LITIGATION) ACT.
—— 1918—VII. *See* INCOME TAX ACT.
—— 1920—V. *See* PROVINCIAL INSOLVENCY ACT.
—— 1922—XI. *See* INCOME TAX ACT.

Acts—Bengal.

—— 1880—IX. *See* CESS ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1913—III. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT.

Acts Bihar and Orissa.

—— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.

Acts—Bombay.

—— 1879—XVII. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT.
—— 1888—III. *See* CITY OF BOMBAY MUNICIPAL ACT.
—— 1901—III. *See* BOMBAY DISTRICT MUNICIPAL ACT.
—— 1906—II. *See* MAMLATDARS' COURTS ACT.
—— 1920—XVII. *See* BOMBAY PLEADERS ACT.

Acts—Burma.

—— 1898—XIII. *See* BURMA LAWS ACT.
—— 1920—II. *See* RANGOON RENT ACT.
—— 1922—VI. *See* CITY OF RANGOON MUNICIPAL ACT

Acts—C. P.

Act 1917—II. *See* C. P. LAND REVENUE ACT.

Acts—Madras.

—— 1908—I. *See* MADRAS ESTATES LAND ACT.
—— 1919—IV. *See* MADRAS CITY MUNICIPAL ACT.
—— 1922—III. *See* MADRAS CITY TENANTS' PROTECTION ACT.

Acts—Punjab.

—— 1873—VIII. *See* NORTHERN INDIA CANAL AND DRAINAGE ACT.
—— 1905—II. *See* PUNJAB PRE-EMPTION ACT.
—— 1911—III. *See* PUNJAB MUNICIPAL ACT.
—— 1913—I. *See* PUNJAB PRE-EMPTION ACT.
—— 1919—IV. *See* PUNJAB COURTS ACT.

Acts—U. P.

—— 1876—XVIII. *See* OUDH LAWS ACT.
—— 1886—XXII. *See* OUDH RENT ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.
—— 1916—II. *See* U. P. MUNICIPALITIES ACT.

Regulations.

Reg. 1806—XVII. *See* BENGAL REGULAION.
—— 1897—II. *See* UPPER BURMA REGISTRATION REGULATION.

Statute.

1915—(5 & 6 GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.

Adjournment, *when to be granted—Secretary of State, position of—Government Pleader, whether entitled to special consideration.*

A Court is not entitled to re-open a matter by granting a review in every case where there is some little excuse for a manifest negligence.

Courts have the very widest discretion as to granting adjournments; but it should always be based upon something reasonable. It is not the duty of the Courts to maintain, still less to invent, any special practice as regards the grounds upon which adjournments of cases are granted. Parties whose cases are fixed for hearing on a particular date have no right to assume that they can get an adjournment without any reason being given provided that somebody else undertakes to keep the Court busy.

Obiter: The Secretary of State for India in Council should be treated exactly like every body else.

It often falls to the Court in dealing with applications by poor people, negligent people or rather stupid people, to refuse to meet their particular necessities and to exact a particular reasonable standard of diligence, exacting it from everybody alike; and the safer and the better way is to treat the learned Vakil who has the honour to appear for Government with the same stringency as, but with no greater stringency than, any of his learned friends appearing for other litigants. **C** BINDUBASHINI ROY CHOWDHURY v. SECRETARY OF STATE, 51 C. 70; 40 C. L. J. 163 **745**

Administration suit—Administrator, suit by—Sanction of Court, whether necessary. *See* BURMA LAWS ACT, s. 13 **729**

————, whether suit for land. *See* LETTERS PATENT (BOM.), CL. 12 **780**

Adverse possession—Co-sharers. *See* LIMITATION ACT, s. 19, SCH. I, ART. 144 **279**

———— *Co-sharers.*

Among co-sharers the possession of one co-sharer cannot become adverse to another except where the co-sharer in possession has explicitly denied and repudiated the title of the others and has been in possession since then for more than 12 years. **A** MUBARAK-UN-NISSA v. MUHAMMAD RAZA KHAN, 22 A. L. J. 307; 46 A. 377; (1924) A. I. R. (A.) 384 **174**

———— *Co-sharers — Ouster — Non-participation in profits—Revenue Records, entry in, effect of.*

If a tenant-in-common has not been in participation of rents and profits for a considerable length of time and other circumstances concur, the Court may find an ouster even though the name of the tenant-in-common continues to be borne on the Revenue Records. **A** BASU v. NANHI **951**

———— *Dispossession actual, under decree—Adverse possession, whether interrupted.*

The delivery of actual possession under decree interrupts adverse possession.

Obiter:—Even delivery of formal possession under a decree in a proper case is sufficient to give a new starting point for limitation. **A** HARPAL KURMI v. MOHAN KURMI **1047**

———— *License—Construction of cattle troughs—Long user.*

Plaintiffs, who claimed to be owners of the plot in dispute, sued to recover possession of it on the allegation that defendants had without any right constructed cattle troughs and fixed certain pegs for tying cattle over a portion of the plot a few months before suit. It was found that the land belonged to the plaintiffs, but that the cattle troughs had been in existence for more than twelve years prior to the suit:

Held, (1) that the defendants having been allowed to use the land and to maintain the cattle troughs for more than twelve years without obstruction the plaintiffs were not entitled to have the troughs removed;

(2) that as the troughs did not occupy the whole of the plot in dispute, no question of adverse possession arose and the title of the plaintiffs to the land remained unaffected. **A** KAMLAPAT DUBEY v. RAM RAJ, (1924) A. I. R. (A.) 103 **450**

———— *Possession taken under void transfer, nature of—Limited interest, whether can be acquired.*

Where an intended conveyance is void from the commencement, for whatever cause, but possession is taken by the transferee under the intended conveyance, such possession is adverse to the

Adverse possession—concld.

transferror and ripens into a good title after the expiry of the statutory period.

Defendant purported to make a gift of certain property in favour of her daughter, but no registered instrument was executed. Mutation of names was, however, effected by the donor and assented to by the donee, who went into possession and remained in possession for over twelve years:

Held, that the donee had acquired a title to the property by adverse possession.

There can be adverse possession of a limited interest in property as well of the full title as owner. **N** KASTURI v. BALIRAM **117**

——— Suit for possession — Dispossession — Burden of proof. *See* LIMITATION ACT, SCH. I, ARTS. 142, 144 **964**

——— *Vacant site—Formal possession in execution sale against supposed owner—Possession, whether adverse to real owner.*

In the case of a vacant site possession follows title. Therefore, where a person obtains a mere formal delivery of possession of a vacant site in an execution sale against a person who is not the owner of the site, but does not in any way use the site, his possession is not adverse to the real owner. **L** ABDULLAH v. GIRDHARI, 8 P. W. R. 1923 **692**

Agra Tenancy Act (II of 1901), s. 4—*Land taken for planting grove, whether holding—Rights of grove-holder, whether transferable.*

In a suit for ejectment for wrongful transfer of land it appeared that the land had been taken from the *zemindar* for planting a grove on payment of a *nazrana*, that the grove was actually planted and had been in existence for 32 years and that the land was incapable of cultivation:

Held, (1) that the plot was neither let nor held for agricultural purposes and was, therefore, neither land within the meaning of the Agra Tenancy Act nor a holding;

(2) that, consequently, there could be no bar to the transferability of the rights of the defendant. **A** GULAB v. BHAGWAN DAS, 21 A. L. J. 907; (1924) A. I. R. (A.) 229 **577**

——— **ss. 4 (5), 79**—*Tenant, whether includes rent-free grantee—Rent-free grantee, ejectment of—Suit, whether cognizable in Revenue Court—Proper remedy.*

Under section 4, sub-clause (5) of the Agra Tenancy Act, a tenant does not include a rent-free grantee.

If, therefore, a rent-free grantee has been wrongfully ejected by the *zemindar* no suit under section 79 of the Agra Tenancy Act can be brought in the Revenue Court. The only remedy open to the rent-free grantee is to sue in a Civil Court. **A** HAR SARUP v. BRIJNANDAN LAL, (1924) A. I. R. (A.) 479 **587**

Agra Tenancy Act—contd.

——— **ss. 4 (12), 88**—*Occupancy tenant, well constructed by, on land belonging to* zemindars *—Improvement—Consent of* zemindars, *except one—Tenant, whether can be compelled to close well.*

An occupancy tenant constructed a masonry well on waste land belonging to the *zemindars* for irrigating his occupancy holding. All the *zemindars* except one, acquiesced in his so doing; but the one who had not given his consent sued to have the well closed;

Held, that the well was an improvement within the meaning of section 4 (12) of the Agra Tenancy Act and the Court would not compel the tenant to close the well at the instance of the solitary *zemindar* who had not acquiesced in the construction of the well. **A** RESHMA BIBI v. BHAWANI SARAN, (1923) A. I. R. (A.) 281 **77**

——— **s. 57**—*Occupancy tenant, grove planted by—Trees, whether belong to* zemindar *or tenant—Suit to recover value of tree appropriated by tenant, nature of—Appeal, second—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 35, 43 A—Civil Procedure Code (Act V of 1908), s. 102.*

An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so, the land-holder has got the power to eject him for doing an act detrimental to the purpose for which the land was let under section 57 of the U. P. Tenancy Act (II of 1901). But that power can only be exercised within one year from the date of the conversion.

The general rule applicable to stray trees growing on an occupancy holding does not apply to groves planted by tenants with the implied or express acquiescence of the *zemindars*. Where land has been let to a tenant for the special purpose of planting a grove thereon or where a grove planted by a tenant has been allowed to exist unchallenged by the *zemindar*, the person who plants the grove acquires a transferable interest therein, and, in the absence of a custom to the contrary, the trees become his property.

A *zemindar* claiming a right to the fallen wood of self-sown trees, which have been growing on an occupancy holding, must prove some custom or contract by which he is entitled to take such wood, and the rule applies *a fortiori* to a grove which has been planted by the tenant.

The incidence of an agricultural holding does not attach to a grove planted by an occupancy tenant on his holding which has been allowed to exist unchallenged for a long time.

A suit by a *zemindar* to recover from an occupancy tenant the value of a tree growing on his holding which has been wrongfully appropriated by the latter falls within the purview of Articles 35 and 43 A of Schedule II to the Provincial

Agra Tenancy Act- contd.

Small Cause Courts Act, and is not, therefore, a suit of a small cause nature within the meaning of section 102 of the Civil Procedure Code. **A** MAN SINGH v. MADHO SINGH, 22 A. L. J. 70; (1924) A. I. R. (A.) 430 **599**

——— **s. 57 (d)**—*Landlord and tenant--Occupancy tenant, illegal transfer by--Tenancy, whether terminated—Suit by tenant to recover possession of holding, maintainability of.*

The execution of an illegal transfer of his holding by a tenant does not *ipso facto* terminate the interest of the tenant. The landlord must sue to eject him and till such ejectment is claimed and decreed the tenancy continues. If before such ejectment is sought; the illegal transfer is cancelled or comes to an end by voluntary redemption or otherwise, the tenancy would continue to subsist.

A mortgagee holding under an illegal mortgage from an occupancy tenant is not a trespasser. His possession is permissive and the tenant can recover possession from him on payment of the mortgage-money. **A** DURGA CHOWDHURI v. JAGROOP, (1923) A. I. R. (A.) 191 **232**

——— **s. 79,** *applicability of– Construction--Ejectment—Tenant, remedy of.*

The provisions of section 79 of the Tenancy Act apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy.

Where a person claiming to have succeeded to a tenancy by right of inheritance, finds that on endeavouring to take possession of the same his right is denied and his possession ousted by the *zemindar*, he has suffered an ejectment at the hands of the landlord within the meaning of section 79 and his appropriate remedy is by a suit under the Tenancy Act. **A** BIDIYA MISIR v. DARYAI **566**

——— **s. 79**--*Ex-proprietary tenant, whether tenant of entire proprietary body– Ejectment by one member of proprietary body--Ejectment by landlord– Suit to contest ejectment – Limitation.*

A holder of *sir* land who sells his share becomes an ex-proprietary tenant of the entire proprietary body and not merely of his vendee, and a dispossession by any one member of the proprietary body, even though he is not the *lambardar*, is to be treated as ejectment by the landholder within the meaning of section 79 of the Agra Tenancy Act, which must be contested by a suit brought within six months of the ejectment. **A** LAGAN RAI v. RAJA RAI, (1924) A. I. R. (A.) 507 **1025**

——— **s. 79** *Suit by tenant to recover possession of ex-proprietary holding Civil or Revenue Court Jurisdiction Suit not resisted by* zemindar, *effect of.*

A suit by a tenant against his landlord and a

Agra Tenancy Act—concld.

person claiming under his landlord to recover possession an ex-proprietary holding is not cognizable by a Civil Court.

The nature of the suit is not affected by the question whether it is resisted by the landlord or not. **A** AIDAL SINGH v. GYAN SINGH **318**

——— **s. 167**—*Ejectment decree against non-occupancy tenant—Civil suit to be declared groveholder, whether maintainable--Jurisdiction of Civil and Revenue Courts.*

A plaintiff cannot by merely changing the form of his relief evade the provisions of section 167 of the Agra Tenancy Act.

Where a person has been ejected by the Revenue Court as a non-occupancy tenant, he cannot subsequently obtain a declaration in the Civil Court that he is a grove-holder, so as to defeat the decree regularly obtained in the Revenue Court. **A** LALA KUNDAN LAL v. PARSHADI, 22 A. L. J. 466; 46 A. 570 **960**

——— **s. 201 (3)**--*Usufructuary mortgagee in possession--Suit for profits, when maintainable – Non-payment by* lambardar *of profits to co-sharer, effect of.*

The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the *lambardar* for profits.

Mere non-payment by a *lambardar* to any co-sharer of the said co-sharer's proper *quota* of the annual divisible profits of the *mahal*, does not, in the absence of evidence to the contrary, constitute an ouster of the said co-sharer from possession.

There is no reason why a different principle should be applied to the case of a usufructuary mortgagee who happens to have taken his mortgage from the particular co-sharer who is filling at the time the office of the *lambardar*. **A** LACHMAN PANDE v. TRIBANI SAHU, 22 A. L. J. 518 **538**

Amendment of plaint—Interlocutory order--Revision—General rule. *See* CIVIL PROCEDURE CODE, s. 115, O. VI, R. 17 **911**

——— Suit for partition—Preliminary decree—Death of defendant—Claim by survivorship—Amendment, whether can be allowed. *See* CIVIL PROCEDURE CODE, O. VI, R. 17, O. XXII, R. 4 **325**

———, effect of – Suit, whether time-barred. *See* PLEADINGS **403**

Appeal, (Civil), against dismissal of suit—Plaintiff, right of, to value relief – Plaintiff, whether can vary valuation. *See* COURT FEES ACT, S. 7 (IV) **582**

——— against mesne profits—*Ad valorem* Court-fees paid in main appeal—Court-fee payable. *See* COURT FEES ACT, S. 6 **906, 908**

Appeal (civil)—contd.

——— against order of remand, whether competent. *See* CIVIL PROCEDURE CODE, ss. 115, 151, O. XLI, R. 33 **482**

——— Agreement to refer not reduced to writing—Award, whether valid. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, ss. 43, 45 **179**

——— Appellate order returning plaint for presentation to proper Court—Competency of revision against appealable order. *See* CIVIL PROCEDURE CODE, O. XLIII, R. 1 (*a*) **1024**

——— Application for certificate for leave to appeal to Privy Council—Delay, effect of. *See* LETTERS PATENT (RAN.), CL. 13 **441**

——— Auction-purchaser, whether party to suit—Restitution, whether can be granted against auction-purchaser—Order refusing restitution, whether decree. *See* CIVIL PROCEDURE CODE, ss. 47, 144 **57**

——— Award proceedings, whether suit—Order in execution—Appeal, whether competent. *See* CIVIL PROCEDURE CODE, s. 47 **477**

——— by contesting defendants—*Ex parte* decree against some defendants—Subsequent application by absentee defendants to set aside decree. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **381**

——— by defendant against whole decree—Suit for settlement of accounts—Preliminary decree—Court-fee payable. *See* COURT FEES ACT, S. 7, CL. (4) **923**

——— Copy of statement, admissibility of—Objection, whether can be taken in appeal. *See* EVIDENCE **221**

——— Death of respondent—Legal representative not brought on record—Separate shares—Property—Appeal, whether abates *in toto*—New plea. *See* CIVIL PROCEDURE CODE, O. XXII, R. 2 **462**

——— Decree against several sets of defendants—Appeal by one set—Dismissal of entire suit. *See* LIMITATION ACT, SCH. I, ART. 182 (2) **794**

———, delay in filing—Extension of time—Diligence, absence of. *See* LIMITATION ACT, S. 5 **812**

———, dismissal of, in default—Appellant's Counsel engaged in another Court—Appellant, absence of—Re-hearing, whether justified. *See* CIVIL PROCEDURE CODE, O. XLI, RR. 17, 19 **550**

——— Execution of decree Compromise order passed—Appeal, whether lies. *See* CIVIL PROCEDURE CODE, ss. 96 (3), 141 **594**

Appeal (civil)—contd.

——— Execution sale, application to set aside—Dismissal in default—Order, effect of. *See* CIVIL PROCEDURE CODE, O. XXI, RR. 90, 92 **351**

——— *Ex parte* decree, application to set aside—Second application to restore first application, dismissal of—Appeal, whether competent. *See* CIVIL PROCEDURE CODE, s. 141, O. IX, R. 13, O. XLIII, R. 1 **323**

——— filed in wrong Court—Mistake *bona fide*—Extension of time, whether can be allowed. *See* LIMITATION ACT, s. 5 **402**

——— from final decree—Order setting aside decree. *See* CIVIL PROCEDURE CODE, s. 105 **69**

———, grounds of—Decree *ex parte*—Summons, service of, whether can be questioned. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **506**

——— Injunction, grant of—Discretion, judicial, exercise of—Interference when feasible. *See* SPECIFIC RELIEF ACT, s. 54 **572**

———, leave to—Delay in making application—Justice of case. *See* LETTERS PATENT (RAN.), CL. 13 **744**

———, new case in—Hindu joint family—Father and sons—Suit for recovery of money—Actual partition, plea of—Separation in eye of law, whether may be pleaded in appeal. *See* PLEADINGS **902**

——— New point, whether can be urged. *See* LETTERS PATENT (LAH.), CL. 10 **281**

———, objection to jurisdiction taken in, whether can be entertained—Court competent to execute decree—Transfer of jurisdiction—Execution of decree. *See* CIVIL PROCEDURE CODE, ss. 21, 37, 38, 79 **806**

——— Order for security and in default for attachment, whether judgment—Appeal, whether competent. *See* CIVIL PROCEDURE CODE, O. XXXVII, RR. 5, 6 **242**

——— Order including name in list of touts—Opportunity to show cause—High Court, power of superintendence. *See* LEGAL PRACTITIONERS ACT, ss. 36, 38 **693**

——— Order refusing to entertain application of creditor under Insolvency Act—Creditor, whether "person aggrieved." *See* PROVINCIAL INSOLVENCY ACT, ss. 53, 54, 68, 75, 78 **395**

——— Order refusing to stay execution pending appeal, whether appealable. *See* LETTERS PATENT (MAD.), CL. 15 **109**

——— Order sanctioning sale of minor's property—Review, power of—Appeal, whether lies. *See* GUARDIANS AND WARDS ACT, ss. 29, 47 **471**

Appeal (civil)—concld.

———— Sale in execution set aside—Restitution of property—Auction-purchaser, position of—Order awarding profits to judgment-debtor. *See* CIVIL PROCEDURE CODE, ss. 47, 144 **636**

———— to His Majesty in Council—Restoration of decree of Trial Court—Execution—Decree whether barred against defendants who did not appeal. *See* LIMITATION ACT, SCH. I, ART. 182 (2) **794**

———— to Privy Council—Appeal to High Court dismissed for default—Restoration, application for, rejection of—Order, whether decree or final order. *See* CIVIL PROCEDURE CODE, s. 109 **504**

———— to Privy Council—Decree-holder's application for personal decree—Order, whether final. *See* CIVIL PROCEDURE CODE, s. 109 **87**

———— Trial Court, findings by, on all issues—Order of remand—Appellate Court, procedure of. *See* CIVIL PROCEDURE CODE, O. XLI, R. 23 **857**

————, whether competent—Order calling upon guardian to pay into Court money due on account. *See* GUARDIANS AND WARDS ACT, ss. 34, 47 **178**

————, *whether continuation of proceedings in suit.*

An appeal is really a continuation of the proceedings in a suit. **M** KANNIAPPA CHETTIAR *v.* RAMACHANDRAIYAR, 46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 386 **92**

————, whether lies against conditional or provisional order. *See* CIVIL PROCEDURE CODE, O. XL, R. 1 **363**

————, whether lies — Death of plaintiff—Order refusing to bring applicant on record as legal representative. *See* CIVIL PROCEDURE CODE, O. XXII, RR. 3, 9, O. XLIII, R. 1 (*k*) **860**

———— (second)—*Ancestral property—Finding of fact.*

A finding as to the character of property, arrived at after a full consideration of the evidence, is a pure finding of fact and cannot be impugned in second appeal. **L** BALBIR SINGH *v.* GOBIND, (1923) A. I. R. (L.) 532 **543**

———— *Cross-objections as to costs, whether can be entertained—New case, whether can be set up.*

A new case cannot be allowed to be set up in second appeal. Cross-objections as to the costs of the Courts below cannot be entertained in second appeal as this is not a matter for second appeal. **L** MADHO PARSHAD *v.* THE FIRM AHSAN ILAHI-ABDUL HAFIZ, 5 L. L. J. 108 **977**

———— Custom, question of—Certificate, refusal to grant.—Procedure. *See* PUNJAB COURTS ACT, ss. 41 (*c*), 44 **488**

Appeal (second)—contd.

———— Decree of small cause nature—Order for execution—Erroneous decision—Refusal to exercise jurisdiction—Revision. *See* DECREE OF SMALL CAUSE NATURE **605**

———— *Findings of fact based on evidence, whether can be challenged—Admissibility of evidence—Non-registration—Objection taken in written statement subsequently dropped—Remand, whether can be directed.*

Where the lower Appellate Court has arrived at findings of fact after considering all the evidence on the record and there exists on the record evidence, which is legally admissible, in support of the findings, the High Court cannot, in second appeal, interfere with the findings of fact merely because it considers that they ought to have been different.

Where an objection to the admissibility in evidence of a document on the ground of non-registration based on the fact that the value of the property dealt with by the document was not correctly stated therein, was taken in the written statement, but was subsequently dropped and was neither put in issue in the Trial Court nor urged in the lower Appellate Court :

Held, that the suit could not be remanded in second appeal for ascertaining the correct value of the property for purposes of registration. **L** BASHESHAR NATH *v.* MEHR CHAND, (1923) A. I. R. (L.) 21 **440**

———— Finding of fact based on wrong principles, whether binding. *See* CUSTOM—SUCCESSION **211**

————*Finding of fact—Evidence, absence of—Conjecture.*

A finding of fact which is not based on any evidence but is conjectural cannot be upheld in second appeal. **L** KISHEN LAL *v.* KANHYA, 5 L. L. J. 106 **970**

———— *Finding of fact—Evidence not considered—Finding not deducible from evidence.*

Where an Appellate Court has arrived at a finding of fact without taking into consideration the whole of the evidence on the record; or where the finding is such that it cannot reasonably be deduced from the evidence, it is liable to be set aside in second appeal. **L** NAGINA SINGH *v.* JIWAN SINGH **107**

———— *Finding of fact—Inference from facts.*

When more inferences than one are legally open from the evidence, the High Court cannot, in second appeal, refuse to be bound by the inference drawn by the lower Appellate Court. **L** ABDUL GHANI *v.* ISHAR SINGH, (1923) A. I. R. (L.) 239, **814**

———— *Finding of fact—Wrong principles, application of.*

Appeal (second)—concld.

A finding of fact arrived at by the application of wrong principles is not final and binding in second appeal. **L** ANOKH SINGH *v.* SAPURAN SINGH, (1923) A. I. R. (L.) 660 **980**

———— Fresh evidence, whether can be admitted. *See* JURISDICTION **367**

———— *Judgment based solely on result of local investigation by Trial Court, legality of.*

A judgment should not be based solely on the result of a personal local inspection made by the Judge.

The judgment of a lower Appellate Court based entirely on a local investigation conducted by the Judge of the Court of first instance cannot be sustained in second appeal. **L** RALLA *v.* HARNAM SINGH, (1923) A. I. R. (L.) 203 **808**

———— *New plea, whether can be raised.*

A point which has not been taken in the pleadings and to which no reference has been made in the judgment of the Court below cannot be raised for the first time in second appeal. **L** RAM DYAL *v.* GHAMANDI LAL-NARAIN DAS, (1923) A. I. R. (L.) 56 **990**

———— Occupancy tenant, grove planted by—Trees, whether belong to *zemindar* or tenant—Suit to recover value of tree appropriated by tenant, nature of. *See* AGRA TENANCY ACT, s. 57 **599**

———— Secondary evidence admitted by lower Appellate Court—Objection, whether can be taken. *See* EVIDENCE ACT, s. 65 **663**

Arbitration—Award—Objection—Appeal, whether lies—Revision. *See* CIVIL PROCEDURE CODE, s. 115, SCH. II, PARAS. 15, 16 **723**

———— *Death of party pending proceedings—Award, whether binding on representatives.*

Where a dispute is referred to arbitration and one of the parties dies before the award is made, then if the hearing of the case had been completed before his death and nothing remained to be done except the delivery of the award, and it is shown that the intention of the parties was that not merely themselves but their legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding on his representatives-in-interest. Where, however, the hearing had not been completed before the death of the party, the representatives of the deceased, who have not agreed to the submission, will not be bound by the award. **L** TEGHA *v.* RAM SINGH **67**

————, reference to—Agreement not in writing—Statement made to Court recorded in writing—Award, validity of. *See* CIVIL PROCEDURE CODE, SCH. II, PARA. 1 **816**

Arbitration Act (IX of 1899), ss. 10 (b), 11—*Special case—Opinion of Court*—Res judicata——*Arbitrators, whether bound.*

The order of the Court on an application by arbitrators under section 10 (*b*) of the Arbitration Act is an *opinion* given by the Court in what is merely its consultative jurisdiction and is not a judgment or decision of the Court and cannot, therefore, operate by way of *res judicata*.

Furthermore where one of several arbitrators has not joined in seeking the opinion of the Court, he is in no way bound by it on the principle of *res judicata*, the parties to the two proceedings not being the same.

In India it is in the discretion of the arbitrators to state a special case for the opinion of the Court or not as they choose and the Courts have no power to compel them to do so.

If, however, an opinion is sought by them, that opinion is not in any case and in all the circumstances bindings upon them and they still remain the final judges of law and fact and are not legally bound to follow it. They may not lightly flout the opinion so obtained for they would run the risk of having their award set aside on the ground of dishonestly or immorality but there may exist special circumstances which may not make it dishonest or immoral on their part not to act upon it. **S** ADAMJI LUKMANJI, *In re* **986**

———— **s. 14** *See* CIVIL PROCEDURE CODE, s. 104 **920**

Attachment before judgment, nature of—Execution of decree—Dismissal for decree-holder's default—Attachment before judgment, whether ceases. *See* CIVIL PROCEDURE CODE, O. XXI, R. 57, O. XXXVIII, R. 11 **144**

———— before judgment—Order for sale—Claim petitition—Limitation. *See* LIMITATION ACT, SCH. I, ART. 11 **917**

————, objection to—Withdrawal of objection—Declaratory suit—Order without investigation—Limitation. *See* CIVIL PROCEDURE CODE, O. XXI, R. 63, O. XXIII, R. 1 **1002**

———— *of decree—Adjustment out of Court.*

Where a person attaches a decree obtained by his judgment-debtor as against a third party there is nothing in law to prohibit the adjustment out of Court between the decree-holder who attaches the decree and the judgment-debtor of the decree attached. **Pat** RAMCHARAN SINGH *v.* JANG BAHADUR SINGH **900**

Award made by umpire without hearing parties, validity of—Award made after expiry of ten days, extension of—Exclusion of Sundays—Construction of Rules—Practice of East India Cotton Association, whether relevant. *See* EAST INDIA COTTON ASSOCIATION RULES, RR. 42, 43 **739**

————, oral—*Res judicata*. *See* CIVIL PROCEDURE CODE, S. 11 **742**

Award--concld.

———, suit to enforce, nature of—Appeal, second, competency of. *See* CIVIL PROCEDURE CODE, s. 102 **718**

———— proceedings, whether suit—Order in execution—Appeal, whether competent. *See* CIVIL PROCEDURE CODE, s. 47 **477**

———, whether binding on representatives—Death of party pending proceedings. *See* ARBITRATION **67**

———, whether valid—Agreement to refer not reduced to writing--Appeal—Suit to enforce award. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, ss. 43, 45 **179**

———, validity of--Agreement not in writing—Statement made to Court recorded in writing. *See* CIVIL PROCEDURE CODE, SCH. II, PARA. 1 **816**

Banker and customer—*Letters of credit, what are—Construction of document—Guarantee, extent of—Mercantile usage, evidence as to, admissibility of.*

The defendant Bank wrote the following letter to the plaintiffs who carried on business in Calcutta as exporters of jute :—

"We beg to inform you that we are in receipt of advice by wire from our London Office, that a confirmed irrevocable credit has been opened under which we are authorised to negotiate your bills, as offered, on Messrs. Mildred Goyenche & Co., to the extent of £16,875 (sixteen thousand eight hundred seventy five only) on the following conditions :—

"Bills to be drawn payable three months after sight and to be accompanied by invoices, full sets of Bills of Lading, made out to order and blank endorsed, and policies of Insurance war risk representing shipment of 2,000 (two thousand) bales jute marked (Jajodia) from Calcutta to Antwerp, during November-December 1920.

"Such shipping documents are to be delivered on acceptance of the bills and should bear the following clause : Drawn under cable credit No. .....dated 22nd November 1920.

"Please note that this advice does not release you from the liability attaching to the drawer of a Bill of Exchange.

"The credit will expire on—

"When negotiating drafts please produce this letter to have the amounts recorded on the back thereof.

"P. S. Under present conditions we can give no undertaking to negotiate bills drawn under this credit."

On the faith of this letter plaintiffs shipped 2,000 bales of jute in December 1920 and drew in favour of themselves against such shipment at three months' sight on the firm of Mildred Goyenche & Co., for the value of the goods, and the drafts were discounted in Calcutta.

The drafts were, on presentation, duly accepted by Mildred Goyenche & Co., in London, who received the shipping documents. The acceptors, however, suspended payments, before the drafts matured. The result was that the plaintiffs were compelled to pay the amount of the drafts without prejudice to their rights under the letter of credit. They then sued the defendant Bank to recover the sum paid together with interest thereon under the terms of the letter of credit :

Held, (1) that by the terms of the letter of credit the defendant Bank did not pledge its credit for the ultimate payment of the drafts as guarantor, its intention was only to give intimation to the plaintiffs that arrangements had been made under which the defendant Bank was satisfied to take such risk as there might be in negotiating the plaintiffs' drafts upon their buyers;

(2) that, therefore, the defendant Bank was not liable to the plaintiffs for the amount of the drafts.

Letters of credit perform a clearly recognised function in effecting exchange. While no set form of words may be necessary, yet a letter of credit as known to the law must contain a request (general or special) to pay the bearer, or person named, money or sell him some commodity on credit or give him something of value and look to the drawer of the letter for recompense, and it partakes of the nature of a negotiable instrument. The rules governing bills of exchange and negotiable promissory-notes are always the same, fixed and determinate; while letters of credit are to be construed with reference to particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them, and the usages of the particular trade or business contemplated. Letters of credit are accordingly not construed with technical nicety; but are considered as being usually framed with more or less informality and looseness of expression, and hence Courts have sometimes indulged in considerable freedom of interpretation in the effort to arrive what is designated as the true intention of the parties.

Though letters of credit should receive liberal, fair and reasonable interpretation so as to attain the object for which the instrument is designed and the purpose to which it is applied, there is room for this principle, only when the provisions of the agreement are ambiguous, loose, or susceptible of more than one fair interpretation; if it admits of two fair interpretations and the guarantee has advanced money on the faith of that most favourable to his rights, that interpretation will prevail.

In order that a mercantile usage may be imported into the construction of a written agreement the usage must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.

Though evidence of known usage is receivable to supplement the provisions of the written

Banker and customer—concld.

agreement on the hypothesis that the contract is in truth partly expressed and in writing, partly implied or understood or unwritten, the evidence cannot be admitted to contradict the positive stipulations in the written contract. **C** CHANDANMULL BENGANEY *v.* NATIONAL BANK OF INDIA, LTD., 51 C. 43; (1924) A. I. R. (C.) 552 **757**

Benami transaction—*Burden of proof—Execution sale—Claim petition by alleged* benamidar*—Dismissal of claim—Suit to establish title—Absolute title,* onus *of, whether on plaintiff.*

Ordinarily it is for the person who sets up that a particular transaction is not real but *benami* to make out affirmatively the case put forward by him. But when the alleged *benamidar* has, in execution proceeding, preferred a claim petition which has been dismissed and he brings a regular suit, it is for the plaintiff in that suit, *i.e.*, the defeated claimant, to establish that he is the owner of the property and it is not sufficient for him to merely rely upon the deed which shows his ostensible title. **M** MODADAGU PERAYYA *v.* PEROLI VAIKAYAMMA, 34 M. L. T. 201; 19 L. W. 627; 47 M. L. J. 14 **899**

Bengal Public Demands Recovery Act (III of 1913)—Peshkush—*Payment for upkeep of embankment—Holders of permanently settled estate, whether liable.*

Plaintiffs, holders of a permanently settled estate under the Government, sued for cancellation of a certificate made under the Public Demands Recovery Act, for recovery of the sum paid in satisfaction thereof and for an injunction against the Secretary of State restraining him from making and enforcing similar certificates in future:

Held, that inasmuch as the demand made on the plaintiffs was in addition to the revenue payable by them in respect of their estate it was recoverable only if there was a special liability either statutory or contractual. **C** NABADWIP CHANDRA NANDI *v.* SECRETARY OF STATE FOR INDIA, 50 C. 208; (1923) A. I. R. (C.) 609 **218**

Bengal Regulation (XVII of 1806), *proceedings taken under, effect of—Mortgage—Foreclosure, decree for—Redemption, suit for, maintainability of—Transfer of Property Act (IV of 1882), principles of, applicability of, to Punjab.*

The principles of the Transfer of Property Act are applicable to the Punjab, but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to the non-observance of prescribed formalities.

In 1882, defendant, who was the morigagee of the land in dispute, took action under Bengal Regulation XVII of 1806, alleging that the mortgage-deed contained a clause of conditional sale. Notice was duly issued and after the expiry of the year of grace defendant brought a suit for possession as owner, obtained a decree and was

Bengal Regulation—concld.

put in possession of the mortgaged property as owner. As a matter of fact, the mortgage-deed did not contain any clause of conditional sale. In 1919 the mortgagor brought a suit to redeem the property:

Held, that the fact that the mortgage-deed did not contain a clause of conditional sale was immaterial, as the defendant having obtained a decree for possession as owner, the mortgage must be deemed to have been extinguished and no rights survived to the mortgagor. **L** JHUMAN *v.* DULIA, 4 L. 439; (1923) A. I. R, (L.) 646 **248**

Bengal Tenancy Act (VIII of 1885), s. 30 (b)—*Enhancement of rent—Land yielding no crop.*

The fact that a certain holding consists of homesteads or *patit* lands or lands which yield no crop, is no ground for disallowing enhancement of the rent of the tenancy. **C** RESHEE CASE LAW *v.* AMBIKA DASSI **567**

——— **ss. 44, 47**—*Tenant holding over—Second lease, execution of—Ejectment suit, whether maintainable.*

Where a large portion of the area of a tenancy was covered by a tank and there was no mention in the leases that the tenancy was being created for purposes of agriculture or horticulture but the documents mentioned that the rent would be increased proportionately as the lands became cultivable, and that the tenant would be liable to damages if the productive power of the lands be diminished through his negligence:

Held, that the tenancy was governed by the Bengal Tenancy Act and not by the Transfer of Property Act.

In a suit for ejectment under section 44 of the Bengal Tenancy Act on the ground that the term of the lease had expired, section 47 of the Act would be a bar if it is found that the defendant held over for about eleven months after the expiration of the first lease and previous to the execution of the second lease after the expiry of which the suit is brought. **C** MUHAMMAD SULAIMAN KHAN *v.* UMA CHARAN SIL **648**

——— **ss. 50 (2), 215**—*Fixed in perpetuity, presumption as to rent, when arises—Payment at fixed rate for 25 to 33 years, whether sufficient.*

Tenants are not entitled to the benefit of the presumption which arises under section 50 (2) of the Bengal Tenancy Act, and in order to establish that they are tenants at fixed rent in perpetuity, they would have to establish by evidence that they have been holding at the rate of rent which has not been changed since the time of the Permanent Settlement.

Where tenants have paid rent at a fixed rate for from 25 to 33 years it cannot be presumed that they have been paying at a fixed rate from the time of the Permanent Settlement. **Pat** KESHO PRASAD SINGH *v.* RAMJAS PANDE, (1923) A. I. R. (Pat.) 324; 2 Pat. 92 **199**

Bengal Tenancy Act—contd.

——— **s. 52**—*Lease on basis of measurement —Tenant what has to prove—Contract for re-assessment—Burden of proof.*

When a letting upon the basis of a measurement is proved, the tenant has *prima facie* to show that the rent was a consolidated rent for all the land within specific boundaries but in the absence of such proof the mere production of *dakhilas* containing entries of area and rate does not suffice to throw any *onus* on the tenant.

There is no reason whatever forbidding a landlord from proving, if he can, a contract that the tenant is liable to re-assessment upon the actual area, but the mere fact that rent has been calculated in the past on the supposition that the holding is of a certain size does not prove such contract. **C** MANINDRA CHANDRA NANDI *v.* KAULAT SHAIK, 50 C. 957; 28 C. W. N. 264; (1924) A. I. R. (C.) 374 **852**

——— **s. 52 (l) (b)**—*Reduction of rent, when can be claimed—Tenant, what must prove.*

In order to bring the case within the scope of section 52, clause (*b*) of the Bengal Tenancy Act the tenant must prove that he is entitled to a reduction of rent on account of deficiency in area proved by measurement of the holding as compared with the area for which rent has been previously paid by him.

When, therefore, in a suit for rent on the basis of a *kabuliyat* executed by the defendant at the rate of rent fixed therein the defendant claimed reduction on this ground that the area was less than that mentioned in the *kabuliyat*, and it appeared that the area was not fixed with reference to actual measurement but by approximate estimate :

Held, (1) that what was leased out to the defendant was land within certain definite boundaries, the area being stated by guess;

(2) that the rent fixed being a lump sum for the land within the boundaries the defendant was not entitled for a reduction thereof. **C** SHEIKH ABDUL MANNAF *v.* SHEIKH MUSLIM **978**

——— **s. 84**—Abwab—*Improvement of* dak *and* bhet *expenses if* abwab—*Construction of* kabuliyat.

Where in a *kabuliyat* the rent of the land was fixed at a certain rate and over and above that the tenant was to pay a certain amount for the improvement of *dak* and *bhet* expenses in respect of the land and the total amount was payable in instalments for which *dakhilas* were to be given:

Held, that the amounts fixed under improvement of *dak* and *bhet* expenses were not *abwabs* and were revocable by the landlords as they were clearly intended to be included under the rent payable by the tenant.

A document has to be construed as a whole and the intention of the parties gathered from the nature of the entire contract. **C** NALINI BHUSAN GUPTA *v.* ALI MIA, 51 C. 643 **346**

Bengal Tenancy Act—contd

——— **s. 85**—*Stipulation in an under-*raiyati *lease for renewal, if valid—Heirs of the under-*raiyat, *if can enforce the stipulation.*

Inspite of the provisions of section 85 of the Bengal Tenancy Act, a stipulation contained in a lease granted by a *raiyat* to an under-*raiyat* that after the expiry of the term for which the lease is granted, the *raiyat* would grant the under-*raiyat* a fresh lease, is valid.

When a *kabuliyat* contains a stipulation for a lease for a fresh term upon the expiry of the term already settled, the heirs of the lessee on competent to execute a first *kabuliyat* by virtue of the covenant. In such a case the question involved is not one of heritability of the tenure, but of simple contract. **C** SHULACHANA *v.* KALI BIBI **317**

——— **s. 105 (3),** *rules framed under—Application for assessment of rent—Court-fee payable.*

On an application under section 105, sub-section (3) of the Bengal Tenancy Act for a settlement of rent a stamp of eight annas is to be levied in respect of each tenancy, not in respect of each tenant who may be one of a group of tenants holding a particular tenancy. **C** SACHHIDANANDA THAKUR *v.* MAHES CHANDRA DAS, 50 C. 903; 28 C. W. N. 116; (1924) A. I. R. (C.) 345 **312**

——— **ss. 105, 107**—*Landlord and tenant—Enhancement of rent, application for—Civil Procedure Code (Act V of 1908), s. 141, O. VI, r. 14—Signing and verification—Application on behalf of all landlords—Subsequent withdrawal of same, effect of.*

Section 141 of the Civil Procedure Code does not apply to applications under section 105 of the Bengal Tenancy Act. Section 107 of the Bengal Tenancy Act makes the procedure for the trial of suits laid down in the Code of Civil Procedure applicable to proceedings under section 105 of the Act, and not to applications initiating the proceedings. The section has not the effect of making the provisions contained in the Civil Procedure Code relating to the signing and verification of plaints applicable to an application made under section 105 of the Bengal Tenancy Act.

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he himself signs and verifies the plaint.

Where an application under section 105 of the Bengal Tenancy Act is filed on behalf of all the landlords, the subsequent conduct of some of them in repudiating the authority of the others to sign the application on their behalf and retiring from the case will not attract the provisions of section 188 of the Act so as to defeat the application, if the other joint landlords choose to proceed with it. **Pat** HAZARI LAL SAHU *v.* AMBICA GIR, (1923) Pat. 273; (1924) A. I. R. (Pat.) 104; 3 Pat. 67; 2 P. L. R. 169; 5 P. L. T. 591, **5**

——— **Sch. III, Art. 3**—*Special limitation, plea of—Landlord originally party but given up in appeal—Question, whether can be agitated—Limitation, question of, when may be taken.*

Bengal Tenancy Act—concld.

The question relating to special limitation may be enquired into even if the landlords were not parties to the suit, or if the landlords being made parties did not appear and contest the suit, or if the landlords did appear and contest the suit but were satisfied with the order passed by the Court below and did not challenge it on appeal. **C** HAMID ALI *v.* RAM CHARAN GOLDAR **569**

Bill of Lading—*Clause prohibiting carriage of other goods—Oral agreement varying clause—Evidence, whether admissible—Evidence Act (I of 1872), s. 92—Shipment of cargo in lieu of ballast—Jettison, evidence of.*

A Bill of Lading evidences the terms of the contract between the parties and no evidence of any oral agreement varying its clauses is admissible under section 92 of the Evidence Act.

A party to a Bill of Lading is bound by any conditions mentioned in it although he may not have read them or known that the Bill of Lading contained any conditions.

When there is an express condition in a Bill of Lading that the ship owner is not to carry any other cargo except that of the person shipping the goods, the shipowner cannot, even if ballast is necessary, obtain other cargo for that purpose, but must ship more ballast.

In a suit for compensation for short delivery of goods by a ship where it is urged by the shipowner that cargo was cast over in an hour of danger during a storm, the Court must exercise due caution in accepting the allegation of the jettison especially when the storm is not supported by meterological experts. **S** STANDARD OIL COMPANY *v.* HARIDAS VELJI, 16 S. L. R. 235 **456**

——— endorsed to agent of seller, effect of—*C. I. F.* contract—Construction of document—Delivery, time for extension of—Seller, duty of. *See* CONTRACT ACT, s. 83 **1012**

Bombay District Municipal Act (III of 1901), s. 3 (12)—*Street land, meaning of—Survey of town—City Survey Officer, decision of—Suit for declaration of ownership—Government, whether necessary party.*

The definition of the word " street " as given in section 3, clause (12), of the Bombay District Municipal Act, does not in any sense negative the idea of private ownership.

A Survey having taken place within the Municipal limits of the town of the City Survey Officer declared certain land to be ' street land' within the meaning of section 3 (12) of the Bombay District Municipal Act. Plaintiffs thereafter filed a suit for a declaration of ownership and for a permanent injunction restraining the defendant Municipality from obstructing them in their enjoyment thereof:

Held, that the Government was not a necessary party to the suit because the decision of the Survey Authorities was not in favour of the Government in any way. **B** NATHALAL RAMDAS VAGHJI *v.* NADIAD

Bombay District Municipal Act—concld.

MUNICIPALITY, 25 Bom. L. R. 58; 47 B. 306; (1923) A. I. R. (B.) 456 **192**

——— **s. 30 A**—*Survey Officer declaring land as public street—Suit for declaration of ownership—Government, whether necessary party.*

A Survey being taken place within the Municipal limits of the City the Survey Officer declared certain lands to form part of the public street. Plaintiff then sued for a declaration of ownership and for an injunction restraining the defendant Municipality from disturbing the plaintiff in the enjoyment of the land. There was a further prayer for settling aside the decision of the Survey Officer:

Held, (1) that the form of the relief did not make any difference to the nature of the suit;

(2) that the matter can really be one between the Municipality and private parties and the mere fact that Government could have some interest in all public streets vested in Municipalities was no reason for holding that Government are necessary party. **B** BAI PARWATI v. THE NADIAD MUNICIPALITY, 25 Bom. L. R. 63; 47 B. 315; (1923) A. I. R. (B.) 459 **197**

——— **s. 120,** *scope of—Private well—Municipality, powers of.*

Section 120 of the Bombay District Municipal Act gives no right to a Municipality to annex a private well and turn it into a public well and does not give the Municipality any right to require a person who has a well which is filled up to excavate it. It does no more than provide that if a person has a well and has given consent to its water being used by the public, he shall not allow it to become dangerous to the public either by reason of the danger of the people falling into the well or owing to the insanitary condition of the water of the surroundings of the well. It gives the Municipality no power to require a private individual to keep up or not to keep a well. **S** ALLAHDINO v. THE SHIKARPUR MUNICIPALITY **409**

Bombay Pleaders Act (XVII of 1920), s. 18 (1)—*Application for execution after commencement of Act—Pleader's fees, calculation of.*

In an application for execution instituted after the coming into force of the Bombay Pleaders Act, pleaders' fees must be calculated at the rates prescribed in the Third Schedule to the Act. **B** BAI JAYAGAVRI v. RAMANLAL CHHOTALAL, 26 Bom. L. R. 187; 48 B. 355; (1924) A. I. R. (B.) 302 **749**

Bond, *execution of, proof of—Interest, covenant for payment of—Burden of proof.*

When a stipulation as to the payment of interest is found in a bond the execution of which is either proved or admitted, the onus of proving that the covenant to pay interest has found its way into the bond without the consent of the

Bond—concld.

debtor must be on the latter. L KEWAL RAM v ALLAH DIYA 55

Breach of contract — Suit for damages—Jurisdiction. *See* CIVIL PROCEDURE CODE, s. 20 30

——— Sale of goods—Contract to pay price on taking delivery—Suit for damages—Jurisdiction. *See* CIVIL PROCEDURE CODE, s. 20 393

——— *Sale of goods—Mutual obligations—Burden of proof.*

In a case arising out of the breach of a contract for the sale of goods, in which there are mutual obligations on the parties, it is for the plaintiff to show that on the date fixed for performance of the contract he was ready and willing to perform his part of the contract. If he is the purchaser it may not be necessary for him to prove that he made an actual tender of the money, but it is incumbent on him to show that he had made arrangements for the purchase-money and was in a position to hand it over to the defendant as soon as he was satisfied that the bulk of the goods was in accordance with the sample and that everything was satisfactory. A MAHOMED ISMAIL KHAN v. HASAN ALI KHAN, (1923) A. I. R. (A.) 220 473

Breach of covenant—*Cause of action, when arises—Award directing party to continue in possession so long as a certain payment was made—Refusal to make payment, effect of—Withdrawal of refusal, effect of.*

A right to sue accrues whenever a person becomes clothed with a legal character entitling him to a relief which a Court of Law is competent to grant.

When a contract is repudiated by one of the parties thereto before the time for its fulfilment, the repudiation gives rise to a cause of action in favour of the other party at once, and it is not necessary for such party to wait till the date fixed for the performance of the contract.

Under the terms of an award defendants were entitled to continue in possession of a certain area of land so long as they continued to pay the land revenue assessed on a certain other area of land in possession of the plaintiffs, but it was provided that if the defendants at any time claimed payment of the land revenue demand in respect of the area in possession of the plaintiffs the latter would be entitled to claim the area in possession of the defendants. During the Settlement operations the defendants made an application that the land in possession of the plaintiffs should be assessed to land revenue. The assessment was made and announced to the plaintiffs, but before it could be levied the defendants withdrew their application and prayed that matters may be left where they were before their application was made. The plaintiffs sued for the area in possession of

Breach of covenant—concld.

the defendants on the ground that by making their former application they had committed a breach of the condition under which they had been allowed to continue in possession of the land under the award :

Held, that the suit must succeed as the defendants had committed the breach complained of which gave an immediate cause of action to the plaintiffs and that it was no answer to the suit to urge that the defendants had subsequently withdrawn their application before the plaintiffs had been called upon to pay the land revenue demand. L ALI NAWAZ *v.* FAIZ ALI 165

Buddhist Law—*Succession—Inferior wife, rights of.*

According to the Buddhist law, a wife of inferior status who did not live with her husband has no right of inheritance but is allowed to retain such property which has passed into her possession during her husband's lifetime. R MA THEIN YIN *v.* MAUNG THA DUN, 2 Bur. L. J. 292; (1924) A. I. R. (R.) 105; 2 R. 62 501

——— Chinese Confucian, dying intestate—Adopted son, claim by. *See* BURMA LAWS ACT, s. 13 729

Burden of proof—*Benami* transaction—Execution sale—Claim petition by alleged *benamidar*—Dismissal of claim—Suit to establish title. *See* BENAMI TRANSACTION 899

——— Civil and criminal cases, quantum of proof necessary—Good faith—Consideration. *See* EVIDENCE ACT, s. 3 609

——— Land belonging to one person—Trees belonging to another—Presumption. *See* POSSESSION AND OWNERSHIP 545

——— Loss of goods—Railway company, negligence of. *See* RAILWAYS ACT, s. 72 341

——— Minor, contract with—Minority—Money obtained during minority. *See* MINOR 945

——— Mortgage of *waqf* property by *mutwalli*, whether valid—Necessity. *See* MUHAMMADAN LAW—WAQF 360

——— *Pardanashin* lady, transfer by—Fraud. *See* MUHAMMADAN LAW—MINOR 260

——— Risk note, Form B—"Loss," meaning of—Onus of proving loss, on whom lies. *See* RAILWAYS ACT, s. 72 126

——— Short delivery of goods—Loss—Claim for damages. *See* RAILWAYS ACT, s. 77 602

——— Suit on promissory note—Absence of consideration—Evidence of plaintiff, disbelieved, effect of. *See* PROMISSORY NOTE, SUIT ON 464

Burden of proof—concld.

——— *Wajib-ul-arz* ambiguous. *See* PRE-EMPTION—CUSTOM 417

——— *Zemindar*, rights of reclamation of forest land—Tenant, whether acquires occupancy rights. *See* LANDLORD AND TENANT 845

Burma Laws Act (XIII of 1898), s. 13—*Succession Act (X of 1865), s. 331—Transfer of Property Act (IV of 1882), s. 52—Buddhist Law, Chinese—Chinese Confucian, dying intestate—Adopted son, claim by—Burden of proof—Administrator, sale by—Sanction of Court, whether necessary—Administration suit*—Lis pendens, *doctrine of, applicability of.*

Section 13 of the Burma Laws Act does not authorise the application of the Customary Law in the case of the succession to the estate of any person who is not a Hindu, Muhammadan or Buddhist.

The provisions of the Succession Act do not confer any right to a share in the estate of an intestate on the adopted son of the intestate.

In the case of a claim by an adopted son to a share in the estate of an intestate Chinese Confucian who is also alleged to be a Buddhist, the onus of proof that the deceased intestate was also a Buddhist lies on the adopted son alleging such fact.

There is nothing in the Succession Act which requires an administrator to obtain the previous sanction of the Court for the sale of any portion of the estate of the deceased.

Where a creditor or one of the next-of-kin of a deceased institutes an administration suit against an executor or administrator, the mere institution of the suit or the obtaining of a mere administration decree does not deprive the executor or administrator of the general power to dispose of assets, unless and until the plaintiff has obtained an order appointing a receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in the executor or administrator. The doctrine of *lis pendens*, therefore, does not apply to a sale made by an administrator during the pendency of an administration suit. R LEE LIM MA HOCK *v.* SAW MAH HONE, 2 R. 1; (1924) A. I. R. (R.) 221 729

Burmese Buddhist Law—Ex parte *divorce—Parties previously married.*

Where parties to a Burmese Buddhist marriage have been previously married, there is no right of divorce at the mere caprice of one party against the will of the other party and without proof of misconduct or default on the part of the other party.

Semble.—The law is the same in the case of parties who have not been previously married.

Burmese Buddhist Law—concld.

R MA HMON *v.* MAUNG TIN KAUK, 1 R. 722; (1924) A. I. R. (R.) 182 705

C. I. F. contract—*Documents against payment—Property when passes to buyer.*

In the case of a C. I. F. contract, where the seller deals with, or claims to retain, the Bill of Lading in order to secure the price, as when he sends forward the Bill of Lading with a Bill of Exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the Bill of Exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance or payment, or tender, the property in the goods does not pass to the buyer. But when payment is made the appropriation which was at first conditional becomes final and the property in the goods passes to the buyer. L GULAB RAI-SAGAR MAL *v.* NIRBHE RAM-NAGAR MAL, 4 L. 423; (1924) A. I. R. (L.) 239 194

Cause of action—Contract for sale of goods deliverable at Karachi—Breach of contract—Suit for damages—Jurisdiction. *See* CIVIL PROCEDURE CODE, s. 20 30

——— Default in payment of instalment—Limitation. *See* LIMITATION ACT, SCH. I, ART. 75 848

———, definition of. *See* CIVIL PROCEDURE CODE, O. II, R. 2 338

———, meaning of. *See* CIVIL PROCEDURE CODE, O. II, R. 2 755

——— Sale of goods—Payment by *hundis*—Overpayments, suit to recover—Place of suing. *See* CIVIL PROCEDURE CODE, s. 20 (*c*) 800

———, *when accrues—Test—Time when begins to run.*

Ordinarily, limitation runs from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is reanimated.

Time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunal for relief.

Consequently the true test to determine when a cause of action has accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result. C DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA DEY, 39 C. L. J. 40; (1924) A. I. R. (C.) 600 520

Cause of action—concld.

———, when arises—Breach of covenant *See* BREACH OF CONTRACT 165

C. P. Land Revenue Act (II of 1917), s. 80—*Settlement* parcha—*Presumption of correctness.*

A Settlement *parcha* is not strictly so called a Settlement entry but only a rent certificate to which no presumption of correctness under section 80 of the C. P. Land Revenue Act of 1917 can apply. **N** TULARAM *v.* SUMRATI 621

——— **s. 109**, *scope of—Protected status, effect of—Exclusive possession by recorded* Thekedar.

Section 109 of the C. P. Land Revenue Act makes the tenure of a protected *Thekedar* impartible but that does not take away the ownership of any person who has a share in it nor his right to joint possession.

The grant of a protected status does not make any change in the rights of the joint holders of a lease *inter se* except making the tenure impartible when the lease might have been partible before.

A person who is recorded as a protected *Thekedar* is not entitled to keep out the other co-sharer from the joint possession of ownership of the *Thekedar* rights. **N** KHEDU SINGH *v.* BHAGWAN SINGH 400

——— **ss. 169, 220 (n)**—*Civil Procedure Code (Act V of 1908), s. 9—Jurisdiction of Civil and Revenue Courts—Jurisdiction, what determines—Partition—Direction to objector to file suit, effect of—Suit filed after expiry of six months, whether can be entertained—Special procedure, effect of.*

The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff, as his cause of action and the matter involved in it does not depend upon what the defendants may assert by way of defence. It may turn out at the trial that the subject of contest between the plaintiff and defendant is not properly represented by the form in which the plaintiff has chosen to put his claim, but the occurrence of that contingency may only render the plaintiff's suit liable to be dismissed as not proved. It will not affect the jurisdiction under which the suit as brought by the plaintiff fell.

The exclusive jurisdiction of Revenue Officers under section 220 (*n*) of the C. P. Land Revenue Act is limited only to the matter of "the partition or union of *mahals* or *pattis*" and the ordinary jurisdiction of the Civil Courts in the matter of giving a declaration on the question of the liability or otherwise of such property to be partitioned, is not ousted. Unless the jurisdiction is *either expressly or impliedly barred* by the Statute, it must remain with the Civil Court in all civil matters under section 9 of the Civil Procedure Code.

C. P. Land Revenue Act—concld.

Where a Statute prescribes a particular remedy and lays down a procedure for working out that remedy, the rights and privileges of the parties must depend upon the result of their following or not following up that procedure in the manner laid down by the Statute and it is the duty of each party to adopt and follow it up, because it is only when the right recognized by the Statute is given effect to in the manner provided by the Statute, that the decision as regards such right can be given by the tribunal contemplated by the Statute and be binding as between the parties. This may involve hardship in particular cases but that is not a matter for the Courts to consider.

The Statute has fixed the period of six months for the filing of a suit directed to be filed under section 169 (1) (*b*) of the C. P. Land Revenue Act, and a Civil Court has no jurisdiction to entertain such a suit after the expiry of the period fixed by the Statute. **N** LABHUA SAO *v.* CHATAN, 20 N. L. R. 115 161

Cess Act (IX of 1880), s. 95. *See* EVIDENCE ACT, *s.* 32 412

Chinese Buddhists — *Widow — Succession — Chinese Customary Law.*

Under Chinese Customary Law, in cases where there are children, a widow takes no share in her deceased husband's estate. She has a claim for maintenance against the estate, and possibly, in certain cases, certain other claims, but the estate belongs to the children. **R** BON KWI *v.* MAYEK YON, 2 Bur. L. J. 102; (1923) A. I. R. (R.) 236 244

Chota Nagpur Tenancy Act (VI of 1908), s. 177—*Rent suit*—Jus tertii, *plea of—Procedure.*

Where in answer to a rent suit the right of a third person to receive rent is pleaded, that third person must be made a party to the suit and the plea must be decided in his presence. **Pat** PAHALAN GARAIN *v.* CHOTU KUNJA, 2 P. L. R. 24; (1924) A. I. R. (Pat.) 522; 5 P. L. T. 614 601

City of Bombay Municipal Act (III of 1888), s. 296—*Street, widening of—Municipality, power of, to acquire more land than is necessary—Recoupment.*

Where an Act authorises land to be acquired for the actual works contemplated by a local authority, the latter will be restrained from taking more land than is actually necessary for such works.

Under section 296 of the City of Bombay Municipal Act, not only has the Municipality power to acquire land for the purpose of making or widening a street, but it may also acquire, if it seems expedient, land outside the regular line of such street. The section clearly recognises the principle of recoupment. **P C** KHANDERAO VITHOBA KORE *v.* MUNICIPAL CORPORATION OF BOMBAY, (1924) A. I. R. (P. C.) 3; 19 L. W. 1; 22 A. L. J. 11; (1924) M. W. N. 77; 46 M. L. J. 169; 33 M. L. T. 462; 28 C. W. N,

City of Bombay Municipal Act—concld.

375; 26 Bom. L. R. 193; 10 O & A. L. R. 121; 2 P. L. R 108; 39 C. L. J. 201; 48 B. 185 (P. C.) **948**

City of Rangoon Municipal Act (VI of 1922), s. 80 (2)—*Assessment to taxation, basis of—Standard rent—Rent actually obtained by tenant from sub-tenants—Rateable value, determination of.*

In assessing buildings and lands to taxation in Rangoon under the City of Rangoon Municipal Act, 1922, the Corporation must, in the absence of special circumstances, take as its basis the standard rent in those cases on which the standard rent has been fixed by the Rent Controller. In other cases it must fix the rateable value on a consideration of all the surrounding facts any circumstances including the effect that the Rangoon Rent Act has, or may have, on the matter.

It cannot be said in every instance that the amount that a tenant is able to obtain from his sub-tenants is always to be taken as the rateable value; but that amount may be taken into consideration with all the other facts governing the question. In other words, in arriving at a decision as to the amount for which the premises may reasonably be expected to let, the Assessor will consider the rent a tenant can extract from his sub-tenants; but this will not be the only matter to be considered in arriving at a decision. **R** MUNICIPAL CORPORATION OF THE CITY OF RANGOON *v.* THE SURATI BARA BAZAAR CO., LTD., 1 R. 668; (1924) A. I. R. (R) 194 **432**

Civil Procedure Code (Act V of 1908), ss. 2, (17) (e), 80—*Village Headman, whether public officer—Suit against Village Headman—Notice, whether necessary—Report to Deputy Commissioner, whether notice.*

A Village Headman holds an office by virtue of which he is empowered to place or keep persons in confinement and has various other powers and duties which constitute him a "public officer" within the meaning of sections 2 and 80 of the Code of Civil Procedure.

Section 80 of the Civil Procedure Code is, therefore, applicable to a suit against a Village Headman to recover damages for an act purporting to have been done by him in his official capacity.

A mere report to the Deputy Commissioner does not amount to a notice within the meaning of section 80 of the Civil Procedure Code. **R** MAUNG SAN YA *v.* MAUNG NGWE HLA, 2 Bur. L. J. 29; (1923) A. I. R. (R.) 250 **818**

——— **s. 9.** *See* C. P. LAND REVENUE ACT, ss. 169, 220 **161**

——— **s. 11**—*Erroneous decision on question of law, whether* res judicata—"*Litigating under same title,*" *meaning of—Parties to subsequent suit—Title, when must come into existence.*

An erroneous decision on a point of law operates as *res judicata*,

Civil Procedure Code—1908—contd.

The title by which the parties to the subsequent suit claim must, for purposes of *res judicata* be subsequent to the commencement of the former suit, because transferees prior to the date of such suit are not bound by the decision of the suit.

The words "between parties or between parties under whom they or any of them claim, litigating under the same title" in section 11 of the Civil Procedure Code cover a case where the latter litigant occupies by succession the same position as the former litigant. **N** TULARAM *v.* SUMRATI **621**

——— **s. 11**—Ex parte *decision*—Res judicata.

For the application of the rule of *res judicata*, an *ex parte* decree and a decree made after contest stand on the same footing. **O** ASHARFI LAL *v.* THE DEPUTY COMMISSIONER, GONDA, 10 O. & A. L R. 553; 11 O. L. J. 448 **660**

——— **s. 11**—*Oral award*—Res judicata.

An arbitration award will bar a subsequent suit dealing with the same subject-matter whether the award is oral or in writing. **R** MA MYA *v.* KO PO SA, (1924) A. I. R (R.) 60; 2 Bur. L. J. 163 **742**

——— **s. 11**—Res judicata *between co-defendants—Decision of question necessary to give relief to plaintiff.*

An adjudication which is necessary to give the proper relief to the plaintiff, is *res judicata* as between the co-defendants as well, provided there is a conflict of interest between the latter.

Defendant brought a suit against the appellant for the determination of his title to a house under a Will, and in that suit it was finally decided by the High Court that the parties were entitled to share equally in the house. A third party then brought a suit to have his rights under the Will determined, and the defendant and the plaintiff were both impleaded as defendants to the suit. The construction of the Will was again put in issue and it was decided by the High Court that the house belonged to the third party and to the plaintiff and that the defendant had no share in it. The plaintiff then brought the present suit for a declaration that the decree of the High Court in the second suit was binding on the defendant and that he had no share in the house in dispute:

Held, (1) that the question of the construction of the Will was directly and substantially in issue in the second suit, and as the decision of that question was necessary in that suit in order to give the proper relief to the plaintiff, the decision was *res judicata* between the parties to the present suit who were co-defendants in the second suit;

(2) that, therefore, the plaintiff's suit was entitled to succeed. **A** RAM PRASAD *v.* MAHABIR, 22 A. L. J. 91; 46 A. 220; (1924) A. I. R. (A.) 310 **803**

——— **s. 11**—Res judicata *between co-defendants, requisites of.*

If the relief given to a plaintiff in a suit does not require or involve a decision of any case between co-defendants, the latter will not be bound as between each other by any proceeding which

may be necessary only to the decree which the plaintiff obtains. N JAGESHWAR RAO *v.* GUJAB RAO 22

——— s. 11—*Succession, decision as to—Legal representative, question of, whether* res judicata.

Where a Hindu widow after her husband's death is sued by his brother who claims to succeed to the deceased's properties by right of survivorship but fails to establish the right, it is not open to him afterwards in other proceedings to object to the widow being added as legal representative of her husband. M KOTHANDARAMASWAMI NAIDU *v.* PAPPAMMAL 891

——— s. 11—*Unnecessary finding*—Res judicata.

A finding in a judgment cannot operate as *res judicata* if it was not necessary to the relief granted by the decree. O OUDH BEHARI LAL *v.* DAL SINGH, 10 O. L. J. 404; (1924) A. I. R. (O.) 205 666

——— s. 11, Expl. VI—Res judicata—*Same parties—Public right—Dispute over well—Municipal Board party to previous litigation—Failure to assert in subsequent litigation—Public right, effect on.*

The Municipal Board represents the public in disputes about wells and other things which are vested in them; and any decision between the Municipal Board and the defendants in a previous litigation about such a well, will operate as *res judicata* against the latter, even if the suit is brought by other persons and not by the Municipal Board. The parties are the same within the meaning of Explanation VI to section 11, Civil Procedure Code. Any refusal or negligence by the Municipal Board to assert a public right does not effect the existence of such a public right. A RAM CHAND *v.* MAULA BAKSH, 21 A. L. J. 882; 10 O. & A. L. R. 39; 46 A. 110; (1924) A. I. R. (A.) 178 310

——— s. 11, Expl. VI—Res judicata—*Suit by reversioner to contest alienation, dismissal of, effect of.*

A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners, and all the reversioners are bound by the decision given in the suit. L BHARAT SINGH *v.* SHAFI MUHAMMAD 484

——— s. 13—*Foreign judgment, suit on—Merits of judgment, inquiry into—Submission to foreign jurisdiction, effect of—Refusal to apply Indian Law.*

In a suit in British India on a foreign judgment, the general rule is that the Court which entertains the suit cannot institute an enquiry into the merits of the original action, or the propriety of the decision.

A foreign judgment must be enforced by the Court in British India in every case in which the judgment-debtor had voluntarily appeared before the foreign Court which passed the judgment.

Where a foreign Court has applied the law of limitation in force there, and which is, different from the law of limitation in force in British India, it cannot be said that the foreign Court has refused to recognize the law of British India in a case in which such law is applicable; and its judgment will be enforceable. A GANGA PRASAD *v.* GANESHI LAL, 21 A. L. J. 890; 10 O. & A. L. R. 61; (1924) A. I. R. (A.) 161; 46 A. 119 332

——— s. 20—*Contract for sale of goods deliverable at Karachi—Breach of contract—Suit for damages—Cause of action—Jurisdiction.*

A contract for sale of wheat, to be delivered at a future day, was made at Lyallpur and, *inter alia*, provided that the sellers were to despatch the same to Keamari (Karachi) at their own risk and cost, after the buyers' agents at Lyallpur had passed it, to receive 90 per cent. of their value on delivery of the Railway Receipts to the buyer's Agents at Lyallpur and the balance after the goods had been finally tested and approved by the buyers at Karachi, the buyers having the right of accepting or rejecting it at Karachi. The contract further provided that the sellers had an option to send the goods direct to Karachi, where they were to be tested and approved by the buyers and provided for reference to arbitration in case of dispute :

Held, that as the contract had to be completed at Karachi, a part of the cause of action arose at Karachi and the Karachi Court had jurisdiction to entertain a suit for damages for failure to make delivery.

Per *Aston*, A. J. C.—"Cause of action" consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendants would have the right to traverse.

In a suit for damages for breach of contract it (*i.e.*, cause of action) consists of the making of the contract and of its breach in the place where it ought to be performed. S KOOVERBHAN SUKHANAND *v.* LOUIS DREYFUS & Co. 30

——— s. 20—*Sale of goods—Goods despatched from one place to another—Contract to pay price on taking delivery—Breach of contract—Suit for damages—Jurisdiction.*

Defendants having ordered the plaintiffs to send to them at A certain bags of grain the plaintiffs sent the bags by train and sent the Railway Receipt to one *S* giving notice to the defendants to take delivey of the goods and pay the money to *S*. On defendants' default, plaintiffs ordered *S* to sell the goods and these having been sold at a loss, they brought a suit to recover damages in the Small Cause Court at K, the place, where they carried on their business :

Held, that as the delivery of the goods and the payment of the price had to be made at A

the cause of action arose wholly at A and the Court at K had no jurisdiction to try the suit. **N** GANPATLAL *v.* THE FIRM OF BILASRAI, (1924) A. I. R. (N.) 18 **393**

——— **s. 20 (c)**—*Sale of goods—Payment by* hundis—*Overpayment, suit to recover—Place of suing—Cause of action, where arises—Negotiation of* hundi, *meaning of.*

Plaintiffs, a firm of merchants at Madras, carried on business with the defendant firm at Calcutta. The Calcutta firm under the orders of the Madras firm, sent goods to various places in the Madras Presidency. The arrangement as regards payment was that the money was to be paid either in cash in Calcutta or by *hundis* drawn by defendants in Calcutta on the plaintiffs' firm in Madras. The payments were made only on the delivery of the Railway Receipts which were to be attached to the *hundis* and presented to plaintiffs' firm along with the *hundis*. In a suit by the plaintiffs' firm against the defendant firm instituted in the City Civil Court, Madras, for refund of certain overpayments made to the defendant firm, the defendant firm pleaded that the Court at Madras had no jurisdiction to entertain the suit:

Held, that a part of the cause of action must be held to have arisen in Madras both as regards the payment on the *hundis* and the presentation of Railway Receipts, which was a necessary condition to be performed before demand for money could be made of the Madras firm, and the City Civil Court had, therefore, jurisdiction to entertain the suit under section 20 (*c*) of the Civil Procedure Code.

When a firm outside Madras draws *hundis* on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the *hundi* is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the *hundi*.

Negotiation of the *hundi* is only a provisional method of realising money from persons who are willing to accept the *hundi* for a small profit and to take the trouble of presenting the *hundi* to the drawee and recovering the money from him. If the *hundi* is dishonoured the endorsee will, of course, have recourse to the drawer of the *hundi* who had endorsed it over to him, so that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the buyer actually makes payment on the *hundi*. **M** PONNUSWAMY IYER *v.* DAMODAR HUNSRAJ, 46 M. L. J. 82; 19 L. W. 168; (1924) M. W. N. 178; 31 M. L. T. 7; 47 M. 403; (1924) A. I. R. (M.) 464 **800**

——— **ss. 21, 37, 38, 39**—*Execution of decree—Transfer of jurisdiction—Court competent to execute decree—Objection to jurisdiction taken in appeal, whether can be entertained.*

No Court can execute a decree, in which the subject-matter of the suit, or of the application for execution, is property situate entirely outside the local limits of its jurisdiction.

In all cases, where between the passing of the decree and the executing of it, the jurisdiction over the subject-matter of the decree has passed to another Court, the Court passing the decree must send it for execution to the Court which has territorial jurisdiction over the subject-matter of the decree. Where, however, the judgment-debtor fails to take objection to the jurisdiction of the Court which passed the decree to execute the decree, and the objection is taken for the first time in the Appellate Court it should not be entertained.

Semble:—The provisions of section 21 of the Civil Procedure Code are applicable to execution proceedings. **M** MANAVIKARAMAN *v.* ANANTHANARAYANA AYYAN, 19 L. W. 16; (1924) M. W. N. 38; 46 M. L. J. 250; (1924) A. I. R. (M.) 457 **806**

——— **s. 47**—*Award proceedings, whether suit—Order in execution—Appeal, whether competent.*

For the purposes of section 47, Civil Procedure Code, an award must be considered to be a decree in a suit and the award proceedings must be deemed to be a suit. Therefore, an appeal would lie against an order under execution although that execution was of an award and not of a decree in suit. **S** DONALD GRAHAM & Co. *v.* KEWALRAM, 16 S. L. R. 245 **477**

——— **s. 47**—*Mortgagee decree-holder purchasing property—Suit for possession of property purchased—Question relating to satisfaction of decree—Suit, whether barred.*

Z hypothecated certain property to *T* and *M* by way of a simple mortgage; subsequently plaintiff purchased certain property which included a portion of the mortgaged property. *T* and *M* obtained a decree on foot of their mortgage and purchased what purported to be hypothecated property in execution thereof. Plaintiff was a party both to the suit and the execution proceedings. *T* and *M* then took possession of a certain share on a certain *mahal* on the authority of their sale certificate. Plaintiff, therefore, sued for a declaration that only a small share of the *mahal* was mortgaged and that he was entitled to possession of the remainder:

Held, that the question whether the mortgagor had mortgaged more than he had a right to mortgage was a question relating to the execution, discharge and satisfaction of the decree, and as such could only by determined by the Court executing the decree, and that, therefore, the plaintiff's suit was barred by section 47 of the Civil Procedure Code. **A** SADANAND PANDEY *v.* SHEIKH TUFAIL AHMAD, (1923) A. I. R. (A.) 115 **486**

——— **s. 47**—*Order rejecting application for arrest of judgment-debtor, whether appealable—Judgment-debtor unable to pay decretal amount—Imprisonment—Order, propriety of.*

An order rejecting an application for the arrest of a judgment-debtor is one under section 47, Civil Procedure Code, and is appealable.

Where a judgment-debtor has no attachable property and is unable to pay off the decretal

Civil Procedure Code—1908—contd.

amount or any portion of it, it would not be proper to order his imprisonment. L LALA DAS *v.* MINA MAL, 4 L. L. J. 266; (1922) A. I. R. (L.) 259 **551**

——— **ss. 47, 144**—*Auction-purchaser, whether party to suit—Restitution, whether can be granted against auction-purchaser—Order refusing restitution, whether decree—Appeal.*

Restitution under section 144 of the Civil Procedure Code cannot be obtained as against a *bona fide* auction-purchaser at an auction-sale held by a Court which had jurisdiction to hold the same.

A *bona fide* auction-purchaser is not a party to the suit within the meaning of section 47 of the Civil Procedure Code and an order refusing restitution as against him is not, therefore, a decree and is, consequently, not appealable. L ASGHARI BEGUM *v.* IRSHAD-UD-DIN **57**

——— **ss. 47, 144**—*Sale in execution set aside—Restitution of property—Auction-purchaser, position of—Order awarding profits to judgment-debtor—Appeal, whether competent.*

An order awarding profits to the judgment-debtor as against the auction-purchaser in connection with proceedings for restitution of property which had been sold by auction but owing to the auction-sale being set aside was ordered to be re-delivered into the possession of the judgment-debtor from that of the auction-purchaser to whom it was in the meantime delivered, is an appealable order.

For the purposes of section 47 of the Civil Procedure Code, an auction-purchaser is the representative of the decree-holder. N SUNDERBAI *v.* SHRIKRISHAN RAMDHAN, 20 N. L. R. 170 **636**

——— **s. 47, O. XXI, r. 2**—*Execution of decree—Adjustment not certified—Suit for declaration that decree has been satisfied, maintainability of.*

A suit for a declaration that a decree has been satisfied and should not consequently be executed against the judgment-debtor is maintainable, and section 47 of the Civil Procedure Code does not operate as a bar to such a suit.

Although O. XXI, r. 2 of the Civil Procedure Code specifically enacts that an uncertified adjustment of a decree cannot be recognised by any Court executing the decree, it is implied that it may be recognised as such by a Court trying the matter as a regular suit. L BISHEN SINGH *v.* MAHINDAR SINGH **125**

——— **s. 47, O. XXI, r. 16**—*Execution application—Dismissal—Appeal—Assignment of decree—Application for execution not made—Determination of question of assignment* suo motu*—Absence of formal application, effect of.*

An order dismissing an application for execution of a decree adversely affects the rights of the decree-holder against the judgment-debtor and consequently comes within the purview of section 47, Civil Procedure Code, and is appealable.

If an assignee of a decree does not make an application for the execution of the decree, it is not the duty of a Court *suo motu* to determine the validity of the assignment and to make the assignee a party to the decree.

Civil Procedure Code—1908—contd.

Where an assignee intends to make an application under O. XXI, r. 16, Civil Procedure Code, and avail himself of the rights conferred by the deed of assignment, the omission of a formal application is a mere irregularity and need not prevent a Court from determining a question which arises between the assignee and the decree-holder and which the former wants to be determined in execution proceedings. L HARDITTA *v.* NIGAHIA MAL, 4 L. L. J. 259; (1922) A. I. R. (L.) 396 **546**

——— **ss. 48, 100, 102, 115.** *See* LIMITATION ACT, SCH. I, ARTS. 181, 182 **605**

——— **s. 50 (2)**—*Legal representative of deceased judgment-debtor, when personally liable—Burden of proof.*

To justify an order under section 52 (2) of the Code of Civil Procedure making the legal representative of a deceased judgment-debtor personally liable, it must be shown by the person applying for execution that the legal representative has received sufficient property to cover the decree debt and the latter must fail to show that the amount that has come into his hands has been duly disposed of. M ANGAVALATHAMMAL *v.* JANKI AMMAL, 19 L. W. 119; (1924) M. W. N. 207; (1924) A. I. R. (M.) 466 **894**

——— **s. 92**, applicability of. *See* MUHAMMADAN LAW—*Waqf* **120**

——— **s. 92**—*Sanction granted for particular relief—Other reliefs claimed in suit—Procedure.*

Where a suit, filed under section 92 of the Civil Procedure Code, includes reliefs for which sanction has been refused by the Collector, the whole suit is not liable to be dismissed, and that portion of the suit which is covered by the sanction of the Collector should be heard and decided on the merits. B SAKHARAM BALWANT PESHWE *v.* LAXMAN TRIMBAK PURANDARE, (1923) A. I. R. (B.) 428 **200**

——— **s. 92**—*Suit for declaration of* waqf *and injunction against those interested—Subsequent addition of co-defendants—Fresh sanction, whether necessary.*

After obtaining the necessary sanction under section 92 of the Civil Procedure Code, plaintiffs sued for a declaration that certain property was *waqf* and for the framing of a scheme for the better management of the property. The two defendants contended that the property originally belonged to their father and on his death it became the absolute property of themselves and other heirs, thereupon the plaintiff applied for amendment of the plaint and the names of eight more defendants were added. No fresh sanction of the Collector was obtained prior to the amendment:

Held, that inasmuch as the sanction already given by the Collector substantially authorised the plaintiffs to sue for a declaration that certain immoveable property was *waqf* and for an injunction against all that claimed an interest therein

the mere absence of some of those interested in the property did not invalidate the sanction already given or necessitate a fresh sanction for bringing the interested parties on the record as co-defendants. **S** BACHAL SHAH *v.* JUMA SHAH, (1923) A. I. R. (S.) 35; 16 S. L. R. 221 **539**

——— **ss. 96 (3), 141,** *applicability of—Execution of decree—Compromise, order passed on—Appeal, whether lies.*

Section 96 (3) of the Civil Procedure Code is restricted to suits only and cannot be extended to execution proceedings.

Section 141 of the Civil Procedure Code is confined entirely to proceedings in original suits and does not regulate appeals from orders in execution proceedings. **Pat** LACHHMAN LAL *v.* PADARATH SINGH, 4 P. L. T. 735; (1924) A. I. R. (Pat.) 346 **594**

——— **s. 100**—*Appeal, second—Custom, question of—High Court, power of.*

It is always open to the High Court in second appeal to see whether an opinion on custom which has been pronounced by the lower Courts was or was not based on sufficient evidence. **A** ALI HUSAIN *v.* SYED MAZAHIR HUSAIN, (1924) A. I. R. (A.) 477 **134**

——— **s. 102.** *See* AGRA TENANCY ACT, s. 57 **599**

——— **s. 102**—*Award, suit to enforce, nature of—Appeal, second, competency of.*

A suit to enforce an award, is in essence a suit for specific performance of a contract, and is not of a small cause nature, consequently, a second appeal is competent in the case of such a suit. **R** MA HLA GYI *v.* MAUNG SEIK PO, 1 R. 700; (1924) A. I. R. (R.) 192 **718**

——— **s. 104**—*Arbitration Act (IX of 1899), s. 14—Order setting aside award—Appeal, whether competent.*

No appeal lies against an order under the Arbitration Act, setting aside an award. **S** G. P. GUNNIS AND CO., LTD. *v.* AMANMAL TULSIDAS, 17 S. L. R. 133; (1924) A. I. R. (S.) 75 **920**

——— **s. 105**—*Order setting aside decree—Appeal from final decree—Order, whether can be questioned.*

In the absence of an error, defect or irregularity affecting the decision of the case, an order of the Trial Court setting aside a decree on the ground that the defendant who was treated as a minor was really not a minor, cannot be questioned in an appeal from the final decree passed in the suit. **A** CHAUBE BENAIK RAO *v.* PUTTAIN SINGH **69**

——— **s. 109**—*Appeal to Privy Council—Appeal to High Court dismissed for default—Restoration, application for, rejection of—Order, whether decree or final order.*

An order of a High Court rejecting an application for restoration of an appeal dismissed for default is not appealable to His Majesty in Council inasmuch as it is not a decree or final order, nor is it an order passed in the exercise of Original Civil Jurisdiction of the High Court. **R** MAUNG SAW MYAING *v.* MG SEIN, 2 Bur. L. J. 294; (1924) A. I. R. (R.) 208 **504**

——— **s. 109**—*Decree-holder's application for personal decree—Order, whether final—Appeal to His Majesty in Council, whether competent.*

An order of the High Court deciding that a decree-holder's application under O. XXXIV, r. 6 of the Civil Procedure Code for the preparation of a personal decree against the judgment-debtor is not time-barred, is a final order within the meaning of section 109, Civil Procedure Code, inasmuch as it goes to the very foundation of the matter in dispute, and leave to appeal to His Majesty in Council against such order should be given. **A** SANTI LAL *v.* RAJ NARAIN, 21 A. L. J. 686; 9 O. & A. L. R. 832; 45 A. 741; (1924) A. I. R. (A.) 119 **87**

——— **s. 109 (a)**—*Letters Patent (Bom.), cl. 39—Order remanding case for fresh decision, whether final order—Leave to appeal to Privy Council, whether can be granted.*

An order passed by the High Court on a Civil Extraordinary Application by which the decree of the Trial Court is set aside and the case is sent back to that Court for passing a fresh decree cannot be said to be a "final order" within the meaning of section 109 (*a*) of the Civil Procedure Code or, a "final judgment" within the meaning of clause 39 of the Letters Patent (Bombay) as it does not finally dispose of the rights of the parties, and leave cannot, therefore, be granted to appeal to His Majesty in Council against such order. **B** SHRINIWAS LAXMIPATI RAO *v.* HANMANT SHRINIWAS DESHPANDE, (1923) A. I. R. (B.) 39 **210**

——— **s. 110**—*Application for leave to appeal to Privy Council—Construction of document—Substantial question of law of general interest.*

The question in dispute was whether on the terms of a document executed by the plaintiff transferring certain property to the predecessor-in-interest of the defendant, the transaction that was entered into was an out and out sale with liberty to re-acquire the property or whether it was a mortgage. The High Court confirmed the decision of the lower Appellate Court that the real transaction between the parties was an out and out sale coupled with a bargain for re-conveyance. The plaintiff then applied for leave to appeal to His Majesty in Council :

Held, that as no substantial question of law of general interest was involved leave for appeal could not be given. **A** BISHAMBHAR NATH *v.* MUHAMMAD ABAIDULLAH, 46 A. 227; (1924) A. I. R. (A.) 559 **213**

——— **s. 115.** *See* LETTERS PATENT (MAD.), CL. 16 **372**

——— **s. 115**—*Jurisdiction, order deciding question of—Revision, whether lies—'Case,' meaning of.*

The word 'case' in section 115 of the Civil Procedure Code must be understood in its broadest and most ordinary sense.

Civil Procedure Code—1908—contd.

The High Court has jurisdiction to revise an erroneous order holding that the Court has jurisdiction to try a suit. **N** SHEOPRATAP SHRINIWAS *v.* SUKHDEO KANHAIYALAL **168**

——— **s. 115**—Onus *misplaced—Finding of fact—Revision.*

A consideration of the evidence from a wrong point of view owing to the *onus* of proof having been wrongly placed makes the finding liable to be set aside in revision. **N** MULCHAND *v.* G. I. P. RY., CO., BOMBAY **602**

——— **s. 115**—*Small Cause Court, judgment of—Limitation, question of—Revision.*

The judgment of a Small Cause Court is liable to be upset on a question of limitation in revision. **O** MOHANYA *v.* PANNA LAL, 10 O. & A. L. R. 534; 11 O. L. J. 513 **848**

——— **ss. 115, 151, 152**—*Decree not in conformity with judgment—Application for amendment—Proper remedy—Court, inherent power of—Order refusing amendment—Revision—High Court, whether will interfere.*

Where the decree is not in conformity with the judgment, an application for review of the judgment is not the only remedy. Sections 151 and 152 of the Code of Civil Procedure give the Court ample jurisdiction to correct mistakes, to pass such orders in the exercise of the inherent power vested in the Court as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.

The inherent power of the Court vested in it by its own constitution is not limited to sections 151 and 152 of the Civil Procedure Code.

An order dismissing an application under sections 151 and 152, Civil Procedure Code, amounts to a refusal on the part of the Court to exercise jurisdiction vested in it by law and the High Court can set it aside in revision under section 115, Civil Procedure Code. **C** KABIR-UD-DIN MONDOL *v.* ENTAJ MONDOL **586**

——— **ss. 115, 151, O. XLI, r. 33**—*Plaintiff, failure of, to produce evidence—Suit dismissed—Remand directing Court to take fresh evidence—Decree not set aside—Appeal against order of remand, whether competent—Revision.*

Plaintiff having failed to produce his witnesses his suit was dismissed. On appeal the Court remanded the case for taking any evidence which may be offered by the plaintiff, but did not set aside the First Court's decree. The defendant filed a second appeal against this order:

Held, (1) that the lower Appellate Court's order must be taken to have been made under its inherent powers, as given under section 151 and O. XLI, r. 33, Civil Procedure Code, and inasmuch as the decree of the Court of first instance was not set aside, no appeal lay;

(2) that there was, however, a right to apply for revision and the memorandum of appeal could be treated as an application under section 115 of the Civil Procedure Code. **R** ASHROF ALI *v.* MAHOMED MORDEN, 1 R. 656: (1924) A. I. R. (R.) 177 **482**

Civil Procedure Code—1908—contd.

——— **s. 115, O. VI, r. 17**—*Amendment of plaint—Interlocutory order—Revision—General rule.*

Order VI, r. 17, Civil Procedure Code, gives the Court great powers to permit either party to alter or amend his pleadings at any stage of the proceedings and the matter of amendment is within the discretion of the Presiding Judge.

An order allowing an amendment of plaint is not, therefore, open to revision under section 115 of the Civil Procedure Code.

It is not usual to interfere in revision with interlocutory orders because though there may be no immediate appeal against such orders, a remedy is supplied by section 105, Civil Procedure Code, which provides that such orders may be made a ground of objection in the appeal against the final decree. **N** ANWAR KHAN *v.* YAKUBKHAN **911**

——— **s. 115, O. IX, r. 2, O. XVII, rr. 2, 3, O. XLVIII, r. 1**—*Process-fees, date for payment of—Court, duty of, to fix date—Default—Discretion of Court—Revision, interference in.*

The Civil Procedure Code contemplates that the Court shall fix a time within which process-fees for summoning a defendant shall be paid, and that the suit *may* be dismissed if payment is not made accordingly. There is, therefore, a duty cast on the Court to fix the time within which process-fees must be paid, and if default in payment of process-fees is due to the omission of the Court to fix a time for payment, the suit should not be dismissed for non-payment of process-fees.

The provisions of O. XVII of the Civil Procedure Code should be liberally construed, particularly as there is a latitude given to the Trial Court to make any such order as it thinks fit, in lieu of an order of dismissal.

There are cases in which justice requires interference in revision even when another remedy is open to the aggrieved party; much more is such interference necessary and justifiable when another remedy is barred. **N** AYODHYAPRASAD *v.* SECRETARY OF STATE **123**

——— **s. 115, O. XXI, r. 89**, *scope of—Application to set aside auction sale—Interest of applicant not disclosed—Dismissal of application, whether justified—Revision—Other remedy open—High Court, powers of.*

The plain meaning of the wording of r. 89 of O. XXI, of Civil Procedure Code is that the right to apply to have the sale set aside on making a deposit is exercisable by a person, who has acquired an interest in the property before the date of sale. The rule does not say that no such application shall be entertained unless it discloses the nature of the interest which entitles the applicant to make the application. If the application, therefore, omits to disclose the interest, it is not such an omission as could prevent the Court from calling upon the applicant to disclose facts on which he bases his right to apply.

Though section 115 of the Civil Procedure Code prohibits revision in cases in which an appeal lies, and revisions should not be granted ordinarily where some other remedy has been provided,

still, as the exercise of the power of revision is discretionary, it must be adapted to the circumstances of each particular case. There are cases in which justice requires interference in revision even though another remedy is open to an aggrieved party. **N** VITHAL SINGH *v.* AGARCHAND **903**

——— **s. 115, O. XXIII, r. 1**—*Withdrawal of suit—Cause of action substantiated—Formal defect—Other sufficient grounds, meaning of—Jurisdiction, absence of—Erroneous withdrawal of suit—Material irregularity—Revision.*

Section 115 of the Civil Procedure Code applies to jurisdiction alone, the irregular exercise or non-exercise of it or illegal assumption of it.

An order purporting to be made under O. XXIII, r. 1 of the Civil Procedure Code in utter disregard of the procedure laid down therein is an order passed with material irregularity and is open to revision.

A suit which must fail by reason of the cause of action on which it is founded not being substantiated by evidence cannot be said to fail by reason of some formal defect within the meaning of sub-clause (*a*) of clause (2) of r. 1 of O. XXIII, of the Civil Procedure Code.

A plea of jurisdiction raised in defence to a suit has no relation whatsoever to the frame of the suit. Consequently a suit instituted in a Court which has no jurisdiction to entertain it does not fail by reason of any formal defect in it.

The expression "other sufficient grounds" used in clause (*b*) of sub-rule (2) of r. 1 of O. XXIII of the Civil Procedure Code does not cover any ground wholly dissimilar to some formal defect. **O** MUHAMMAD EJAZ RASUL KHAN *v.* MUBARAC HUSAIN, 10 O. & A. L. R. 685 **1033**

——— **s. 115, O. XXIII, r. 1**—*Withdrawal of suit—Legal defects alleged by defendant, whether sufficient—Formal defect—Judicial discretion—Revision.*

In order to give a Court jurisdiction to act under O. XXIII, r. 1 of the Civil Procedure Code it is not sufficient that the defendant should allege legal defects but the Court must be satisfied either from the plaintiff's admission or otherwise that there really is some formal defect which must lead to the failure of the suit or some other sufficient cause within the meaning of the rule.

Failure on the part of a Court to exercise judicial discretion in allowing withdrawal of a suit with liberty to bring a fresh suit may be made the subject of revision. **O** RAJINDRA PURI *v.* BENI MADHO, 10 O. & A. L. R. 823; 11 O. L. J. 351 **1031**

——— **s. 115, O. XXXIII, r. 5 (4)**—*Application for leave to sue* in forma pauperis, *dismissal of—Revision, whether lies.*

Where a Court finds upon the materials placed before it that an applicant for leave to sue as a pauper is not unable to pay the Court-fees due from him, the High Court will not interfere with the order in revision. **Pat** UMAR BAHADUR *v.* KHAJA MOHAMAD KARIM NAWAB, (1923) Pat. 287; 2 P. L. R. 276; 5 P. L. T. 606 **56**

——— **s. 115, Sch. II, paras. 15, 16**—*Arbitration—Award—Objection—Appeal, whether lies—Revision.*

The effect of the introduction of the words "or being otherwise invalid" in paragraph 15 of Schedule II to the Civil Procedure Code, is that any objection to the award on the ground that it is not an award or on the ground of its invalidity should be made at the time when the award is filed.

If such an objection is not taken then, or is taken and is disallowed, it is not open to the party objecting, to re-agitate the matter by way of appeal against the decree. **B** MAHOMED VALLI ASMAL *v.* VALLI ASMAL, 26 Bom. L. R. 171; (1924) A. I. R. (B.) 324 **723**

——— **s. 141, O. VI, r. 14.** *See* BENGAL TENANCY ACT, ss. 105, 107 **5**

——— **s. 141, O. VI, r. 14**—*Signing and verification.*

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he himself signs and verifies the plaint. **Pat** HAZARI LAL SAHU *v.* AMBICA GIR, (1923) Pat. 273; (1924) A. I. R. (Pat.) 104; 3 Pat. 67; 2 P. L. R. 169; 5 P. L. T. 591 **5**

——— **s. 141, O. IX,** *applicability of.*

Order IX of the Code of Civil Procedure is not applicable to applications arising out of execution proceedings.

The objections that are made under O. XXI of the Civil Procedure Code to the execution of a decree, though numbered separately and treated as separate miscellaneous cases, are virtually proceedings in execution and hence section 141, Civil Procedure Code, is not applicable to them. **C** NARENDRA NATH *v.* RAKHAL DAS **351**

——— **s. 141, O. IX, r. 13, O. XLIII, r. 1**—*Ex parte decree, application to set aside—Dismissal for default—Second application to restore first application, dismissal of—Appeal, whether competent.*

An appeal lies from an order refusing to set aside an *ex parte* decree, but the Code of Civil Procedure does not provide an appeal from an order dismissing an application for restoration of an application to set aside an *ex parte* decree. Nor can a right of appeal be claimed by virtue of section 141 of the Code of Civil Procedure, when O. XLIII of the Code makes no provision for such an appeal. **A** CHANDRA SAHAI *v.* DURGA PRASAD, 22 A. L. J. 427; 46 A. 538 **323**

——— **ss. 144, 151**—*Wrongful appointment of Receiver—Restitution—Inherent power of Court.*

When a plaintiff obtains the appointment of a Receiver in respect of the property of several defendants, one of whom is subsequently dismissed from the suit as having been wrongly joined, although restitution in respect of the Receiver's commission and other expenditure incurred, cannot be granted under section 144 of the Civil

Civil Procedure Code—1908—contd.

Procedure Code, the order passed not being a decree, yet the Court should allow restitution in such a case under its inherent powers. The fact that the Receivership has been to the applicant's advantage is no ground for not granting restitution in view of the possession of the Receiver having been wrongful *ab initio*. **R** NAIKWARA *v.* MA AYE BYU, 1 R. 770; (1924) A. I. R. (R.) 181 **724**

——— **s. 151,** applicability of. *See* DECREE, COMPROMISE **685**

——— **s. 151,** *scope of—Application beyond time, admission of—Inherent power of Court.*

Section 151 of the Civil Procedure Code is not intended to override the express provisions of the law. On the other hand it is intended for cases for which the strict letter of the law provides no remedy.

Where the law provides a period of limitation for a particular class of applications, the Court cannot admit them beyond time by applying section 151 of the Civil Procedure Code. **A** TOTA RAM *v.* PANNA LAL, 22 A. L. J. 583; 46 A. 631 **997**

——— **s. 151, O. XX, r. 3, O. XXI, r. 53 (6)** *—Judgment signed—Alteration of order—Court, inherent power of.*

The Court has, in view of O. XX, r. 3 of the Civil Procedure Code no inherent power to re-call an order signed by it except under section 152 of the Code or on review.

There is no inherent power in the Court to do anything which is expressly prohibited by the Civil Procedure Code. **Pat** RAMCHARUN SINGH *v.* JANG BAHADUR SINGH **900**

——— **s. 151, O. XXI, r. 100**—*Execution of decree—Dispossession—Application, dismissal of, for default—Restoration—Inherent power of Court.*

An application under O. XXI, r. 100 of the Civil Procedure Code must be entertained and disposed of according to law.

Where the order passed on such an application was, "Petitioner absent. File:"

Held, that the order was not legal and the petitioner was entitled to have the application properly registered and disposed of and that the application could not be treated as having been dismissed in default and no question of restoration arose.

A Court has ample jurisdiction under section 151 of the Civil Procedure Code to restore an application under O. XXI, r. 100 of the Code which has been dismissed in default. **Pat** THAKUR PRASAD LAL *v.* SUKHLAL SINGH, 5 P. L. T. 567 **598**

——— **O. I, rr. 2, 10**—*Security for costs—Transfer of one of several plaintiffs to category of defendants—Future costs—Court, inherent power of.*

In the absence of special circumstances the mere fact that one of the plaintiffs is transferred to the category of defendants does not entitle the defendants to call upon the co-plaintiff to furnish

Civil Procedure Code—1908—contd.

security for future costs. It is really a case of amendment and costs in such cases are allowed up to the date of amendment.

Per *Cuming, J.*—It is very doubtful if the inherent power of the Court can be called in aid in such a case. **C** BHAIRABENDRA NARAIN DEB *v.* UDAI NARAIN DEB, 50 C. 853; (1924) A. I. R. (C.) 251 **298**

——— **O. I, r. 10**—*Limitation Act (IX of 1908), ss. 19, 22—Suit by one of joint promissees, maintainability of—Non-joinder of parties—Subsequent joinder by order of Court—Limitation—Acknowledgment, essentials of.*

It is not competent to one only of the partners of a firm or to one of the joint promissees to maintain a suit in respect of a cause of action which has accrued to all jointly.

A Court may, under O. I, r. 10 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by section 22 of the Limitation Act to dismiss the suit after such party has been added. That section applies though a party is joined by an order of the Court.

An acknowledgment under section 19 of the Limitation Act, must be a conscious admission of an existing liability in respect of the property or right which is claimed in the suit and must show an existing jural relationship between the parties at the time when the admission was made. If an acknowledgment is not express it may be by implication but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal. **S** RALLIARAM SHEWARAM *v.* BUDHURAM PARMANAND **914**

——— **O. I, r. 10**—*Plaint presented in name of minor—Death of minor before suit—Next friend, whether can continue suit as representative.*

A plaint was presented on behalf of a minor by his mother as his next friend, and it afterwards turned out that the minor had died long before the presentation of the plaint:

Held, that the minor's mother could not be allowed to be substituted as plaintiff in the minor's place and to continue the suit. **L** BOONDU *v.* MOTI CHAND, (1923) A. I. R. (L.) 652 **284**

——— **O. II, r. 2**—*Cause of action, definition of—Muhammadan lady leaving husband, sister and daughters as heirs—Suit by sister for recovery of her share of inheritance—Subsequent suit by sister for her daughter's share of dower, whether barred.*

The words 'cause of action' include every fact which it would be necessary for the plaintiff to prove if traversed by the defendant in order to support his right to the judgment of the Court.

One *Musammat A* died leaving as her heirs under Muhammadan Law her sister *Q* her husband *A R* and her minor daughter *K F*. On 10th November 1914, *Q* brought a suit against *A R* and *K F* for recovery of possession of

her share in the *zemindari* property left by *A*, alleging that *A R* had taken illegal possession of the whole of the property of the deceased and purported to do so in the name and in the interest of his minor daughter *K F*. On the 30th January 1917, *Q* brought another suit against the same defendants for recovery of her share and that of *K F* in the dower debt due by *A R* to the estate of the deceased:

Held, that as the cause of action was different in the second suit it was not barred under the provisions of O. II, r. 2, Civil Procedure Code. **A** ABDUR RASHID *v.* QUDRATUNNISSA, 22 A. L. J. 432; 46 A. 542 **338**

——— **O. II, r. 2**—*Suit for possession of portion of mortgaged property, whether maintainable.*

A mortgagee is not bound to sue for possession of the entire mortgaged property and a suit by him for possession of a portion of the mortgaged property is maintainable if he thinks that portion to be sufficient security for his money. **L** RAGHO *v.* DWARKA DAS, 10 P. W. R. 1923 **687**

——— **O. II, r. 2**—*Transactions, series of—Goods, delivery of, at different times—Separate suits—Single cause of action—Burden of proof—"Cause of action," meaning of.*

Where there is a series of transactions between the parties in which goods have been delivered at different times under separate vouchers, each delivery is *prima facie* a separate transaction and constitutes a separate cause of action, unless there is either a contract or a course of dealings from which an implied contract might be inferred that the entire series at a particular time or for a specified period should be treated as a single cause of action for the purposes of O. II, r. 2 of the Civil Procedure Code. The question whether there is such a contract is one of fact and the *onus* would lie on the defendant pleading O. II, r. 2 of the Civil Procedure Code in bar of separate suits in respect of the transactions to prove the contract.

If goods are delivered under a single contract, the parties may stipulate that each delivery shall be deemed to be a separate contract.

The meaning of the expression "cause of action" as used in O. II, r. 2 of the Civil Procedure Code should be gathered from that rule and the authorities on that rule and it should not be assumed that the expression has the same meaning in that rule as it has either in English decisions or in decisions on questions relating to the law of limitation. **R** AHMED SAHIB AND Co. *v.* PAKIR MAHOMED ROWTHER, 1 R. 694; 2 Bur. L. J. 169; (1924) A. I. R. (R.) 145 **755**

——— **O. II, r. 6,** *applicability of.*

O. II, r. 6 of the Civil Procedure Code does not apply to suits for rent under the Tenancy Act. **A** HIRA LAL *v.* HOTI LAL, 22 A. L. J. 459 **560**

——— **O. III, r. 4, Sch. II, rr. 1, 16 (2)**—*Arbitration—Award—Appeal, whether lies—Reference, validity of, whether can be questioned—Parties interested, failure of, to join, effect of—Pleader, whether can make reference—Ratification, effect of.*

A restrictive provision like the one contained in paragraph 16 (2) of Schedule II to the Civil Procedure Code must be strictly construed.

The Legislature must be taken to have contemplated that the decree in respect of which paragraph 16 (2) of the Second Schedule to the Civil Procedure Code provides that there shall be no appeal, must be one which has been passed after a substantial compliance with the preceding provisions of the Schedule.

In a case where the validity of a reference to arbitration is attacked, the Court, in order to determine whether an appeal lies against the decree passed on the award, must decide whether the reference was valid or invalid. If it was valid, the decree will be a decree under the Second Schedule and no appeal will lie therefrom if it is passed in terms of the award. If the reference is not valid, the decree will not be a decree under the Second Schedule and will be open to appeal like any other decree not coming under the Schedule.

Where all the parties interested in a matter do not apply for a reference to arbitration, and an order of reference is made, the order is illegal and if an award is made on such reference, the award will also be illegal.

In order to decide whether a reference to arbitration made by a Pleader on behalf of a party was competent or not, the first question which the Court must consider is whether the Pleader had authority to make the reference, and this necessitates examination of the terms of the power-of-attorney given to the Pleader.

A Pleader has no authority to apply for making a reference to arbitration unless his *vakalatnama* is so worded as to give him that authority specifically.

No amount of ratification can raise an act which is void *ab initio* to the level of a valid one. **N** HUSSAINBHAI BHORA *v.* BANSILAL **48**

——— **O. IV, r. 1**—*Presentation of plaint—Presentation to Judge outside office hours and away from Court, validity of.*

There is nothing in r. 1 of O. IV of the Civil Procedure Code to show that the presentation of a plaint must be within office hours, or must be to the officer appointed at the Court or at any particular place, and there is no reason why, if a Judge so chooses, he should not constitute himself the officer to receive a particular plaint at any place that he chooses.

Where, therefore, a Judge accepts a plaint outside office hours away from the Court, the suit must be deemed to have been instituted on the day on which the plaint is so accepted.

A Judge is not, however, bound to accept a plaint in such a manner, and it is within his

Civil Procedure Code—1908—contd

discretion to refuse to do so. **M** SATTAYA PADAYACHI *v.* SOUNDRATHATCHI, 46 M. L. J. 78; (1924) M. W. N. 162; 19 L. W. 168; 47 M. 312; (1924) A. I. R. (M.) 448 **1017**

——— **O. VI, r. 17, O. XXII, r. 4**—*Partition, suit for—Preliminary decree—Death of defendant—Claim by survivorship—Amendment of plaint, whether can be allowed—Application to implead legal representatives.*

Plaintiff sued her sister for possession by partition of a moiety of a certain property alleged to be *stridhanam* property of their mother. After a preliminary decree was passed recognising the plaintiff's right to half the property the defendant died and the plaintiff made two applications, one for impleading the legal representatives of the deceased and the second for an amendment of the plaint so as to enable her to get the other half on the ground of survivorship:

Held, (1) that as the plaintiff's right to a half share in the property had been finally established, the death of the defendant was not sufficient to deprive her of her original cause of action and the legal representatives of the deceased could be brought on the record ;

(2) that the amendment of the plaint could not be allowed inasmuch as it sought to introduce a new cause of action which was not available for the plaintiff when the original plaint was presented. **M** LAKSHMI AMMAL *v.* ALAMELU AMMAL, (1923) M. W. N. 839; 18 L. W. 874; 45 M. L. J. 811; (1924) A. I. R. (M.) 309 **325**

——— **O. VII, r. 5**—*Plaint not showing defendant's interest.*

A plaint which does not show that the defendant is interested or claims to be interested in the subject-matter of the suit and that he is liable to be called upon to answer the plaintiff's demand is a defective plaint, because it does not comply with the requirements of O. VII, r. 5, of the Civil Procedure Code. The Court is in such a case bound to call upon the plaintiff to disclose his cause of action correctly against each defendant. **N** BALAJI VINAYAK BUTI *v.* VITHOBA **614**

——— **O. VII, r. 10**—*Order returning plaint for presentation in proper Court—Revision—Interference, whether desirable.*

In a suit for the plaintiff's share of the profits valued at Rs. 400, after a portion of the evidence had been recorded plaintiff applied to the Court stating the suit had been valued by mistake at Rs. 400 instead of Rs. 4,000 and asked that the plaint might be amended and returned for presentation to the proper Court. This application was allowed. An application for revision against this order was rejected by the Court of the Judicial Commissioner in view of the fact that an appeal was pending in the Court of the District Judge. The appeal was subsequently allowed the Court directing that the plaint should be sent back to the Original Court. The plaintiff filed a petition of revision :

Civil Procedure Code—1908—contd.

Held, that as it was not possible to restore the plaintiff to his previous position and the direction for the return of the plaint back again to the Original Court would further delay the hearing of the suit, it was not desirable to make any further interference with the progress of the suit. **O** KHUNAI TEWARI *v.* DIL KUNWAR, (1923) A. I. R. (O.) 38 **237**

——— **O. IX, r. 13**—*Decree, ex parte—Appeal, grounds of—Summons, service of, whether can be questioned.*

Where an *ex parte* decree is passed, the defendant can challenge it by way of appeal on the ground that the evidence adduced by the plaintiff was not sufficient to justify the decree but he is not entitled in appeal to go into any question connected with his non-appearance at the hearing, as that is the subject-matter of the special proceedings under O. IX of the Civil Procedure Code. **R** RAJ CHANDRA DHAR *v.* MESSRS. K. D. O. C. RAY, 2 Bur. L. J. 282; 2 R. 108; (1924) A. I. R. (R.) 137 **506**

——— **O. IX, r. 13**—Ex parte *decree against some defendants—Appeal by contesting defendants—Subsequent application by absentee defendants to set aside decree—Original Court, jurisdiction of.*

A decree was passed *ex parte* against some defendants, and the contesting defendants preferred an appeal against it making the *absentee* defendants *pro forma* respondents. While the appeal was pending the absentee respondents applied to the Original Court to have the *ex parte* decree set aside:

Held, that the jurisdiction of the Original Court to entertain the application was not ousted by the appeal. **A** MIRZA ABDULLAH BEG *v.* RAMZAN KHAN, 21 A. L. J. 901; (1924) A. I. R. (A.) 173 **381**

——— **O. IX, r. 13, O. XLI, r. 22**—*Decree ex parte—Appeal, whether lies—Cross-objections, point, whether can be taken in—Application for leave to defend and produce evidence, effect of.*

A defendant who has been placed *ex parte* is entitled to impugn the decree ultimately passed, subject to the condition that he has not moved the Court of first instance to set aside the *ex parte* decree under O. IX, r. 13 of the Civil Procedure Code.

A defendant cannot be deemed to have so moved the Court merely because, before the decree was passed but under the incorrect impression that it had been passed, he presented a petition asking the First Court to allow him to make a defence and produce his evidence and the Court disposed of that petition on its merits. Such a petition is not a remedy recognised by the Code and the fact that it was intended to be and believed to be a petition recognised by the Code cannot alter its real nature or give it and the order passed on it a legal effect to which they would not in fact be entitled.

Where a defendant is entitled to appeal against his having been wrongly placed *ex parte* he

would also be entitled to raise the point by a memorandum of cross-objections under O. XLI, r. 22 of the Civil Procedure Code. M BAVA LEVVAI SAHIB *v.* AMMEENAMMAL, 45 M. L. J. 805; 1924) A. I. R. (M.) 107 **968**

——— **O. XVI, r. 1**—*Summonses to witnesses, party, right of to—Application made at late stage—Court, whether can refuse application—Procedure.*

A party to a suit is entitled as of right to summonses for his witnesses. So long as an application is made after the institution of the suit, the Court is bound to issue the summonses. If the application is made at such a late stage of the proceedings that the witnesses cannot be served, the Court may refuse to adjourn the case for their attendance, but, it has no power to refuse to issue summonses. L SARDARI LAL *v.* MOHAR SINGH **143**

——— **O. XX, r. 4**—*Judgment of Small Cause Court, contents of.*

The judgment of a Court of Small Causes should contain the points for determination and the decision thereon. Where, therefore, a judgment contains nothing except the words: "The claim is decreed with costs," it does not indicate that the points in dispute between the parties were at all considered and the suit must be remanded for a trial and judgment according to law. O BHUDHAR SINGH *v.* SHEIKH SAHAMAT, 9 O. & A. L. R. 414 **547**

——— **O. XX, r. 12**—*Decree for possession—Execution, application for—Dismissal in default—Application for ascertainment of mesne profits, whether barred.*

A preliminary decree for possession of immoveable property awarded mesne profits subsequent to suit and the plaintiff applied, under O. XX, r. 12 of the Civil Procedure Code, for ascertainment of these profits. It appears that the plaintiff had already filed several petitions seeking to execute the decree so far as it was capable of execution and praying in addition for ascertainment of mesne profits. These petitions had been dismissed either for default or for some other reason but there had been no judicial determination in either of these petitions of the plaintiff's right to mesne profits:

Held, (1) that the Court had no jurisdiction to entertain what were termed execution applications for ascertainment of mesne profits;

(2) that the Court did not purport to decide nor did it decide the plaintiff's right to recover mesne profits;

(3) that the dismissal of the previous applications did not, under the circumstances, result in the dismissal of the suit itself;

(4) that as there had been no decision on the merits the application for ascertainment of mesne profits was not barred. M MAGTIPA RAMACHANDRA RAJU *v.* MAGTIPRAGADA BUJANGA BAHADUR ZEMINDAR GARU, 45 M. L. J. 46; 19 L. W. 69; (1924) M. W. N. 115; 1924) A. I. R. (M.) 473 **635**

——— **O. XXI, r. 2**—*Execution of decree—Certification of payment, after decree has become barred, whether revives limitation.*

No time is provided within which an application for certification of a payment must be made under O. XXI, r. 2 of the Civil Procedure Code, but such an application cannot be made after the period of limitation for execution has expired.

The provision contained in O. XXI, r. 2 of the Civil Procedure Code is not intended to enable a decree-holder to revive a decree which has already become time-barred.

An uncertified payment cannot be recognised for the purpose of saving limitation. O JAMWANTI KUNWAR *v.* MOHAN DEI, 10 O. & A. L. R. 72; 11 O. L. J. 379 **799**

——— **O. XXI, r. 2**—*Uncertified adjustment of decree, whether can be recognised—Fraud of decree-holder—Estoppel—Doctrine, whether applies.*

A Court of Execution cannot recognise a payment or adjustment of a decree unless it has been certified in the manner allowed by law even though the non-certification may be due to the fraudulent conduct of the decree-holder.

The general law as to estoppel cannot be allowed to override the special rule of law laid down in O. XXI, r. 2, Civil Procedure Code. S MOTOOMAL *v.* TEOOMAL **89**

——— **O. XXI, r. 2 (3)**—*Adjustment of decree—Certification, absence of—Court, whether can take notice of adjustment—Limitation Act (IX of 1908), Sch. I, Art. 113—Specific performance, suit for—Limitation, commencement of.*

The prohibition contained in O. XXI, r. 2 (3) of the Civil Procedure Code, is limited to a Court executing the decree, and does not extend to a case where a Court which is not executing the decree is dealing with the matter. Under Article 113 of Schedule I to the Limitation Act, where a date is not fixed for specific performance time does not commence to run till specific performance has been demanded and the plaintiff has been refused. R MA MA GYI *v.* MA NYO PO, (1923) A. I. R. (R.) 44 **278**

——— **O. XXI, r. 19**—*Construction of decree—Decree based on award—Execution—Set-off, whether can be claimed.*

A clause in a decree based on an award which purported to settle all disputes between the parties ran as follows:—

"As to the amount of Income-Tax, Excess Profits Tax and Super-Tax for 1919-20 to be paid by party No. 1, after the tax has been deposited in the Government Treasury, the liability, therefore, will be shared by party No. 1 and party No. 2 among themselves in proportion to their share for nine months." Party No. 1 having paid the Excess Profits Tax for the year 1918-19, claimed, in execution of the decree, to have the share of the Excess Profits Tax for which party

Civil Procedure Code—1908—contd.

No. 2 was liable, deducted from the amount payable to the latter under the decree. It was objected that the decree being merely declaratory as to the liability of party No. 2 as to the sum claimed, party No. 1 was not entitled to claim a set-off in execution proceedings, and that, in any case, the decree did not impose any liability on party No. 2 in respect of the Excess Profits Tax for 1918-19:

Held, (1) that the object of the decree being to put an end to all disputes between the parties, party No. 1 was entitled to claim the set-off in execution proceedings under the provisions of O. XXI, r. 19 of the Civil Procedure Code;

(2) that under the decree, as it stood, party No. 2 was under no liability in respect of the Excess Profits Tax for the year 1918-19. **L** MOHAMMAD TAQI *v.* ABDUL RAHMAN, (1923) A. I. R. (L.) 151 **281**

——— **O. XXI, r. 44**—*Attachment before appointment of Receiver—Subsequent sale without leave of Court, whether valid.*

Though an attachment is on property before the appointment of a Receiver, the sale of the property subsequent to the appointment of the Receiver without leave of Court is invalid and is liable to be cancelled at the discretion of the Court. **M** THAYUMAN PILLAI *v.* RAMASWAMI CHETTIAR, 19 L. W. 681 **632**

——— **O. XXI, r. 57, O. XXXVIII, r. 11**—*Attachment before judgment, nature of—Execution of decree—Dismissal for decree-holder's default—Attachment before judgment, whether ceases.*

Held by the majority (Schwabe, C. J., and Wallace, J., *contra.*)—The words, "property attached in execution" in O. XXI, r. 57 of the Civil Procedure Code, include "property attached before judgment," when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale, so that if the execution petition is dismissed for the decree-holder's default, the attachment before judgment comes to an end.

Per *Chief Justice.*—The principle applicable to the interpretation of a penal rule is that the matter in question must be brought within the operation of the rule in express terms or at least by necessary implication.

The words "property attached in execution" in O. XXI, r. 57 of the Civil Procedure Code do not include "property, attached before judgment" when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale.

Attachment before judgment and attachment in execution are essentially different.

An attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of O. XXXVIII of the Civil Procedure Code but it cannot by implication be brought to an end by an order under O. XXI, r. 57 of the Code.

Civil Procedure Code—1908—contd.

Per *Coutts-Trotter, J.*—There is no difference in *rerum natura* between an attachment before judgment and an attachment in execution of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely, the obtaining of a decree, confers a priority in time. But an attachment before judgment is not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed.

When a decree-holder having obtained his decree takes out an execution petition, he has, in effect, elected to take the benefit of O. XXXVIII, r. 11 of the Civil Procedure Code and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election, his attachment thereupon becomes subject to those requirements of dilligence laid down by O. XXI, r. 57 of the Code.

Per Ramesam, J.—Attachment before judgment and after judgment are identical in their essential features. Each is affected by a prohibitory order, the purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. **M** MEYYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR, 46 M. L. J. 415; 34 M. L. T. 118; (1924) M. W. N. 392; (1924) A. I. R. (M.) 494; 47 M. 483 **144**

——— **O. XXI, rr. 58, 63**—*Claim petition, dismissal of, for default—Application to restore petition, whether maintainable.*

Where a claim petition under O. XXI, r. 58 of the Civil Procedure Code is dismissed for non-appearance of the claimant, an application to restore the petition is maintainable.

The provision in O. XXI, r. 63 of the Civil Procedure Code that an order thereunder shall be conclusive does not take away the right of the party to have the order of dismissal for default set aside. **M** RAMAPPA CHETTIAR *v.* EKAMBARA PADAYACHI, 19 L. W. 685; 47 M. L. J. 13; (1924) M. W. N. 479; 47 M. 651 **818**

——— **O. XXI, r. 63, O. XXIII, r. 1**—*Limitation Act (IX of 1908), Sch. I, Art. 11—Objection to attachment—Withdrawal of objection — Order without investigation—Declaratory suit—Limitation.*

The period of limitation for a suit to set aside an order under O. XXI, r. 63 of the Civil Procedure Code is one year, even if the order is passed without any investigation or consideration of the merits of the claim or objection.

But where the objection is withdrawn and the proceedings are dropped in consequence the order is equivalent to one under O. XXIII, r. 1 of the Code granting permission to withdraw with liberty to institute fresh proceedings and

is not under O. XXI, r. 63 of the Code so as to bar a subsequent suit not instituted within one year. **N** CHITNAVIS *v.* NATHU SAO, 20 N. L. R. 106; 7 N. L. J. 170 **1002**

——— **O. XXI, rr. 72, 84, 86**—*Auction sale—Prohibition to bid—Failure to make deposit or pay balance within time—Irregularity—Prejudice—Extension of time.*

Order XXI, r. 72 of the Civil Procedure Code has no application to the holders of decrees other than those in execution of which the property is sold.

Delay in making the deposit under O. XXI, r. 84 of the Civil Procedure Code is not more than a material irregularity which does not vitiate the sale unless it has caused substantial injury.

Delay in paying the balance of purchase-money under O. XXI, r. 86 of the Civil Procedure Code does not necessarily invalidate the sale and the Court has a discretion to extend time. **R** MAUNG CHIT HLAING *v.* FIRM N. A. R. M. CHETTY, 2 Bur. L. J. 166; (1924) A. I. R. (R.) 81 **747**

——— **O. XXI, r. 88**—*Rules framed by Local Government, r. 32—Auction-sale—Execution—Co-sharers and strangers, equal bids by—Sale, confirmation of, in favour of stranger—Co-sharer, whether can sue to recover possession.*

B and *T* bid at an auction of certain property put up for sale in execution of a decree. *T* asserting himself to be a co-sharer, capped each bid with a bid of correspondingly equal value intending to exercise his preferential right as a co-sharer. When the matter came up before the Collector, *T* was absent though served and the sale was confirmed in favour of *B T* then sued to recover possession of the property:

Held, that under the circumstances *T* was not competent to bring the suit and the Collector's order was final. **A** BADRI SINGH *v.* TULSI RAM, 21 A. L. J. 53; (1923) A. I. R. (A.) 186; 45 A. 203 **82**

——— **O. XXI, r. 89**—*Sale in execution—Trespasser in possession, right of, to set aside sale.*

A trespasser in possession of property sold in execution of a decree has sufficient interest in the property to entitle him to make an application to set aside the sale under O. XXI, r. 89 of the Civil Procedure Code.

Per *Oldfield, J. (contra).*—A trespasser in possession of property sold in Court sale who has not completed his prescription does not possess an interest in property in virtue of a title acquired before the sale within the meaning of O. XXI, r. 89, Civil Procedure Code. Nature of possessory title examined. **M** POTTI NAYAKAR *v.* SUPPAMMAL, 20 L. W. 31 **874**

——— **O. XXI, rr. 90, 92**—*Execution sale, application to set aside—Dismissal in default—Order, effect of—Appeal, whether maintainabl—Revision—High Court, whether will interfere.*

The effect of the dismissal of an application under O. XXI, r. 90 of the Civil Procedure Code even for default is to confirm the sale under r. 92; hence an appeal lies against such an order and the High Court will not interfere in revision. **C** NARENDRA NATH *v.* RAKHAL DAS **351**

——— **O. XXII, r. 2**—*Abatement—Death of respondent—Legal representatives not brought on record—Separate shares—Property—Appeal, whether abates* in toto—*New plea.*

Plaintiffs sued for a declaration that defendant was not the owner of the house and land in suit but had merely a life-interest of them. The defendant's pleas were that he had been adopted by the widow of the last male owner with the consent of his reversioners and that as an adopted son he was full proprietor and plaintiffs' suit was time-barred. The suit having been decreed by both the Courts below, the defendant appealed to the High Court. During the pendency of the appeal, one of the plaintiffs died and his representatives were not brought on the record within the statutory period:

Held, that as the plaintiffs were not joint tenants of the property and each one had his separate share in it any one of them might have maintained the suit in respect of his own share and, therefore, the appeal did not abate as against all the plaintiffs. **L** LAJJA RAM *v.* SHAMBHU NATH RAM SARUP, 5 L. L. J. 14; (1923) A. I. R. (L.) 252 **462**

——— **O. XXII, rr. 3, 9, O. XLIII, r. 1 (k)**—*Death of plaintiff—Order refusing to bring applicant on record as legal representative—Appeal, whether lies.*

Where several persons apply to be brought on the record as the legal representatives of a deceased plaintiff and the application of some of them is granted and that of others is refused, there is no abatement of the suit and no appeal lies against the order refusing to bring on record some of the applicants as legal representatives of the deceased. **M** KASIBHOTLA VENKATA SESHAMMA *v.* KALAGA GUNNESWARA RAO, (1924) M. W. N. 58; 19 L. W. 113; 46 M. L. J. 129; (1924) A. I. R. (M.) 622 **860**

——— **O. XXII, r. 4.** *See* DECREE, CONSTRUCTION OF **365**

——— **O. XXII, r. 4**—*Abatement of suit—Death of* pro forma *defendant, effect of.*

In a suit for ejectment of a trespasser by some of several co-sharer landlords the other landlords are only *pro forma* parties and the death of one of them does not result in the abatement of the suit either in part or in its entirety. **L** LEKHA *v.* BHANI, (1923) A. I. R. (L.) 617 **182**

——— **O. XXII, r. 9 (2)**—*Death of respondent—Abatement of appeal—Application to set aside abatement—Ignorance of factum of death—Substitution of names, when can be made—Patna High Court Rules, Chap. VI, r. 6.*

The right to file the affidavit required by r. 6 of the Patna High Court Rules is conditional on proof of reasonable diligence. But when that

Civil Procedure Code—1908—contd.

condition is fulfilled and the application is filed, substitution is only admissible subject to other provisions of the law regarding appeals such as O. XXII of the Code of Civil Procedure and the Limitation Act.

Where an appeal has abated on account of the death of a party and the failure of the opposite party to bring the deceased's legal representatives on the record within the statutory period, no substitution of names can be made until the abatement has been set aside on application under O. XXII, r. 9 (2) of the Civil Procedure Code.

A person prosecuting a suit or an appeal is bound to keep himself informed of the existence of his adversary. A mere plea of ignorance of the death of an opposite party which took place many months or even years before is not a sufficient ground for setting aside abatement. **P** RAMPERKASH DAS *v.* KUNJ LAL, 4 P. L. T. 567; (1924) A. I. R. (Pat.) 126 **414**

——— **O. XXIII, r. 3**—*Agreement by defendant to admit plaintiff's claim on fulfilment of certain conditions—Agreement, whether amounts to adjustment—Defendant, how far bound.*

In a suit for redemption it was contended by the defendants that plaintiff was not the son of *B* through whom he claimed but was the illegitimate son of *B's* widow *P*. Plaintiff called one *D* to prove his case and the defendants agreed that if the witness would eat food cooked by *P* the suit should be decreed against them. This agreement was reduced to writing by the Court and signed by the defendants. The witness having eaten food cooked by *P*, both the Courts below decreed the suit. On second appeal:

Held, (1) that the agreement could not be treated as an adjustment of the suit under O. XXIII, r. 3 of the Civil Procedure Code and no decree could be passed on it as it stood;

(2) that the defendant was bound to this extent that he could not thereafter question the legitimacy of the plaintiff. **A** BHAWANI PRASAD MISIR *v.* RAM SUNDER, 22 A. L. J. 301 **353**

——— **O. XXIII, r. 3**—*Arrangement not arrived at* bona fide—*Adjustment.*

An arrangement between some of the parties to a suit which has not been arrived at *bona fide* and which was not put forward during the course of the proceedings then pending between the parties cannot be recognised as a lawful adjustment within the meaning of rule 3 of Order XXIII of the Civil Procedure Code. **P.C.** KEVALDAS TRIBHOVANDAS *v.* SAKERLAL BULAKHIDAS, (1923) A. I. R. (P. C.) 178; 45 M. L. J. 763; 33 M. L. T. 421; 28 C. W. N. 930 **452**

——— **O. XXXII, rr. 3, 4.** *See* DECREE, CONSTRUCTION OF **365**

——— **O. XXXII, r. 4 (3)**—*Guardian, appointment of—Consent, whether can be implied—Minor's interests, protection of—Guardian, irregular appointment of, whether material.*

Under O. XXXII, r. 4 (3) of the Civil Procedure Code, it is not necessary that the consent

Civil Procedure Code—1908—contd.

of the person to be appointed guardian should be expressed; it may be implied from conduct, as where a notice is served on a person to show cause why he should not be appointed guardian and he does not appear in answer to the notice appointing him guardian.

An irregularity in the appointment of a guardian is not a sufficient ground for setting aside the proceedings at the instance of a minor, if there is nothing to suggest that the interests of the minor have not been duly protected in a suit and that he has been prejudiced by the appointment of the guardian. **L** JAWAHAR SINGH *v.* SEWA SINGH, 5 L. L. J. 487; (1924) A. I. R. (L.) 97 **572**

——— **O. XXXIII, r. 5**—*Inquiry into pauperism—Plaint allegations, whether enough—Refusal of permission to sue as pauper—Revision.*

In cases of inquiry into pauperism under O. XXXIII, r. 5 of the Civil Procedure Code, it is the duty of the Court not merely to read through the plaint but to make a very extensive enquiry as to the facts on which the plaint is based.

No revision lies against the order of the Court refusing permission to sue as a pauper, where the Court has properly exercised its jurisdiction, whether the conclusions arrived at by the Court are right or wrong. **O** MUHAMMAD ISMAIL *v.* KARAM ALI, 10 O. & A. L. R. 579 **922**

——— **O. XXXIV, r. 1.** *See* MORTGAGE—SUIT TO ENFORCE MORTGAGE **614**

——— **O. XXXIV, r. 6.** *See* LIMITATION ACT, SCH. I, ART. 181 **85**

——— **O. XXXVII, rr. 5, 6**—*Letters Patent (Cal.), cl. 15—Order for security and in default for attachment, whether judgment—Appeal, whether competent—Procedure.*

On an application by the plaintiffs alleging that the defendants were disposing of their stock-in-trade with a view to obstruct or delay the execution of any decree which might be passed against them, the Court made an order calling upon the defendants to show cause why they should not furnish security for the claim and costs of the plaintiff or why in default the stock-in-trade should not be attached until the final determination of the suit. The defendants having shown cause, the Court made its order absolute. The defendants appealed:

Held, (1) that the order, in so far as it directed attachment of the property, was a judgment and was appealable but in so far as it directed security to be furnished it was not appealable;

(2) that inasmuch as the order for security had been complied with, the order as to the attachment of the property was infructuous and the appeal was also, therefore, the infructuous.

Per Sanderson, C. J.—It was intended by those who framed the Code, that where the Court confines its order to a direction that the defendant should give security within a fixed time, there should be no appeal from that order inasmuch as O. XXXVII, r. 5 is omitted from the provisions of

O. XLIII, r. 1. But where the Court makes an order that the defendant's property should be attached before judgment, the Code provided that there should be an appeal inasmuch as O. XXXVIII, r. 6 is specifically mentioned in O. XLIII, r. 1. C HAJI MOHAMMUDIN AND COMPANY *v.* THE EASTERN JAPAN TRADING COMPANY, 50 C. 215; (1923) A. I. R. (C.) 639 **242**

——— **O. XXXVIII, r. 11**—*Attachment before judgment.*

The same principle applicable to the case of an attachment after judgment applies equally to the case of an attachment before judgment and it is immaterial that the attachment before judgment was not followed by an application for execution of the decree after the decree was passed. M MANYAM SURAYYA *v.* SUNKAVALLI VENKATARATNAM, 45 M. L. J. 822; 19 L. W. 20; (1924) A. I. R. (M.) 210; 47 M. 176 **779**

——— **O. XXXIX, r. 1**—*Injunction, temporary, restraining alienation—Alienation afer decree—Disobedience.*

A temporary injunction was issued restraining appellant from alienating certain property till the disposal of the suit. He mortgaged the property after decree and whilst no proceedings in execution were pending:

Held, that the jurisdiction of the Court issuing the injunction had determined as soon as the suit was decided, and the appellant was not, therefore, guilty of disobedience. L PARS RAM *v.* HARGOLAL AND SONS **444**

——— **O. XXXIX, r. 2,** *scope of—Injunction whether can issue against third party—Prevention of injury.*

Under O. XXXIX, r. 2 of the Civil Procedure Code a temporary injunction can only issue to the defendant in the suit and not to any other persons.

A filed a suit for a declaration that *L* was not eligible to stand for election to the Municipal Committee of Gujrat and obtained an *ad interim* order staying the election. The Election Officer applied for the discharge of the *ad interim* order:

Held, (1) that inasmuch as the suit was not one for restraining *L* from committing an injury of any kind within the meaning of the rule, no injunction could issue against him;

(2) that as the Election Officer was no party to the suit no injunction could issue against him under O. XXXIX, r. 2, Civil Procedure Code;

(3) that to grant the injunction would be tantamount to granting the plaintiff the relief sought in his suit and might do great injustice to the defendant and the *ad interim* order shall, therefore, be discharged. L THE ELECTION OFFICER, GUJRAT *v.* ABDUL GHANI, (1923) A. I. R. (L.) 47 **233**

——— **O. XL, r. 1**—*Receiver, appointment of—Prima facie case—Waste, absence of.*

To justify the appointment of a Receiver, there must be some substantial ground for interfering with existing rights of possession.

Where a plaintiff has not a *prima facie* right to the relief asked by him and there is no danger of waste, it is not proper to appoint a Receiver on the mere ground that no harm will be done thereby. M MELA VITTIL KUNHAN MENON *v.* MELE VITTIL KANNAN MENON, 46 M. L. J. 133; (1924) M. W. N. 202; (1924) A. I. R. (M.) 482 **561**

——— **O. XL, r. 1**—*Succession certificate—Court, whether can appoint Receiver—Revision—High Court, whether can interfere—Conditional or provisional order, appeal against.*

There is no right of appeal against an order which is either conditional or provisional and does not eventuate in a final order.

It is not competent for a Court sitting as a Succession Certificate Court working the provisions of the Succession Certificate Act, to entertain an application for the appointment of a Receiver.

While the general provisions of the Civil Procedure Code do not apply to a Court administering the Succession Certificate Act, they do apply to the High Court sitting as such and the High Court can interfere in revision if the Court below exercises a jurisdiction which it does not possess. A KANHAIYA *v.* KANHAIYA LAL, 22 A. L. J. 345; 46 A. 372; (1924) A. I. R. (A.) 376 **363**

——— **O. XLI, r. 2**—*Document, admissibility of—Objection before Appellate Court—Discretion of Court—High Court, whether will interfere.*

Where a document has been admitted without objection in the Trial Court and even in appeal no question of its admissibility is raised till the time of arguments, the Appellate Court is entitled to refuse to entertain the objection, having regard to the provisions of O. XLI, r. 2 of the Civil Procedure Code, and the High Court will not interfere with the discretion of the lower Appellate Court in second appeal. A BEHARI LAL *v.* AMIN CHAND **1029**

——— **O. XLI, r. 5**—*Stay of execution—Notice to decree-holder, whether necessary—Possession delivered before stay, effect of.*

Before a final order for stay of execution is passed under O. XLI, r. 5 of the Civil Procedure Code, it is necessary that notice of the application should be given to the decree-holder and he should be called upon to show cause why execution should not be stayed.

A stay of execution cannot be ordered after possession has been delivered in execution, as there is nothing left to stay. Pat HIRA LAL v. CHUNI SHAH, 5 P. L. T. 556; 2 P. L. R. 263 **1**

——— **O. XLI, r. 5**—*Stay of execution—Sheds and tram-lines belonging to judgment-debtor standing on property—Substantial loss—Execution of decree—Possession delivered behind judgment-debtor's back, whether can be reversed—Notice to judgment-debtor, necessity of—Duty of Court.*

In execution of a decree the decree-holder sought to get possession of a piece of land on which stood coolie-sheds and tram-lines belonging to the judgment-debtor and erected for the purpose of working his colliery:

Held, that, as the removal of the sheds and lines would cause substantial injury and loss to the judgment-debtor, this was a proper case in which

Civil Procedure Code—1908—contd.

execution of the decree should be stayed pending the decision of the judgment-debtor's appeal.

Where a judgment-betor's application for stay execution was rejected by the Registrar but the order was not communicated to the applicant or his Pleader and before he could move the High Court for stay of execution, the decree-holder obtained possession of the property in dispute by execution behind the judgment-debtor's back and without notice to him:

Held, that the delivery of possession to the decree-holder was, in the circumstances of . the case, null and void, and the High Court had jurisdiction, while staying execution of the decree, to direct that possession be restored to the judgment-detor.

No order should be made in favour of one party to the prejudice of another unless that other has had an opportunity of showing that it should not be made.

An important order, in execution proceedings, such as an order directing delivery of possession to the decree-holder, should not be passed *ex parte*, and the signature of the Pleader for the opposite party should invariably be taken in column 4, provided for in the order-sheet for that purpose.

The lower Courts should always notify to the parties the receipt of the record when it goes back from the High Court in order that the parties may be apprised of it and take necessary steps. **Pat** KARSHAN BHABAN CHATALIA *v.* INDRA NARAIN CHANDPA, 1 P. L. R. 393 **188**

——— **O. XLI, rr. 17, 19**—*Appeal, dismissal of, in default—Appellant's Counsel engaged in another Court—Appellant, absence of—Re-hearing, whether justified.*

When a Pleader is engaged in another Court at a distance, it is due by way of courtesy to the Court before which he is to appear, that some one may be left behind to inform the Court of the fact, so that if it likes, it can take up some other business. The disappearance of every person connected with the party, in hopes that the Court will be compelled to wait for the Pleader, is a wrong method and if the appeal is dismissed in default, the appellant is not entitled to a re-hearing. **O** HARI DAS FAQIR *v.* PRADUMAN NATH, 9 O. & A. L. R. 410 **550**

——— **O. XLI, r. 19**—*Appeal—Dismissal for default—Restoration—Absence unintentional.*

An appeal was dismissed for default but appellant's Counsel appeared soon after and satisfied the Court that his failure to appear when this appeal was called on for hearing was wholly unintentional:

Held, that the appeal ought to be restord. **L** BALMOKAND *v.* WAZIR CHAND, 5 L. L. J. 89 **504**

——— **O. XLI, r. 19**—*Appeal—Dismissal for default—Restoration, application for—Procedure.*

An appeal was transferred by the District Judge to the file of the Additional District Judge who on the same day took up the same for hearing and dismissed it for default as the appellants were not present; thereafter on the appellants applying for restoration the Judge without taking any evidence or giving the appellants any opportunity to adduce evidence dismissed the application:

Held, that the procedure followed by the Judge was not quite in accordance with law and that an opportunity should have been given to the appellants to prove their contention.

Per *Suhrawardy, J.*—The usual procedure in the case of an application for restoration of an appeal is to register such an application as a miscellaneous case and give both sides an opportunity of adducing evidence.

Under O. XLI, r. 19 of the Civil Procedure Code the Judge can only restore an appeal dismissed for default if it is proved to his satisfaction that the appellant was prevented by sufficient cause from appearing at the hearing. **C** JAHA BAKSHA *v.* ABDUL LATIF **319**

——— **O. XLI, rr. 22, 33**—*Cross-appellant, whether can file cross-objections—Appellate Court, general powers of—Powers, whether may be exercised in favour of defeated cross-appellant.*

Under O. XLI, r. 22 of the Civil Procedure Code, a respondent who has preferred an appeal cannot file cross-objections.

Although no general rule can be laid down that O. XLI, r. 33 of the Civil Procedure Code, cannot be applied in favour of a party who has appealed or has lodged cross-objections and failed, yet the Court will not take such a course in the absence of very strong reasons. **L** TEHL KAUR *v.* AMAR NATH, 17 P. W. R. 1923 **670**

——— **O. XLI, r. 23**—*Suits Valuation Act (VII of 1887), s. 11—Trial Court, findings by, on all issues—Appeal—Order of remand—Appellate Court, procedure of—Second appeal—High Court, whether can interfere—Revision.*

Where the Trial Court recorded evidence on all the issues framed in a case, and gave findings on all but one, though without any reasons in five of them, and on appeal by defendant, the Appellate Court, treating the case as one disposed of on a preliminary point, set aside the decree of the lower Court and all the findings and remanded the case for fresh decision after a fresh trial:

Held, (1) that the procedure adopted by the lower Appellate Court was irregular;

(2) that the order of remand was not a proper order and ought to be set aside;

(3) that the order could not be maintained simply because the party appealing would be prejudiced in not being able to raise an objection as to jurisdiction in the Appellate Court;

(4) that the order of remand being an order which the lower Appellate Court was incompetent to pass the High Court could interfere in revision, if no appeal lay. **M** ADURI CHELMAYYA *v.* ADURI LAKSHMI DEVAMMA **857**

——— **O. XLI, r. 27**—*Additional evidence, admission of—Court, duty of, to record reasons—Omission to record reasons, effect of.*

A Court of Appeal is bound to record its reasons for the admission of additional evidence and when it omits to do so, its finding cannot be

Civil Procedure Code—1908—contd.

accepted as binding on the High Court, being a finding partly based on inadmissible evidence. **A** KABUL *v.* KABOOL SINGH, (1923) A. I. R. (A.) 413 **408**

——— **O. XLI, r. 33.** *See* LIMITATION ACT, SCH. I, ART. 182 (2) **794**

——— **O. XLIII, r. 1 (a)**—*Appellate order returning plaint for presentation to proper Court—Appeal, competency of—Revision against appealable order.*

Order XLIII, r. 1 (*a*) of the Code of Civil Procedure applies not only to orders passed by the Trial Court but also to similar orders passed by the Appellate Court.

Where an order returning a plaint for presentation to the proper Court passed by the Subordinate Judge is confirmed by the District Judge in appeal, an appeal lies against the latter order.

No revision lies where an appealable order has not been appealed from within the time allowed by law. **O** BADRI SINGH *v.* LALTA SINGH, 10 O. & A. L. R. 437 **1024**

——— **O. XLVII, r. 1**—*Review of judgment, effect of—Procedure.*

When a review of a judgment is granted it is the party who has applied for the review who must move the Court further in the matter. The other party stands by the order already made, and if the party to whom review has been granted takes no steps to re-argue the matter, the original order still remains, though it cannot be enforced until the review order has been discharged for non-prosecution.

The effect of an order granting a review is to hold the original order in suspense until it has been decided whether it should stand or not. **B** ACHYUT VISHNU PATANKAR *v.* TAPIBAI KRISHNAJI JOSHI, 26 Bom. L. R. 103; 48 B. 210; (1924) A. I. R. (Bom.) 310 **753**

——— **O. XLVII, r. 1**—*Review—"Other sufficient reason," meaning of.*

The words "other sufficient reason" in O. XLVII, r. 1 of the Civil Procedure Code, must be construed in the light of the previous words and on the principle of *ejusdem generis*. The reason must be one having sufficiency of a kind analogous to the two cases specified in the rule, that is to say, analogous to executable failure to bring to the notice of the Court new and important matter or analogous to error on the face of the record. **C** BINDUBASHINI ROY CHOWDHURY *v.* SECRETARY OF STATE, 51 C. 70; 40 C. L. J. 163 **745**

——— **Sch. II, para. 1.** *See* OATHS ACT, S. 9 **246**

——— **Sch. II, para. 1**—*Reference to arbitration—Agreement not in writing—Statement made to Court recorded in writing—Award, validity of*

A record taken down of an oral statement made by the parties or their Pleaders agreeing to refer the matter in dispute to arbitration is as much an agreement in writing, for the purposes of para. 1 of Schedule II to the Civil Procedure Code, as a written application made by the parties or their Pleaders. The personality of the writer makes no difference.

Where both the parties to a pending suit consent to a reference to arbitration, and an order of reference is then and there made by the Court in the presence of the parties, though not upon a written application, the reference is perfectly valid.

An award is not invalid merely because an application for an order of reference is not made in writing. **A** MAHABIR *v.* MANOHAR SINGH, 22 A. L. J. 67; 46 A. 208; (1924) A. I. R. (A.) 540 **816**

Companies Act (VII of 1913), ss. 155, 171, 232—*Decree against Company—Voluntary liquidation after decree, effect of—Jurisdiction of executing Court.*

Section 232 of the Companies Act is expressly limited to (1) winding-up either by Court or (2) subject to the supervision of the Court.

Therefore, a voluntary liquidation cannot have the effect *ipso facto* of putting an end to an attachment already in force under a decree passed prior to liquidation. **O** NATIONAL BANK OF UPPER INDIA LTD. *v.* SHEO MANGAL BAJPAI, 10 O. & A. L. R. 115; 11 O. L. J. 349 **968**

Compromise—*Consent decree—Provision to do certain acts within specific time—Time, whether of essence of contract—Execution after expiry of time—Laches.*

In a suit for injunction a consent decree was passed which provided for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of the compromise. This was not done. Subsequently, the defendant applied to the Court offering to pay the money and asking for the construction of the wall :

Held, that the parties intended that time should be of the essence of the contract, and the defendant was out of Court because he was a year out of time and no waiver or new agreement had been proved ;

(2) that even if time was not of the essence of the contract, the defendant could not succeed as he had slept over his rights for so long.

Per *Fawcett, J.*—The Court should act upon the principle that the plaintiff in equity is bound to prosecute his claim without undue delay, and a Court of Equity should refuse to comply with his demands when the plaintiff has slept upon his rights and acquiesced for a great length of time. **B** SHANKAR SAKHARAM JAGDALE *v.* RATANJI PREMJI SHET, 25 Bom. L. R. 328; 47 B. 607; (1923) A. I. R. (B.) 441 **226**

Confession, *incriminating innocent person—Setting law in motion.*

When in a criminal proceeding instituted against him, a person makes a confession incriminating another person as his accomplice, as a result of which the latter is also involved in the prosecu-

Confession—concld.

tion, the responsibility for starting prosecution as against him rests on the former. **O** BADRI SHAH *v.* BALBHADDAR SINGH, 10 O. L. J. 468; (1924) A. I. R. (O.) 145 **697**

Consideration, small portion of, found without necessity, effect of. *See* CUSTOM—ALIENATION **543**

——— Suit on promissory note—Consideration, absence of—Burden of proof—Plaintiff, evidence of, disbelieved, effect of. *See* PROMISSORY NOTE, SUIT ON **464**

Construction of decree—Decree based on award. *See* CIVIL PROCEDURE CODE, O. XXI, R. 19 **281**

——— *Ejectment from land, whether includes ejectment from huts standing on land.*

In a suit for the ejectment of the defendant from certain land on which there were some huts, the huts were not mentioned in the plaint but the decree directed *khas* possesssion of the land to be given to the plaintiff by ejectment of the defendant therefrom :

Held, that on a proper construction of the decree the defendant was liable to be ejected not only from the land but from the huts as well. **C** JNANENDRA NATH MOOKERJEE *v.* BRAHMAPADA PRAMANICK, (1923) A. I. R. (C.) 701 **191**

Construction of document—Acknowledgment and promise to pay—Promissory note—Agreement. *See* CONTRACT ACT, s. 25 **77**

——— *Ariat*, essentials of—Marriage settlement—Revocation. *See* MUHAMMADAN LAW—CONSTRUCTION OF DOCUMENT **716**

——— C. I. F. Contract—Property when passes—Bill of lading endorsed to agent of seller, effect of. *See* CONTRACT ACT, s. 83 **1012**

——— *Deed of gift—Family custom of donor, consideration of.*

In the construction of deeds of gift or bequests, the general test is, having regard to the presumed knowledge of local customs by donor or testator and the manner of holding property in the community of the donor or testator and having regard to the terms in which they have expressed their intention in their deeds of gift or bequests, what was their real intention. Generally unless there are apt words to indicate that the intention was that the property should be held with powers larger than usual, it must be taken that the intention was that the property should be held in the usual manner. **M** CHATHOTH PARKUM *v.* PARAMBATH CHATHENKANDI, 34 M. L. T. 238; 20 L. W. 41; (1924) M. W. N. 480 **886**

——— *Lease*, darpatni—*Rent fixed in perpetuity*—Darpatnidar *agreeing to pay any new payments levied from* patnidar—*Increase of rent*—Patnidar, *whether entitled to proportionate increase*—Ejusdem generis, *principle of.*

Construction of document—concld.

Under a *darpatni* lease in which the rent was fixed in perpetuity, the *darpatnidar* undertook to pay in addition the road cess and public works cess and "any other new amount or payment that may be fixed and whatever else was payable by the *darpatnidar* according to law." On a re-settlement of the estate the rent was increased and the *patnidar* sued the *darpatnidar* to recover a proportionate amount of the increased rent :

Held, that the *darpatnidar* was not liable to pay increased rent under the lease and the words "any other new amount or payment that may be fixed" must be interpreted *ejusdem generis* with the words "road cess and public cess," etc. **C** SRISH CHANDRA PAL CHOWDHURY *v.* DEBENDRA NATH SINHA ROY **369**

——— Letters of credit, what are. *See* BANKER AND CUSTOMER **757**

——— *Mortgage-deed—Interest, whether charge on land—Mortgagee, remedy of.*

In a mortgage-deed the payment of interest was recited as an obligation to be met by the mortgagors yearly. It was further stated that in case of default the mortgagee could bring the property to sale at any time in order to recover the principal and interest and that at any time the mortgagors could redeem by paying the principal mortgage-money :

Held, (1) that the interest was not a charge on the mortgaged property and the mortgagors were entitled to redeem the property on payment of the principal amount only ;

(2) that the remedy of the mortgagee was to recover the interest due by means of a separate suit for sale. **L** RAMJI LAL *v.* MUNSHI LAL **24**

——— *Mortgage-deed—Stipulation to pay arrears of rent due from tenants on redemption—Time-barred arrears, whether payable—Mortgagee in possession, duty of—Occupancy rights created—Mortgagor, whether entitled to compensation.*

Where a mortgagor makes himself liable to pay to the mortgagee at the time of redemption all arrears of rent due from the tenants, he should be taken to have intended to pay up only those arrears which he can himself recover. He cannot, therefore, be held liable to pay the amounts of any decrees obtained by the mortgagee against tenants which have become time-barred.

It is the duty of the mortgagee in possession to take as much care of the property mortgaged to him as a prudent man would take if it was his own. If he, therefore, grants occupancy rights to tenants in lieu of *nazrana*, he must compensate the mortgagor, and the amount realized by him must be deducted from the mortgage amount. **A** GHASI RAM *v.* BHOLA NATH, 21 A. L. J. 886; 10 O. & A. L. R. 97; (1924) A. I. R. (A.) 153; 46 A. 115 **314**

——— *Question of fact or law.*

The interpretation of the terms of a deed is a question of law. **N** TULARAM *v.* SUMRATI **621**

——— Sale-deed—Agreement to re-convey. *See* TRANSFER OF PROPERTY ACT, s. 58 (*c*) **626**

Construction of Statutes—*Illustrations, value of.*

In the construction of the text of the sections of an enactment it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the Statute, should not be thus impaired. **O** AGNES HARRIET DAVID *v.* MURRAY & CO., LLD., 11 O. L. J. 459 **1026**

Contract, executed and executory—Mortgage in favour of lunatic, whether enforceable. *See* CONTRACT ACT, s. 11 **955**

——— for remuneration to be strictly *meruit*—*Quantum meruits*, principle of, whether applicable. *See* PRINCIPAL AND AGENT **287**

——— Intention to sell or purchase—Speculation, effect of—Contract, whether void. *See* CONTRACT ACT, s. 30 **578**

———, *performance of—Widow, alienation by—Suit by reversioners—Compromise—Decree upholding alienation conditional on payment of sum of money by widow to reversioners within specified time—Time, whether of essence of contract—Non-payment, effect of.*

In a suit by a reversioner to set aside an alienation by a widow, a compromise decree was passed which provided that in case of payment of a sum of money by the widow to the plaintiffs within a time fixed, the alienation was to be declared valid and on default, it was to be set aside as null and void. Two days after the prescribed time, the defendant applied to the Court to be allowed to deposit the amount in Court:

Held, that time was of the essence of the contract and that the question of relieving against forfeitures did not arise in the case and the alienation by the widow must be declared void. **M** ELLAMMAL *v.* VENKATARAMANA RAO **958**

——— *with mutual obligations—Parties, rights and liabilities of.*

Where a contract contains mutual obligations, a party who is unable to perform his part of the contract cannot exact performance from the other party. **A** FAQIR MAHOMED *v.* BHAGU KHAN **371**

——— *C. I. F.*—Sale of goods—Construction of document—Delivery, time for extension of—Seller, duty of. *See* CONTRACT ACT, s. 83 **1012**

Contract Act (IX of 1872), ss. 2, 11. *See* MINOR **945**

——— **s. 11**—*Mortgage in favour of lunatic, whether enforceable—Executed and executory contracts.*

Contract Act—contd.

A lunatic or a minor is not disqualified as such to take immoveable property under an executed contract and a mortgage executed in favour of a lunatic or a minor is enforceable by him.

The case of executory contracts, however, is different and a lunatic or a minor cannot validly enter into a contract for sale or mortgage in his favour. **O** SHEORATAN SINGH *v.* KALI CHARAN, 10 O & A. L. R. 543; 11 O. L. J. 498 **955**

——— **s. 16**—*Undue influence—Mortgage—Need of money—Compound interest—Interest, high rate of—Donee from mortgagor's widow, whether can object.*

Urgent need of money on the part of a borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act.

There is nothing inherently wrong or oppressive in an agreement for the payment of compound interest, nor is the mere fact of the rate of interest being high sufficient to raise a presumption of undue influence.

A donee from the mortgagor's widow is not entitled to the equities which existed in favour of the mortgagor and it is not, therefore, open to him to plead that the contract of mortgage is bad for undue influence. **L** CHIRANJI LAL *v.* DOST MAHOMED, (1923) A. I. R. (L.) 631 **995**

——— **ss. 17, 18.** *See* FRAUD **330**

——— **s. 25**—*Limitation Act (IX of 1908), s. 19—Stamp Act (II of 1899), s. 35, Sch. I, Art. 5—Acknowledgment and promise to pay difference between—Construction of document—Promissory-note—Agreement.*

Whether a statement contained in a particular document is a mere acknowledgment within the meaning of section 19 of the Limitation Act, or is a promise to pay within the meaning of section 25 of the Contract Act, must depend upon the language of the instrument under consideration.

Defendants executed a document in the following terms:—"Account of money. In the name of Panaullah Miji and Umer Ali Miji of Namupur, Mokam Chandpore. Amount due brought forward from the account of Panaulla Miji at page 21 of this book Rs. 3,535. Interest at the rate of one rupee per mensem, stipulated time for payment the month of Bhadra of the year 1318 B. S.:"

Held, (1) that the document contained a promise to pay within the meaning of section 25 of the Contract Act;

(2) that the document was not a promissory-note, but an agreement within the meaning of Article 5 of Schedule I to the Stamp Act, and was not affected by the provisions of section 35 of that Act. **O** PRASANNA KUMAR PAL SANATAN KUNDA *v.* PANAULLA MIJI, (1923) A. I. R. (C.) 659 **77**

——— **s. 25**—*Limitation Act (IX of 1908), s. 19—Decree—Verbal contract to pay amount—Contract, whether enforceable.*

Where a judgment-debtor, in consideration of the decree-holder not enforcing the decree verbally promises to pay the decretal amount at some future date, the contract is valid and enforce-

Contract Act—contd.

able in law, even though the decree has by that time become time-barred.

The fact that an acknowledgment of a debt under section 19 of the Limitation Act is required to be in writing, does not in any way affect the validity of a verbal contract such as the above, which is a new promise for a new consideration and is a cause of action in itself.

All that is required by section 19 of the Limitation Act is an acknowledgment of an existing debt. A new consideration is not required nor is an actual promise to pay. **C** IBRAHIM MALLICK *v.* LALIT MOHAN ROY, 50 C. 974; 28 C. W. N. 322; (1924) A. I. R. (C.) 388 **489**

——— **s. 30**—*Wagering contract—Intention to sell or purchase—Speculation, effect of—Contract, whether void.*

A contract may be unenforceable, if it only amounts to wager on the rise or fall of the market and is not accompanied by an intention to sell or purchase goods at a given time and place at a certain rate. Where, however, there is a real desire on the part of the vendor to sell and the buyer to purchase the goods agreed to be sold at the contracted rate, the contract is not a wagering contract and is enforceable and existence of speculation which forms an element in many transactions does not make the contract void. **O** NARAYAN DAS *v.* MAHESHI LAL, 9 O. & A. L. R. 567 **578**

——— **s. 73**—*Interest Act (XXXII of 1839), s. 1—Sale of goods—Breach of contracts—Damages—Exchange, rate of, when to be calculated—Interest, whether can be awarded.*

In a suit to recover the value of goods which were agreed to be paid for "as per home invoice," the rate of exchange for the conversion of sterling into rupees should be that prevailing on the date on which payment was to be made under the contract, and not that prevailing on the date of judgment.

Interest may, in such a suit, be awarded to the plaintiff, as damages under section 73 of the Contract Act, where it is proved that loss has been caused to him owing to the defendant's default in not making the payment on the due date.

In the case of an old contract interest may be awarded under the Interest Act, from the time when a demand for payment is made in writing so as to give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. **R** SHAKOOR & Co. *v.* FINLAY FLEMING & Co., 2 Bur. L. J. 130; 1 R. 339; (1923) A. I. R. (R.) 265 **291**

——— **s. 73, illus. (n)**—*Interest Act (XXXII of 1839), s. 1—Interest, when allowable.*

The claim for interest on a sum of money due from one person to another depends upon contract, express or implied, or on some rule of law allowing it. If there is no contract allowance of interest can only be made as a matter of law.

In the absence of a contract to that effect, the only grounds on which a person can claim interest on money due to him from another, when the liability for the sum is established, are to be found either in section 73, illus. (*n*) of the Contract Act or in section 1 of the Interest Act. **A** JWALA PRASAD *v.* HOTI LAL, 22 A. L. J. 558; 46 A. 625 **1049**

Contract Act—contd.

——— **s. 74**, *applicability of—Execution of decree—Court executing decree, powers of—Interest, whether can be reduced.*

The Court executing the decree must take the decree as it stands and has no power to go behind it or entertain an objection to the legality of the decree.

The terms of section 74 of the Contract Act are not applicable to a decree, and the Court executing the decree cannot grant relief in respect of interest mentioned therein on the ground that it is penal. **A** RAGHUNANDAN PRASAD RAM *v.* GHULAM ALAUDDIN BEG, 22 A. L. J. 464; 46 A. 571 **916**

——— **ss. 78, 83, 107, 118**—*Sale of goods, subject to inspection and approval—Sale, when complete—Re-sale, right of, when arises—Goods answering particular description—Warranty, implied.*

Where goods are purchased subject to the condition that they are undamaged and in good travelling condition and subject to inspection and approval, the sale is not complete till they are inspected and approved by the purchaser and till then no right of re-sale arises under section 107 of the Contract Act.

In the case of a contract of a general nature for the purchase of goods known by a certain description, there is always an implied warranty that the goods will be such as are usually sold under that denomination and not in a damaged condition. **Pat** RAMDAYAL RAM NARAIN *v.* BHAIRO BUX GOURIDATTA, 1 P. L. R. 398; (1924) A. I. R. (Pat.) 240; 5 P. L. T. 558 **183**

——— **s. 83**—*Sale of goods—C. I. F. Contract—Property when passes—Bill of Lading endorsed to agent of seller, effect of—Construction of document—Delivery, time for extension of—Seller, duty of.*

Whether the property in the goods has passed in the case of a C. I. F. contract depends entirely on the question whether the seller has parted with the control over the disposal of the goods. He may intend to do this if he endorses the Bill of Lading over to the purchaser. But if he endorses the Bill of Lading in blank and hands it over to his own agent for delivery with instructions that he shall not hand it over until the goods are paid for, the intention of the seller is to retain the disposal of the goods under his own control.

Defendant in Bombay agreed to purchase certain goods from plaintiffs in England. Plaintiffs wrote to the defendants :—

"In the present state of our market it is impossible to guarantee delivery, and it must be understood, in case any of the yarns are a little late, there must be no claim for late delivery. You can, however, rely on our shipping the yarns to time, if this is at all possible."

To this the defendant replied :—

"We note that it is impossible to guarantee delivery in the present state of your market. We, however, hope that you will do your best to expedite the shipment as early as you can and will

Contract Act—concld.

cable us the name of the steamer, carrying our goods :"

Held, that the parties had agreed to extend the time of shipment and as no particular period for extension was mentioned in the letters, the plaintiffs were bound to deliver the goods within a reasonable time beyond the contract time. **B** BANK OF MORVI LTD. *v.* BAERLEIN BROS., 26 Bom. L. R. 155; 48 B 374; (1924) A. I. R. (B.) 325 **1012**

———**s. 108, Excep. I**—*Sale of goods—Hire by vendor—Sale, subsequent, whether passes title.*

S made over his buffaloes to the plaintiff in settlement of a debt and then hired them from him. Subsequently he made them over in settlement of a debt to the defendant. Plaintiff sued to recover the buffaloes from the defendant :

Held, that Exception I to section 108 of the Contract Act was not applicable to the case and the plaintiff was entitled to recover the buffaloes from the defendant. **R** SHAUNG NYAN *v.* KO MAUNG, (1923) A. I. R. (R.) 98 **280**

Costs—Practice—Original Side—Costs to several respondents—Order, meaning of. *See* PRACTICE—ORIGINAL SIDE **704**

——— Wrongful detention—Measure of damages—Extravagant claim. *See* TORT **245**

Court, *act of—Election petition—Deposit of money—Delay in payment—Unforeseen cause—Limitation Act (IX of 1908), s. 5, application of.*

Where a person who is bound to pay money produces the money in Court and complies with the rule which requires him to take out *challan* and pay the money at a different place and there is a delay in the actual payment of the money into the Treasury or Bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the *challan* obtained.

The rule of law that nobody should be prejudiced by an act of Court or of its officers is one of universal application and does not depend upon section 5 or any other provision of the Limitation Act.

The election to a Taluk Board was held on 9th May 1922. The Court was closed for the vacation of 14th May and re-opened on 17th July. The period of 11 days allowed for presentation of election petitions expired during the vacation and the petitions were presented on 17th July, the re-opening day, with the necessary Lodgment Schedule for the requisite deposit. The *challans* were issued late in the day. The Treasury Officer was at that time absent from his place and it was too late to make the payment to the Bank. The next day on account of a *jutka* accident and a delay of an hour by the Treasury Officer, the money could not be paid. The money was, however, paid on the 19th :

Held, that, in the absence of any negligence on the part of the petitioner, the payment must be

Court—concld.

held to have been made in time. **M** GOPALAKRISHNA PILLAI *v.* KUNJITHAPATHAM PILLAI, (1923) M. W. N. 811; 18 L. W. 844; 45 M. L. J. 849; (1924) A. I. R. (M.) 324; 33 M. L. T. 106; 47 M. 543 **651**

———, appellate, general powers of—Powers, whether may be exercised in favour of defeated cross-appellant—Cross-appellant, whether can file cross-objections. *See* CIVIL PROCEDURE CODE, O. XLI, RR. 22, 38 **670**

——— competent to execute decree—Transfer of jurisdiction—Objection taken to jurisdiction in appeal, whether can be entertained. *See* CIVIL PROCEDURE CODE, ss. 21, 37, 38, 39 **806**

———, discretion of—Document, admissibility of—Objection before Appellate Court—High Court whether will interfere. *See* CIVIL PROCEDURE CODE, O. XLI, R. 2 **1029**

———, duty of—Privy Council record. *See* OUDH RENT ACT, s. 107G **250**

———, duty of, to record reasons—Additional evidence, admissibility of. *See* CIVIL PROCEDURE CODE, O. XLI, R. 27 **408**

———, inherent power of—Application beyond time, admission of. *See* CIVIL PROCEDURE CODE, s. 151 **997**

———, inherent power of—Judgment signed—Alteration of order. *See* CIVIL PROCEDURE CODE, s. 151, O. XX, R. 3, O. XXI, R. 53 (6) **900**

———, inherent power of—Security for costs—Transfer of one of several plaintiffs to category of defendants—Future costs. *See* CIVIL PROCEDURE CODE, O. I, RR. 2, 10 **298**

———, inherent power of—Wrongful appointment of Receiver—Restitution. *See* CIVIL PROCEDURE CODE, ss. 141, 151 **724**

———, leave of, whether necessary—Property situate outside original jurisdiction, whether can be investigated. *See* LETTERS PATENT (BOM.), CL. 12 **780**

———, original jurisdiction of—*Ex parte* decree against some defendants—Appeal by contesting defendants—Subsequent application by absentee defendants to set aside decree. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **381**

———, power of, to interfere—Order directing removal of encroachment. *See* PUNJAB MUNICIPAL ACT, s. 175 **8**

———, when can decline to adjudicate. *See* PROVINCIAL INSOLVENCY ACT, s. 4 **322**

———, whether can refuse application—Summonses to witnesses, party, right of to—Application made at late stage. *See* CIVIL PROCEDURE CODE, O. XVI, R. 1 **143**

Custom—contd.

———, local incidents and proof of—Hundwa estate, whether under-tenure of Kharakpur—Alienability. *See* GHATWALI TENURE, INCIDENTS OF **825**

———, question of—Appeal, second—High Court, power of. *See* CIVIL PROCEDURE CODE, s. 100 **134**

———, question of—Certificate, refusal to grant—Procedure—Appeal, second. *See* PUNJAB COURTS ACT, ss. 41 (*c*), 44 **488**

——— Right to cut trees—*Zemindar*, position of—Unerpur Jagir. *See* JAGIR LAND **819**

——— Trees, right to transfer—*Wajib-ul-arz*, entry in, construction of. *See* LANDLORD AND TENANT **542**

——— **Abadi** Ryots, *right of, to transfer site of house*—Mauza *Datiana, Muzaffarnagar District*—Laches *of some co-sharers, effect of.*

A custom which permits a *raiyat* in a village to transfer not only the materials of his house but also the site on which the house stands can be recognised only when there is absolutely clear evidence to that effect.

No such custom prevails in *Mauza* Datiana in the Muzaffarnagar District.

Where some of the co-sharers have neglected to take steps to avoid transfers made by people who are nothing but *raiyats* in the village, their laches cannot affect the rights of the other co-sharers in the village. **A** ALI HUSAIN *v.* SYED MAZAHIR HUSAIN, (1924) A. I. R. (A.) 477 **134**

——— **Adoption**—*Succession to adopted son—Daughter of adopted son, whether takes in preference to collaterals of adoptor.*

The adoption of a son or the appointment of an heir under the Customary Law of the Punjab is usually intended to make provision for succession to the adoptive father's property after his death, and does not operate as a gift of the property in favour of the adopted son.

In each case a deed of adoption must be construed according to its language and in the light of attendant circumstances and no hard and fast rule can be laid down on the subject. In some cases a deed of adoption may well be construed as a deed of gift while in others a gift *inter vivos* may not be contemplated, and the adoptive father's intention may simply be confined to the appointment of the adopted son as his heir, who would, as such heir, succeed to his property after his death. **L** NATHAL *v.* DHAN KAUR **115**

——— **Alienation,** by female—Reversioner, remote, whether can challenge. *See* HINDU LAW—CUSTOM **497**

——— ——— *by male proprietor—Necessity—Antecedent debt—Alienee, duty of—Decree against minor, effect of—Consideration, small portion of; found without necessity, effect of.*

It is not the duty of an alienee from a male proprietor who advances money for the payment of first antecedent debts of the alienor to see to the application of the money or to find out whether the whole of the money due to the antecedent creditor was actually paid.

Where a decree is in existence against an alienor the payment of that decree constitutes valid necessity for the alienation of ancestral property.

Where the amount of consideration for an alienation by a male proprietor which is found to be without necessity represents only a small portion of the entire consideration, it is not necessary to convert the sale into a mortgage. **L** BALBIR SINGH *v.* GOBIND, (1923) A. I. R. (L.) 532 **543**

——— **Alienation** *by widow—Necessity proof, of—Decree* ex parte *against widow, value of.*

The mere fact that an *ex parte* decree has been obtained against a widow by a creditor does not of itself amount to evidence of legal necessity for the amount of the decree so as to justify an alienation by the widow of her husband's estate. **L** BARIAM SINGH *v.* PHAGGU MAL, 5 L. L. J. 90 **506**

——— ——— *Necessity—Just debt, what is—Debt incurred to prosecute abduction case.*

A just debt incurred by a male proprietor for a necessary purpose is always binding on his estate irrespective of the income and means of the alienor.

A just debt is a debt which is actually due and is not immoral or illegal or opposed to public policy and is not contracted as an act of reckless extravagance or wanton waste or with the intention of destroying the interests of the reversioners.

A debt incurred to prosecute a case under section 498 of the Penal Code may reasonably be regarded as necessary. **L** ANOKH SINGH *v.* SAPURAN SINGH, (1923) A. I. R. (L.) 660 **980**

——— ——— *Reversioner, remote,* locus standi *of, to challenge alienation.*

An alienor had three minor sons living. His next immediate reversioner brought a suit to challenge the alienation on the ground of want of consideration and necessity:

Held, that the plaintiff had only a bare possibility of succession to the alienor and had, therefore, no *locus standi* to maintain the suit, which must be dismissed as speculative. **L** GIRDHARI *v.* MAM CHAND, 6 L. L. J. 224 **442**

——— ——— *Will—Ancestral property—Sonless* Awans *of Kot Sarang,* Tahsil *Talagang.*

A sonless *Awan* of Kot Sarang in *Tahsil* Talagang is not competent to make a testamentary disposition of his ancestral estate. **L** RAKHI *v.* BAZA, 5 L. 34; (1924) A. I. R. (L.) 452 **743**

——— **Ancestral property**—*Property acquired by purchase.*

Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the

Custom—contd.

common ancestor, for instance, by purchase from a collateral. **L** NAGINA SINGH *v.* JIWAN SINGH 107

——— **Ancestral property,** *what is—Land purchased from collateral, whether ancestral.*

Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor. Therefore, land purchased from a collateral although ancestral in the hands of the latter ceases to be ancestral in the hands of the purchaser. **L** GHANIA *v.* PHUMAN SINGH 170

——— **Hindu widow,** position of—Succession. *See* TRUSTS—SUCCESSION 891

——— **Pre-emption**—Wajib-ul-arz, *entry in, construction of*—Shurkayan shikmi, *meaning of.*

An entry in a *wajib-ul-arz* provided that on the occasion of a transfer, the first right to take the property would be given to "*shurkayan shikmi*" and that, if they declined, an offer should be made to the other proprietors of the *thok* or *mahal*:

Held, (1) that the primary idea underlying the words *shikmi* was inclusion, that is to say, the *shurkayan shikmi* must, in some way or other, be connected with the vendor by reference to inclusion in something which contained them both, *e.g*, a *khata*;

(2) that, therefore, the expression *shurkayan shikmi* meant those proprietors in the *thok* or *mahal* who were proprietors in the same *khata* with the vendor. **A** SHARIF AHMAD ALVEE *v.* MUHAMMAD, 46 A. 118; (1921) A. I. R. (A.) 375 612

——— Wajib-ul-arz, *entry in, interpretation of*—Mahal *including shares in different villages*—*Co-sharers in* thoks, *position of.*

A certain *mahal* included shares in sixteen different villages, and a single *wajib-ul-arz* was drawn up for the entire *mahal*. The pre-emptive clause of the *wajib-ul-arz* placed persons entitled to claim pre-emption in three categories, *viz.*, near co-sharers, co-sharers in the same *thok* as the vendor, and co-sharers in *thoks* other than that of the vendor:

Held, (1) that for purposes of pre-emption the whole *mahal* must be treated as a single unit and every *thok* appertaining to the *mahal* in whatever village it may be situated was a *thok* of the *mahal*;

(2) that under the third clause of the *wajib-ul-arz* no preference was given to co-sharers who shared in the proprietary rights in *thoks* other than that of the vendor but in the same village as the vendor, as against co-sharers in *thoks* other than that of the vendor situated in different villages. **A** RAGHUNANDAN SINGH *v.* MULAK RAJ SINGH, 21 A. L. J. 84; (1923) A. I. R. (A.) 255 470

——— Wajib-ul-arz, *entry in, value of—Rebuttal.*

An entry in a *wajib-ul-arz* is by itself good *prima facie* evidence of the custom of pre-emption,

Custom—concld.

and it is not necessary to corroborate a *wajib-ul-arz* by proof of instances in which pre-emption has been allowed. On the other hand, the evidence afforded by the *wajib-ul-arz* may be rebutted by convincing evidence which satisfies the Court that in fact the *wajib-ul-arz* cannot reasonably be treated as a record of custom. Such evidence may be found in the language of the document itself or there may be external evidence. **A** SHER MUHAMMAD KHAN *v.* PARBHU LAL, 21 A. L. J. 801; 46 A. 17; (1924) A. I. R. (A.) 271 41

——— **Shamilat land,** *whether accessary to proprietary holding Sale of proprietary land, whether includes* shamilat *Jhang District, villages of, rule applicable to.*

The rights of proprietors in the *shamilat* of a village are not a mere accessory to the land separately held by them and the *onus* lies on a purchaser of proprietary land to show that a sale to him included a share in the *shamilat*.

The *shamilat* lands of villages in the Jhang District were clearly defined at the Settlement of 1856, and alienations of proprietary land in villages in that District subsequent to 1856 should not, in the absence of evidence to that effect, be held to carry with them rights in the *shamilat* of the village. **L** GOBIND RAM *v.* ALI MOHAMMAD 84

——— **Succession**—*Collaterals, right of, nature of—Suit by one collateral for whole estate, whether maintainable—Limitation—Burden of proof—Register of Births, entry in, value of—Appeal, second—Finding of fact based on wrong principles, whether binding.*

The right of the collaterals of a deceased person to succeed to his estate under the customary law is not a single indivisible right, so as to give each collateral a right of action for the whole estate; each collateral is entitled to sue only for his own share of the estate.

Semble:—Where in arriving at a finding of fac the lower Appellate Court has infringed rules and maxims laid down by the High Court and has decided the question on wrong principles as to the *quantum* of proof, the finding of fact may be challenged in second appeal.

A plaintiff must prove affirmatively and clearly that his suit is within time.

A mere entry in a Birth Register that a son was born to a man of the name of the plaintiff's father does not necessarily prove that the entry relates to the plaintiff. **L** PREM DAS *v.* SARBALAND, (1923) A. I. R. (L.) 41 211

Damages, claim for—Short delivery of goods—Loss—Burden of proof—Notice, whether necessary. *See* RAILWAYS ACT, s. 77 602

———, suit for—Damages caused by action of Canal Officers—Limitation. *See* NORTHERN INDIA CANAL AND DRAINAGE ACT, ss. 6, 15, 58 208

———, suit for—Loss of goods—Risk note, Form B—Notice to Railway. *See* RAILWAYS ACT, ss. 72, 77, 140 428

Damages—concld.

———, suit to recover—Damages caused by construction of canal—Limitation. *See* LIMITATION ACT, SCH. I, ART. 2 **185**

Decree, against minor, effect of—Consideration, small portion of, found without necessity, effect of. *See* CUSTOM—ALIENATION **543**

——— based on award—Execution, whether can be refused on non-payment of Court-fee. *See* EXECUTION OF DECREE **489**

———, compromise — Execution of decree — Decree, whether can be questioned. *See* EXECUTION OF DECREE **891**

———, *compromise—Matter foreign to suit included—Execution—Interest—Power of Court—Civil Procedure Code (Act V of 1908), s. 151, application of.*

In a suit for specific performance of a contract for sale, the parties came to an agreement under which the plaintiff agreed to purchase certain other property of the defendant as well. The compromise was accepted by the Court and embodied in a decree. Subsequently, the plaintiff sought to avoid purchasing property not subject-matter of the previous suit and urged that he was not bound by that portion of the decree :

Held, (1) that the compromise must be taken as a whole and each part of it treated as consideration for the other ;

(2) that even if the agreement relating to the property not subject-matter of the suit could not lawfully form part of the decree, once it had been so made a part, the person bound by the decree could not object to that part as being not binding on him ;

(3) that, in any case, the Court had inherent power to prevent abuse of its own process and as the action of the decree-holder in executing only a portion of it would cause damage to the judgment-debtor, the Court would not permit him to do so. O MUHAMMAD YASIN ALI KHAN *v.* ALI BAHADUR, 10 O. L. J. 443; (1924) A. I. R. (O.) 230 **685**

———, consent—Executing Court, powers of. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, S. 15 B **553**

———, *construction of—Decree against joint tortfeasors, nature of—Non-executable decree—Attachment of suit—Death of defendant—Sons, appointment of, as legal representatives—Major and minor sons—Guardian* ad litem, *omission to appoint—Decree against major defendants, whether legal—Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XXXII, rr. 3, 4.*

A decree for recovery of possession against a number of joint tortfeasors is a joint decree, inseparable and undivisible.

A Court should not pass a decree which cannot be given effect to.

Decree—contd.

Plaintiffs sued for recovery of possession of certain plots of land against seven defendants alleging that they had been dispossessed by defendants Nos. 4, 6 and 7. The First Court declared the plaintiffs' title to two plots but dismissed their claim for possession, which, however, was decreed on appeal. It appeared that defendant No. 1, having died during the pendency of the appeal his heirs were brought on the record but that five of these heirs were minors and no steps were taken for their proper representation. The Appellate Court passed a decree against the major defendants and declared that the minors would not be bound by this decree as they were not properly represented in the appeal. The other defendants appealed to the High Court :

Held, that the appeal before the lower Appellate Court could not proceed in the absence of the representatives of the deceased defendant and no decree could be made under the circumstances. C NEYAJADDIN *v.* AKAMAT ALI **365**

——— by consent—Provision for payment by instalments and execution of decree in default—Decree, whether merely preliminary—Decree, execution of. *See* MORTGAGE SUIT **418**

——— directing execution individually—Application for joint execution—Application, whether in accordance with law. *See* LIMITATION ACT, SCH. I, ART. 182, CL. (5) **880**

———, *ex parte*, against widow, effect of—Custom—Alienation by widow—Necessity, proof of. *See* CUSTOM—ALIENATION BY WIDOW **506**

———, *ex parte*—Agreement to withdraw appeal—Failure to act upon agreement—Prosecution of appeal—Decree, whether fraudulent. *See* FRAUD **330**

———, *ex parte*—Appeal, grounds of—Summons, service of, whether can be questioned. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **506**

———, *ex parte*—Appeal, whether lies—Cross-objections, point, whether can be taken in. *See* CIVIL PROCEDURE CODE, O. IX, R. 13, O. XLI, R. 22 **968**

———, *ex parte*, application to set aside—Dismissal for default—Appeal. *See* CIVIL PROCEDURE CODE, S. 141, O. IX, R. 13, O. XLIII, R. 1 **323**

——— for damages—Civil wrong by Hindu father—Benefit to family property—Sons, whether bound—Immoral or illegal debt. *See* HINDU LAW—MITAKSHARA **1036**

——— for dower, sale of—Time of essence of contract. *See* TRANSFER OF PROPERTY ACT, S. 6 (c) **214**

——— *for injunction, stay of—Decree declaratory in part, effect of.*

It is no bar to the stay of execution of a decree

Decree—concld.

for an injunction pending the disposal of an appeal, that a part of the decree appealed from is declaratory in character. **M** SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR, 46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 427; 47 M. 316; (1924) A. I. R. (M.) 597 109

——— for possession—Execution, application for—Dismissal in default—Application for ascertainment of mesne profits, whether barred. *See* CIVIL PROCEDURE CODE, O. XX, R. 12 635

——— *of small cause nature—Order for execution—Second appeal, if competent—Erroneous decision—Refusal to exercise jurisdiction—Revision.*

No second appeal lies against an order for the execution of a decree passed in a suit of the nature of a small cause of value below Rs. 500, but the petition of appeal may be treated as a petition in revision.

Where a decision is so palpably erroneous as to amount almost to an improper refusal to exercise jurisdiction, as, for instance, where the Court refuses to execute a decree as time-barred, while the decree is not so barred, the High Court will interfere in revision. **A** SURAJMAN CHAUBE *v.* ANJORE SHUKUL, 21 A. L. J. 861; 9 O. & A. L. R. 989; 46 A. 73; (1924) A I R (A.) 263 605

———, preliminary—Suit for settlement of accounts—Appeal by defendant against whole decree—Court-fee payable. *See* COURT FEES ACT, s. 7, CL. (4) 923

——— Proceedings necessary to ascertain set-off—Decree, whether declaratory. *See* LIMITATION ACT, ART. 182 477

———, whether fraudulent—Fraud—Agreement to withdraw appeal—Failure to act upon agreement—Prosecution of appeal—*Ex parte* decree. *See* FRAUD 330

Defamation—*Complaint to public servant—Good faith, absence of—Privilege.*

Communications addressed in good faith to persons in public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals, are privileged, provided the subject-matter is within the competence of the person addressed; where, however, the communication is not made in good faith and is unfounded, malice in law must be presumed and the privilege disappears. The person complained against is, in such a case, entitled to sue the person making the communication for damages for slander.

Obiter:—Even where a complaint is filed in a Criminal Court and is afterwards dismissed, a suit for damages for malicious prosecution is in certain circumstances maintainable, because the privilege is qualified and not absolute, and there

Defamation—concld.

is no protection unless the case comes within the qualification attached to the privilege. **A** BINDESHWARI PRASAD TIWARI *v.* HANUMAN PRASAD TIWARI, 22 A. L. J. 65; (1924) A. I. R. (A.) 445 640

DEFINITIONS:—

Act, meaning of. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 53 395
Agricultural land, tea garden, whether. *See* PUNJAB PRE-EMPTION ACT, 1905, s. 3 (1) 946
Ala and Adna maliks. *See* CUSTOM 91
Animus Momendi, not proved. *See* DIVORCE ACT, 1869, s. 2 719
Case, meaning of. *See* CIVIL PROCEDURE CODE, 1908, s. 115 168
Cause of action, meaning of. *See* CIVIL PROCEDURE CODE, 1908, O. II, R. 2 755
Cultivable, meaning of. *See* MADRAS ESTATES LAND ACT, 1908, s. 3 (16) 718
Ejusdem generis, principle of. *See* CONSTUCTION OF DOCUMENT 369
Hundi, negotiation of, meaning of. *See* CIVIL PROCEDURE CODE, 1908, s. 20 (*c*) 800
In accordance with Law. *See* LIMITATION ACT, 1908, ART. 182, CL. (5) 880
Jus tertii, plea of. *See* CHOTA NAGPUR TENANCY ACT, 1908, s. 177 601
Litigating under same title, meaning of. *See* C. P. LAND REVENUE ACT, 1917, s. 80 621
Lis pendens, doctrine of, applicability of. *See* BURMA LAWS ACT, 1898, s. 13 729
Loss, meaning of. *See* RAILWAYS ACT, 1890, s. 72 126
Mohtamim's rights, nature of. *See* PRE-EMPTION 327
Matters before the Court, scope of. *See* EVIDENCE ACT, 1872, s. 3 609
Nominate, meaning of. *See* EAST INDIAN COTTON ASSOCIATION RULES, R. 42 769
Order, meaning of. *See* PRACTICE 704
Other sufficient reason, meaning of. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII, R. 1 745
Person aggrieved, creditor, whether. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 53 395
Purchaser, whether includes trustee. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 53 888
Quantum Meruit, principle of, whether applicable. *See* PRINCIPAL AND AGENT 287
Raiyati land, definition of. *See* MADRAS ESTATES LAND ACT, 1908, s. 3 (16) 718
Running train, what is. *See* RAILWAYS ACT, 1890, s. 72 428
Shurkayan shikmi, meaning of. *See* CUSTOM—PRE-EMPTION 612
Valuable consideration, meaning of. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 53 888

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15 B—*Consent decree—Executing Court, powers of.*

In the case of suits falling under clauses (*y*) and (*z*) of section 3 of the Dekkhan Agriculturists' Relief Act, an agriculturist, if the decree is a consent decree, can apply to the Court for an

order under section 15 B to grant instalments in execution not provided for in the decree.

Section 15 B of the Dekkhan Agriculturists' Relief Act does not make any exception in the case of consent decrees. The fact that a decree is a consent decree does not limit the powers of the Court, which can in proper cases substitute system of instalments to direct sale. **S** SANGATMAL LILARAM *v.* JAN MAHOMED GULAM KHAN, 16 S. L. R. 260 **553**

——— **ss. 43, 45**—*Conciliator, appointment of as arbitrator—Agreement to refer not reduced to writing—Award, whether valid—Appeal—Suit to enforce award—Procedure.*

A mortgagor of certain property assigned his rights to the plaintiff who applied for a certificate under the Dekkhan Agriculturists' Relief Act. When the parties appeared before the Conciliator they agreed that the matter should be settled by arbitration and appointed the Conciliator as their arbitrator who made an award the same day. The plaintiff's application for filing the award having been dismissed he filed the present suit for enforcing his rights under the award:

Held, (1) that the absence of any writing referring the matter to arbitration did not affect the validity of the agreement evidenced by the award;

(2) that in view of the provisions of sections 43 to 45 of the Dekkhan Agriculturists' Relief Act the award could not be treated as a valid award;

(3) that it was not open to the plaintiff to treat the award as affording a distinct and separate cause of action to be dealt with according to the ordinary rules applicable to a suit based on the award. **B** SAKHARAM MARUTI *v.* RAJMAL GIRDHARILAL, 25 Bom. L. R. 52; (1923) A. I. R. (B.) 173; 47 B. 298 **179**

Divorce Act (IV of 1869), ss. 2, 7—*Domicile of origin English—Domicile of choice, acquisition of—Requisites*—Animus Momendi *not proved—Jurisdiction to grant decree* nisi.

Courts in India are bound by the provisions of section 7 of the Divorce Act, notwithstanding the provisions of section 2 of the Act, and their jurisdiction to grant divorce depends upon domicile as under the English Law.

Domicile of origin cannot be lightly shed and the *onus* lies distinctly on the person wanting to do so that he has in its place acquired a domicile of choice. A domicile of choice can only be acquired by residence coupled with an intention of permanent or indefinite residence, mere residence by itself being insufficient.

A soldier with an English domicile of origin obtained employment in Burma on discharge from the army. He was married in Burma and his children were also being educated there. After residing there for about 11 years he lost his appointment in Burma; he returned to England and from there went to Barbados where he was in service for about a year when he returned to Burma to his former appointment. He presented a petition for divorce and the question was whether the Court had jurisdiction to grant the decree:

Held, that his return to Burma was due to the opportunity of employment and did not arise from a firm and fixed intention of making Burma his home and that this in itself being no proof of the fact that he had acquired his domicile of choice, the Court had no jurisdiction to grant the divorce sought. **R** JONES *v.* JONES, 1 R. 705; (1924) A. I. R. (R.) 193 **719**

Easement—*Agreement not to block window—Diminution of light and air—Servient owner, position of.*

The owner of the servient tenement is permitted to reduce the access of light and air to the dominant tenement provided he does not diminish the light and air so as to make it less than the owner of the dominant tenement requires for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings.

One party to a suit agreed that he would not block up a certain window in the house of the other party and the suit was compromised. Subsequently, the first party erected a shed which diminished the light and air of the window of the second party but still sufficient was left for the purposes for which the room was used. In a suit for injunction by the second party who urged that the agreement was absolute in its language:

Held, that upon a true construction of the agreement it had no such character, and under it the plaintiff obtained for his window nothing more than the character of an ancient light and his suit must fail. **A** GUR PRASAD MUKERJI *v.* BISHUN DUT **349**

Easements Act (V of 1882), ss. 59, 60—*License—Work of permanent character—Transfer by grantor—Revocation.*

Where a licensee acting under the license has created a work of a permanent character on the land, the license is not revoked by the transfer of the land by the grantor to another, nor can the transferee claim compensation from the licensee. **N** VITHALDAS MARWARI *v.* GOMA, 20 N. L. R. 60 **173**

East India Cotton Association Rules, rr. 42, 43—*"Nominate," meaning of—Objection to nomination, waiver of—Representative of member, firm whether can act as umpire—Award made by umpire without hearing parties, validity of—Award made after expiry of ten days—Extension of time—Exclusion of Sundays and holidays—Construction of rules—Practice of Association, whether relevant.*

The word "nominate" in clause B of rule 43 of the Rules of the East India Cotton Association means "finally appoint," that is, when the arbitrator has accepted the appointment, and there can be no effective nomination of an arbitrator until he agrees to act as such.

Where the appointment of an arbitrator is open to objection under the rules, but the parties appear before him and raise no objection to his

East India Cotton Association Rules—concld.

appointment, they must be taken to have accepted the appointment and to have waived the objection.

A representative nominated by a firm, which is a member of the East India Cotton Association Ltd., to act as an arbitrator is eligible to act as an umpire within the meaning of clause A of rule 43 of the Rules of the Association.

The expression "purposes of arbitration" in rule 42 (*a*) of the Rules of the East India Cotton Association Ltd., is comprehensive enough to include acting as an arbitrator or as an umpire, within the meaning of clause A of rule 43.

An award made by an umpire without giving notice to the parties and without giving them an opportunity of being heard is invalid, but where a party fails to take objection to the validity of the award on the ground of absence of notice, before the Appeal Committee, the objection must be deemed to have been waived.

The provision as to the extension of time for making an award contained in clause A of rule 43 of the Rules of the East India Cotton Association Ltd., applies only to arbitrators and not to umpires.

Under sub-clause (*ir*) of clause B of rule 43, an umpire is bound to make his award within ten days from the date of his appointment. If he fails to make his award within that period, the result is that the arbitration is completely superseded, and the arbitrators have to be appointed fresh and the arbitration must commence *de novo*.

Where the language of a rule is unambiguous, the practice of the Association is not relevant to the construction of the rule, nor can the rule be construed in the light of the practice contrary to the plain meaning of the words used.

The provision contained in rule 58 of the Rules of the East India Cotton Association Ltd., as to the exclusion of Sundays and holidays in computing any period of time prescribed under the rules is not applicable to periods fixed under r. 43. **B** CHATURBHUJ *v.* DEOKARAN, 25 Bom. L. R. 84; (1924) A. I. R. (B.) 370 **769**

Ejectment—Agra Tenancy Act, s. 79—Construction—Tenant, remedy of. *See* AGRA TENANCY ACT, s. 79 **566**

——— decree against non-occupancy tenant—Civil suit to be declared grove-holder, whether maintainable—Jurisdiction of Civil and Revenue Courts. *See* AGRA TENANCY ACT, s. 167 **960**

——— from land whether includes ejectment from huts standing on land. *See* CONSTRUCTION OF DECREE **191**

——— Notice to quit when should expire. *See* TRANSFER OF PROPERTY ACT, s. 106 **957**

———, *suit for—Trespasser—Co-sharer landlords, some, whether can sue—Person wrongly claiming to be heir of occupancy tenant*

Ejectment—concld.

The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable to a case where the defendant is not a tenant but a trespasser.

Where on the death of an occupancy tenant a person claiming to be his heir gets into possession of the lands of the tenancy and it is found that he is not entitled to succeed to the deceased tenant under section 59 of the Punjab Tenancy Act, he is in the position of a trespasser and can be ejected at the instance of a co-sharer landlord from lands appertaining to the share of the latter. **L** LEKHA *v.* BHANT, (1923) A. I. R. (L.) 647 **182**

———, suit for, whether maintainable—Tenant holding over—Second lease, execution of. *See* BENGAL TENANCY ACT, ss. 44, 47 **648**

Election petition—Deposit of money—Delay in payment—Unforeseen cause—Limitation. *See* COURT, ACT OF **651**

Estoppel, doctrine of, whether applies—Uncertified adjustment of decree, whether can be recognised—Fraud of decree-holder. *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 **89**

——— Judgment when operates by way of estoppel. *See* JUDGMENT **520**

——— Lease taken by pre-emptor from vendee—Acquiescence Pre-emption, suit for—Partition proceedings, participation in. *See* PRE-EMPTION, SUIT FOR **140**

——— Tenant in possession—*Kabuliyat* in favour of third party. *See* EVIDENCE ACT, s. 116 **371**

——— *Transfer of immoveable property—Report to Revenue Surveyor signed by transferor's heirs—Transferee in possession—Heirs, whether can deny transferee's title.*

Plaintiffs, the children of *SM* by *PK* sued to recover possession of land from the widow of one *PC* the son of *SM* by her second husband *PY* alleging that on the death of *PY* a partition was effected and *PC* had received his share separately. It appeared that the land in suit had been transferred by *SM* to *PC* and her report of the transaction for the Revenue Surveyor with a view to mutation of names in the official records was signed by the plaintiffs:

Held, that as the plaintiff had stood by with full knowledge of the transaction and had allowed the land to stand in the name of *PC* they were, under the circumstances, estopped from denying his title. **R** MA SHIN *v.* MAUNG HMAN, 1 R. 651; (1924) A. I. R. (R.) 102 **579**

Evidence, absence of—Conjecture—Finding of fact—Appeal, second. *See* APPEAL, SECOND **970**

———, admissibility in—Division of status—Document containing list of properties falling to each share—Registration, whether necessary. *See* REGISTRATION ACT, s. 17

Evidence—coneld.

——— *Copy of statement, admissibility of—Objection, whether can be taken in appeal—Mercantile contract—Time, whether of the essence of contract—Provision regarding payment, effect of.*

When a certified copy of a statement has been put in evidence without objection from the other party it is not open to that party to object to its admissibility in appeal.

As a general rule, time is of the essence of mercantile contracts and provision in the contract regarding payment of interest and liability for godown rent does not take the case out of the general rule. **L** DARGA DAT JAGAN NATH *v.* RAM PARTAB SUKH DAYAL, (1923) A. I. R. (L.) 138 **221**

———, finding not deducible from—Evidence not considered—Finding of fact. *See* APPEAL, SECOND **107**

——— to show transaction was mortgage, whether admissible—Sale-deed. *See* EVIDENCE ACT, s. 92 **186**

Evidence Act (I of 1872), s. 3—*"Matters before the Court," scope of—Proof, what constitutes—Civil and criminal cases, quantum of proof necessary—Good faith—Consideration—Burden of proof.*

The expression "matters before it" in section 3 of the Evidence Act includes matters which do not fall within the definition of "evidence" as given in it, which must be read with that of "proved" given in the said section.

Proof considered as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of Courts is effected by (1) evidence or statements of witnesses, admissions or confessions of parties as also production of documents, (2) presumptions, (3) judicial notice, (4) inspection.

The probative force, which is the extent to which any individual material of evidence aids in the establishment of the general truth, must be sufficient to induce the Court either to believe in the existence of the fact sought to be proved or to consider its existence so probable that a prudent men ought to act upon the supposition that it exists.

What circumstances will constitute proof can never be the subject of general definition.

In civil cases what is required or considered sufficient is preponderance of probability while in criminal cases, the persuasion of guilt must amount to such a moral certainty as convinces the minds of the Tribunal, as reasonable men beyond all reasonable doubt unless otherwise proved.

Where the good faith as also the consideration of a transaction are in question, the primary duty must rest on the alienee to prove both. **N** BHAIRONPRASAD *v.* LAXMI NARAYAN DAS **609**

——— **s. 32**—*Cess Act (IX of 1880), s. 95—Road Cess Return, when can be used—Statement* re *possession made in return, value of—Appellate judgment, what should contain—Finding of fact, when can be challenged in second appeal.*

A Road Cess Return cannot be used under any circumstances in favour of the person making it but it can be used by others for a purpose not directly connected with the statements made in the return.

A statement that a certain land is in the *khas* possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a return by invoking the aid of section 32 of the Evidence Act or some other adjective law

In a judgment of reversal, it is not enough to say that, in the opinion of the Appellate Court, the evidence is meagre and could not be relied on without giving any reason in support of that view.

Where the Appellate Court simply says that the evidence is meagre and cannot be relied on and does not give any reasons in support of its view, its finding on a question of fact can be challenged in second appeal. **C** CHANDRA MOHAN MAITI *v.* KINARAM MAITI **412**

——— **s. 32 (5),** *scope of—Genealogical table, when admissible—Special means of knowledge of relationship—Hearsay, source of.*

Under section 32 (5) of the Evidence Act to make a genealogical table admissible in evidence it must be shown that the statements contained in the pedigree were made by a person who had special means of knowledge of the relationship to which the statements relate.

Where a witness is stating from hearsay, he must show that his knowledge comes from a person whose statements are admissible under section 32 of the Act.

Plaintiffs sued to recover possession of certain lands alleging that they were entitled to succeed to these lands as heirs of one *M*, who at his death over 30 years ago, was in possession as the sole surviving member of a joint *Mitakshara* family. The defendants were in possession and the Record of Rights was in their favour. The important evidence in the case was a genealogical table produced by a partisan witness *J* at a late stage of the case and alleged to have been copied from an old genealogy which no longer existed :

Held, (1) that before the genealogical table could be admitted in evidence, the plaintiffs must show who was responsible for the old genealogy ;

(2) that inasmuch as *J* was a partisan witness, he was really in the position of a party and the plaintiffs should have explained why the genealogical table was produced at a late stage of the case ;

(3) that under the circumstances the pedigree was not a reliable document and could not be accepted. **Pat** JHOBALI RAI *v.* SAKHI RAI, (1923) Pat. 266; (1923) A. I. R. (Pat.) 585 **335**

Evidence Act—contd.

——— **s. 45**—*Expert opinion, when admissible —Examination in Court necessary.*

Expert evidence must be tested by examination and cross-examination in open Court and does not of itself become evidence in the case.

The report of a Finger Print Expert based upon a comparison of finger impressions is not admissible under section 45 of the Evidence Act unless the finger print with which the comparison is made is admitted or proved beyond doubt to be that of the person alleged and the comparison is made in open Court in the presence of such person and the expert is cross-examined as to the grounds of his opinion about the result of the comparison. **N** PITAM *v.* BABOOSINGH **641**

——— **s. 65**—*Secondary evidence admitted by lower Appellate Court—Appeal, second—Objection, whether can be taken.*

Once secondary evidence of the contents of a document has been admitted by the lower Appellate Court, the High Court, sitting in second appeal, cannot reject it. **O** BASHIRUDDIN KHAN *v.* MAHADEO SINGH, 27 O. C. 26; (1924) A. I. R. (O.) 306 **663**

——— **s. 68**—*Will—Attestation, proof of—Execution—Identification of signatures of witnesses, effect of.*

The mere identification of the signatures of the witnesses to a Will, does not amount to proof of execution of the Will. **L** KAHAN CHAND *v.* JAWANDI, (1923) A. I. R. (L.) 171 **500**

——— **s. 90**—*Mortgage-deed more than 30 years old—Proper custody—Execution, presumption as to—Deed, value of.*

Plaintiffs sued for recovery of possession by way of redemption. The alleged mortgage was executed in 1872 and the deed of mortgage was registered. It was produced by one of the alleged mortgages:

Held, that the document being an old one and having been produced from proper custody, the presumption of law in favour of its proper execution applied and the document was, therefore, sufficient evidence of the mortgage. **A** RAMACHARI *v.* SADHU SARAN TEWARI **405**

——— **s. 91.** *See* TRANSFER OF PROPERTY ACT, ss. 107, 117 **26**

——— **s. 92.** *See* TRANSFER OF PROPERTY ACT, s. 54 **429**

——— **s. 92**—*Deed of gift—Oral evidence to vary terms of deed, admissibility of.*

Where a deed purports to evidence a gift pure and simple, oral evidence cannot be admitted as between the parties to the deed or their representatives for the purpose of showing that the transaction was really what is known under the Mudammadan Law as a *hiba-bil-ewaz*, that is, a gift for consideration. **L** FEROZ-UD-DIN AHMED *v.* SIRDAR SHAH, 6 L. L. J. 221; (1924) A. I. R. (L.) 562 **81**

Evidence Act—contd.

——— **s. 92**—*Promissory-note payable on demand—Oral evidence to prove one executant signed as surety, admissibility of—Agreement to proceed first against principal, whether can be proved.*

In a suit on a promissory-note payable on demand executed by two persons it is open to one of them to lead parol evidence to prove that he executed the pro-note as surety for the other, but parol evidence is not admissible to prove a contemporaneous oral agreement by the plaintiff to recover the amount of the loan in the first instance from the principal. **S** CENTRAL BANK OF INDIA LTD. *v.* NADIRSHAHA METHA, (1924) A. I. R. (S.) 13 **445**

——— **s. 92**—*Sale-deed—Evidence to show transaction was mortgage, whether admissible.*

It is open to a person who is not a party to a document that the transaction embodied in the document though in the form of a sale was intended only to be a mortgage, but it would have to be established by satisfactory evidence. **B** HIRAJI *v.* VISHNU, (1923) A. I. R. (B.) 429 **186**

——— **s. 92,** *scope of—Document not* interpartes *—Oral evidence, whether admissible.*

Section 92 of the Evidence Act only excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives-in-interest.

When in a suit for pre-emption the defendants contended that the transaction was really not one of sale and produced evidence to show the real nature of the document embodying the transaction:

Held, that as the plaintiff was neither a party for the instrument, nor in any sense a representative of any party to the instrument, it was open to the vendee as against the plaintiff, to produce evidence for the purpose of showing that the document was not, in fact, a document of sale. **A** BHULLAN SINGH *v.* KHUSHI RAM, 21 A. L. J. 932; 10 O. & A. L. R. 319; (1924) A. I. R. (A.) 229 **320**

——— **s. 92**—Shipment of cargo in lieu of ballast —Jettison, evidence of. *See* BILL OF LADING **456**

——— **s. 92 (b).** *See* NEGOTIABLE INSTUMENTS ACT, ss. 4, 80 **420**

——— **ss. 102, 114**—*Burden of proof—Party, duty of*—Onus, *when shifted.*

A party is bound to discharge the burden that lies on him by adducing evidence on his own side. But he can also sustain the *onus* cast on him by the facts he may elicit by cross-examination of the opposite party's witnesses.

Plaintiff sued to recover possession of a house on the strength of a sale-deed executed in his favour by the defendant almost twelve years before the date of the suit. The defendant had been in possession of the house throughout without paying any rent and without having executed any rent note. The defendant admitted the execution of the sale-deed but pleaded that the sale was not real or for consideration and was not intended to be acted upon:

Evidence Act—concld.

Held, that, under the circumstances, it was legitimate to infer that the sale was without consideration and the *onus* was on the plaintiff to show that consideration had passed, in spite of the fact that the execution of the sale-deed had been admitted by the defendant. **N** RAJARAM *v.* BAPU, 20 N. L. R. 154 **596**

——— **ss. 112, 114** — *Presumption of marriage, when arises—Absence of evidence—Legitimacy, whether can be presumed.*

The presumption of marriage under section 114 of the Evidence Act arises from the fact either that the persons have lived together for a length of time or that they have been recognised as husband and wife by a certain number of persons. But there is no general presumption in favour of legitimacy without laying the foundation for it under section 112 of the Act.

Where there is no evidence at all, legitimacy of a person cannot be taken as proved. **M** CHOCKALINGAM PILLAI *v.* SAMI BATTAR **623**

——— **s. 116.** *See* LANDLORD AND TENANT **881**

——— **s. 116**—*Tenant in possession*—Kabuliyat *in favour of third party—Estoppel.*

The mere execution of a *kabuliyat* by a person already in possession as tenant of a third party does not operate as an estoppel in favour of the lessor. **A** FAQIR MUHAMMAD *v.* BHAGU KHAN **371**

Executing Court, *powers of—Instalments, whether can be allowed.*

It is not open to an Executing Court to reduce the actual amount payable under the decree or the rate of interest, if such is awarded in the decree. It can direct that the decretal amount be paid by instalments instead of being recovered immediately by sale. Instalments must be calculated at such a rate that they would enable the capital and interest payable under the decree to be paid off in full during the period settled for the payment of instalments. **S** SANGATMAL LILARAM *v.* JAN MOHAMMAD GHULAM KHAN, 16 S. L. R. 260 **553**

———, powers of—Interest, whether can be reduced. *See* CONTRACT ACT, s. 74 **916**

Execution of decree—Adjustment not certified—Suit for declaration that decree has been satisfied, maintainability of. *See* CIVIL PROCEDURE CODE, s. 47 **125**

———, application for—Claim proceedings—Title suit—Limitation. *See* LIMITATION ACT, SCH. I, ARTS. 181, 182 **779**

———, application for—Decree for possession—Dismissal in default—Application for ascertainment of mesne profits, whether barred. *See* CIVIL PROCEDURE CODE, O. XX, R. 12 **635**

——— Certification of payment, after decree has become barred, whether revives limitation. *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 **799**

——— *Compromise decree—Decree, whether may be questioned.*

In proceedings in execution of a compromise decree, it is not open to a party to question the validity of the decree which is binding on the parties to the suit till it is set aside, just as much as if it had been passed after contest. **M** KOTHANDARAMASWAMI NAIDU *v.* PAPPAMMAL **891**

——— Compromise, order passed on—Appeal, whether lies. *See* CIVIL PROCEDURE CODE, ss. 96 (3), 141 **594**

——— Death of decree-holder—Application by executor—Limitation. *See* LIMITATION ACT, ss. 9, 17 **284**

——— Decree against several sets of defendants—Appeal by one set—Dismissal of entire suit—Restoration of decree of Trial Court—Decree, whether barred against defendants who did not appeal. *See* LIMITATION ACT, SCH. I, ART. 182 (2) **794**

——— *Decree based on award—Execution, whether can be refused on ground of non-payment of Court-fees—Court-fees, whether payable.*

Where a decree has been properly drawn up on an award, the Executing Court cannot refuse to execute it on the ground that Court-fees have not been paid on the decree.

Quære:—Whether any Court-fees are payable on a decree based on an award. **B** VADILAL *v.* MANAKLAL, (1923) A. I. R. (B.) 41 **489**

——— Decree, compromise—Matter foreign to suit included. *See* DECREE **685**

——— Decree executable after some time—Limitation, operation of. *See* LIMITATION ACT, SCH. I, ARTS. 181, 182 **605**

——— Dismissal for decree-holder's default—Attachment before judgment, whether ceases. *See* CIVIL PROCEDURE CODE, O. XXI, R. 57, O. XXXVIII, R. 11 **144**

——— Dispossession—Application, dismissal of, for default—Restoration—Inherent power of Court. *See* CIVIL PROCEDURE CODE, s. 151, O. XXI, R. 100 **598**

——— *Execution petition dismissed for default—Second petition—Properties not identical—Continuation of previous petition.*

Where a former petition for execution has been dismissed for default of the decree-holder or where the properties sought to be sold in the former petition were different from those in the subsequent petition for execution the latter is not in continuation of the former. **Pat** RESHMA KUARI *v.* RAMESHWAR OJHA **897**

——— Judgment-debtor adjudicated insolvent—Application by decree-holder to be entered in schedule of creditors, rejection of—Order for adjudication, annulment of—Subsequent application for execution—Decree, whether time-barred—Execution, whether can proceed. *See* LIMITATION ACT, s. 14 **696**

——— Possession delivered behind judgment-debtor's back, whether can be recovered—Notice

Execution of decree—concld.

to judgment-debtor, necessity of. *See* CIVIL PROCEDURE CODE, O. XLI, R. 5 188

——— Sale—Co-sharers and strangers, equal bid by—Sale, confirmation of, in favour of strangers—Co-sharer, whether can sue to recover possession. *See* CIVIL PROCEDURE CODE, O. XXI, R. 88 82

——— *Sale—Judgment-debtor, whether can object to validity of sale in subsequent proceedings—Auction-purchasers, position of.*

A judgment-debtor who might have raised objections to a sale in execution of a decree against him, or who might have appealed against the order for sale, but who refrains from doing so has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable.

So far as the parties to an execution-sale are concerned, a person who is a stranger to the suit is justified in believing that the Court had authority to attach and sell the property. **A** MUKAT SINGH *v.* MISRA PARAS RAM 106

——— *Sale in execution—Property not saleable—Executing Court, jurisdiction of—Sale null and void—Confirmation of sale, effect of.*

The Full Bench has clearly laid down the rule that where the Court has no jurisdiction to sell some property it is immaterial whether a decree for sale of that land has been previously obtained and is in execution.

R and others obtained a decree against *S* and in execution thereof attached a grove situated in Bundelkhand. One *M* objected to the attachment on the strength of a sale-deed from *S*. The objection having been allowed the decree-holders instituted a suit for and obtained a declaration that the sale-deed in favour of *M* was fictitious and that the property belonged to *S* and was liable to attachment and sale in execution of their decree. Subsequently, *S* put in a new set of objections urging that the property was governed by the Bundelkhand Land Alienation Act but the objections were dismissed for default and an application for restoration was also dismissed. After this the grove was sold and purchased by the decree-holders, the sale was later on confirmed. *S* then appealed from the order dismissing this application for restoration, and the case having been remanded on the acceptance of the appeal, the Court allowed the objections and set aside the sale. On appeal by the decree-holder, the Appellate Court also confirmed the finding that the grove was not saleable in execution of the decree but thought that the order of the lower Court directing the setting aside of the sale was "unnecessary." The judgment-debtor applied to the High Court in revision:

Held, (1) that the former decree declaring that the land was liable to be sold in execution did not estop the judgment-debtor from raising the objection that it was not saleable;

(2) that the subsequent confirmation of the sale in favour of the decree-holders did not have any adverse effect on their proceedings;

Execution of decree—concld.

(3) that the grove in question was not at all saleable in execution of the decree and the executing Court had no jurisdiction whatsoever to sell it, and that, therefore, the sale was a mere nullity and did not in any sense pass title to the decree-holders as purchasers. **A** SATDHAR *v.* RAM CHANDRA, 21 A. L. J. 917; 46 A. 153; (1924) A. I. R. (A.) 261 532

——— *Sale of property—Possession, delivery of—Limitation.*

A decree-holder auction-purchaser is not entitled to possession of the property sold more than three years after the confirmation of the sale. **O** MAHMOOD HASAN *v.* THE NATIONAL BANK OF UPPER INDIA 691

——— **sale,** application to set aside—Dismissal for default—Order, effect of—Revision. *See* CIVIL PROCEDURE CODE, O. XXI, RR. 90, 92 351

——— Set-off, whether can be claimed. *See* CIVIL PROCEDURE CODE, O. XXI, R. 19 281

——— Transfer of jurisdiction—Court competent to execute decree—Objection to jurisdiction taken in appeal, whether can be entertained. *See* CIVIL PROCEDURE CODE, ss. 21, 37, 38, 39 806

Fraud—*Agreement to withdraw appeal—Failure to act upon agreement—Prosecution of appeal—*Ex parte *decree—Decree, whether fraudulent—Contract Act (IX of 1872), ss. 17, 18.*

Plaintiff sued to set aside an *ex parte* decree on the ground of fraud alleging that at the time of the execution of an order in his favour, defendant paid a part of the money due and agreed to withdraw an appeal which he had already preferred against the said order in full satisfaction of the claim; but that he proceeded with the appeal and obtained an *ex parte* decree, no notice in respect of the appeal being served on him. The Court found that the defendant did enter into an agreement with the plaintiff to withdraw the appeal, but that there was no fraudulent suppression of summons:

Held, (1) that although it was alleged that there was fraud in connection with the agreement that the defendant entered into with the plaintiff by reason of the fact that the defendant never meant to act up to the stipulation which he was entering into, it would not be a fraud of the description which would be sufficient for setting aside the *ex parte* decree;

(2) that the defendant's fraud in connection with the compromise would not help the plaintiff in getting a decree for setting aside the *ex parte* decree so long as it was not established that, as a matter of fact, there was fraud in the service of notices and other processes of Court by which the defendant obtained that *ex parte* decree;

(3) that since as a matter of fact there was no fraud in the matter of the service of the processes of the Court, the plaintiff was not entitled to the relief sought. **C** PRITHURAM KALITA *v.* MAYARAM SARMA 330

Fraud—concld.

——— by agent—Principal, liability of, to third persons. *See* PRINCIPAL AND AGENT **139**

——— *Pardanashin* Lady, transfer by—Burden of proof. *See* MUHAMMADAN LAW—MINOR **260**

Ghatwali tenures, *incidents of—Hundwa estate, whether under-tenure of Kharakpur—Alienability—Custom, local, incidents and proof of.*

Where a grant is forthcoming to a man and his heirs as *ghatwal* or is to be presumed to have been made though it may have since been lost, personal performance of the *ghatwali* services is not essential so long as the grantee is responsible for them and procures them to be rendered.

Inalienability is one of the incidents of *ghatwali* lands. But evidence may be given to show that in a certain district they are by local custom subject to special incidents in this regard.

To terminate the *ghatwali* character of lands it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and re-grant of the lands on new terms, or, at any rate, of a release of the right to appoint the *ghatwal* and call for the performance of the services.

Where a tenure is created, as distinct from a mere personal employment, the tenure-holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land; it constitues a personal right in so far as the land held on that condition is concerned, and a personal obligation in so far as concerns the grantor, which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage, nor, being in the nature of a title to the lands, can be relegated to desuetude for the mere disadvantage of the *ghatwal*. The truth is that, where rights can once be shown to have been established and continue to be vested in living persons, obsolescence and desuetude are popular expressions rather than solid legal grounds for refusing a continuing recognition to the right as originally established.

The Hundwa estate is not an under-tenure of Kharakpur. It is a *ghatwali* tenure and is inalienable.

Incidents of *ghatwali* tenures discussed. A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent.

It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area.

Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant. **P C** KUMAR SATYA NARAIN SINGH *v.* RAJA SATYA NIRANJAN, (1924) A. I. R. (P. C.) 5; 28 C. W. N. 351; 5 P. L. T. 171; 3 Pat. 183 (P. C.) **825**

Government of India Act, 1915 (5 & 6 Geo. V, Ch. 61), s. 107. *See* LEGAL PRACTITIONERS ACT, ss. 36, 38 **693**

Guardians and Wards Act (VIII of 1890), s. 7—*Guardian, when should be appointed—Welfare of minor.*

The mother of certain minor children applied to be appointed guardian of their property. It appeared that an alienation of a part of the property was necessary to pay off certain debts on which interest was accumulating:

Held, that as it would be impossible for the mother to alienate the property so long as she did not get a certificate of appointment from the Court, this was a fit case for the appointment of a guardian. **L** TAHAN *v.* SHADI, (1923) A. I. R. (L.) 601 **579**

——— **s. 19 (a)**—*Minor girl, married—Guardian, whether can be appointed.*

Under section 19 (*a*) of the Guardians and Wards Act, the Court is prohibited from appointing a guardian of the person of a minor who is married and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person. **L** BULLU MAL *v.* HARDWARI MAL, 6 L. L. J. 219; (1924) A. I. R. (L.) 570 **451**

——— **ss. 29, 47**—*Order sanctioning sale of minor's property—Review, power of—Appeal, whether lies.*

An appeal lies under section 47 of the Guardians and Wards Act against an order of the District Judge reviewing his own previous order sanctioning a sale of the minor's property.

It is open to a District Judge in the interests of a minor, to review his own order sanctioning a sale of the minor's property. **N** SONBA *v.* NARAYAN **471**

——— **s. 30**—*Mortgage by guardian, where voidable by minors—Guardian* ad litem *with adverse interest—Minor, whether properly represented.*

A mortgage executed by the guardians of minors in contravention of the Guardians and Wards Act is voidable at the option of the minors.

Where a guardian *ad litem* has an interest adverse to the minors they are to be considered as not having been properly represented in the suit and the decree is not binding on them. **A** CHIRANJI LAL *v.* SYED ILIAS ALI, 22 A. L. J. 193; 10 O. & A. L. R. 678; 46 A. 620 **556**

——— **ss. 34, 47**—*Order calling upon guardian to pay into Court money due on account—Appeal, whether competent—Revision.*

No appeal lies under section 47 of the Guardians and Wards Act against an order passed under section 34; but the order is open to examination by the High Court on the revision side. **L** RAM JAS *v.* CHANI, 4 L. L. J. 272; (1923) A. I. R. (L.) 89 **178**

Hindu Law—Adoption—*Widow re-married, whether can give son in adoption.*

The Hindu Law does not provide for the re-marriage of a Hindu widow; on re-marriage, therefore, a widow's connection with the family of her husband ceases and she has no power, after re-marriage, to give in adoption her son by her first husband, unless the latter had expressly authorised her to do so. **N** SHEOKABAI *v.* GANPAT, 20 N. L. R. 57 **142**

——— **Alienation** *by father — After-born son, right of—Fresh cause of action—Limitation Act (IX of 1908), Sch. I, Art. 126—Limitation, starting point of.*

Under the Hindu Law a son born after an alienation does not acquire a fresh cause of action to contest the alienation by birth but he is entitled to take advantage of an existing cause of action if he is born before the title of the transferee becomes absolute.

Under Article 126 of the Limitation Act the fact which starts limitation running is the ouster of the Hindu father and son from the actual enjoyment of the property transferred. Therefore, in the case of a simple mortgage by the father, there is no necessity for the son to take any action. He can wait till the mortgagee seeks to enforce the mortgage and then plead his own right in answer to it. **O** OUDH BEHARI LAL *v.* DAL SINGH, 10 O. L. J. 401; (1924) A. I. R. (O.) 205 **666**

——— *Gift by widow—Consent of nearest reversioners, effect of.*

A gift by a Hindu widow with the consent of the next reversioner is valid. **N** KHUSHI BAI *v.* MANRAKHAN, (1923) A. I. R. (N.) 265 **422**

——— *Widow, gift by—Consent of reversioners, effect of—Surrender.*

Alienation by a widow with the *consent* of reversioners can only be looked on as affording evidence that the alienation was under circumstances which rendered it lawful and valid; or, in other words, the consent of the reversioners affords presumptive evidence that the alienation by the widow was for legal necessity. This presumption cannot arise in the case of a gift by the widow in favour of a stranger and it cannot possibly be held to be evidence of alienation for value for purposes of necessity.

The surrender by a widow of her widow's estate can only be made in favour of the next reversioner. If the widow makes a gift of her husband's property in favour of a stranger and if the reversioner has consented to the gift being made such consent by the reversioner cannot be held to have conferred any title on the stranger beyond the life-interest of the widow. **C** JNANENDRA NATH ROY CHAUDHURY *v.* RAM RANJAN BANERJI, **588**

——— **Co-widows**, *rights of—Surrender of estate by one, whether valid.*

Under the Hindu Law, one co-widow, without the conjunction of the other co-widow, cannot surrender the estate of their husband at all

Hindu Law—contd.

because both the widows have equal rights in their husband's estate and without both joining there can be no surrender of that estate, as surrender requires that the whole of the estate should be dealt with in the matter of surrender. **M** BODU ANNA NAIDU *v.* VARADA JAGU NAIDU **646**

——— **Custom**—*Alienation by female—Reversioner, remote, whether can challenge.*

Both under Hindu Law and under the Customary Law of the Punjab, a remote reversioner may maintain a suit to challenge an alienation made by a female holding a qualified estate, where the immediate reversioner is a female and is herself only the holder of a life-estate.

The object of the rule is to permit the nearest male reversioner who has not colluded or otherwise disqualified himself from maintaining the suit to protect the estate.

A reversioner so remote that his chances of succession are speculative is not allowed to maintain the suit, but this does not apply where the only intervening reversioners are females who may or may not produce heirs to the estate. **L** JAWAHRA *v.* DATA RAM **497**

——— **Daughter,** *estate taken by—Alienation—Necessity—Alienee, position of—Enquiry.*

In the Madras Presidency, a Hindu daughter as heiress of her father, takes a restricted interest similar to that taken by a widow with a similar power of disposal. This power is conditional; she can dispose of the inheritance for legal necessity, but it lies on the alienee or the person claiming under him to prove the existence of this necessity, and this is so even though the absence of necessity be not pleaded by the reversioner.

Even though there may not be legal necessity in fact, the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

Where the inheritance is not transferred so as to bind the reversioners, the reversioners on the death of the alienor can treat it as a nullity without the intervention of any Court. **P C** OBALA KONDAMA NAICKER AYYAN *v.* KANDASAMY GOUNDAR, 28 C. W. N. 1050; 22 A. L. J. 16; 19 L. W. 107; (1924) M. W. N. 86; 46 M. L. J. 172; (1924) A. I. R. (P. C.) 56; 26 Bom. L. R. 198; 10 O. & A. L. R. 176; 39 C. L. J. 194; 47 M. 181 **961**

——— **Female,** *alienation by—Consent of next reversioner—Alienation in favour of next reversioner—Legal necessity.*

The consent of the nearest reversioner to an alienation by a Hindu female does not constitute an absolute proof of the validity of the transaction, but operates by raising a presumption that the alienation was made for legal necessity.

Hindu Law—contd.

When, however, the alienation is in favour of a person having a direct interest in obtaining it, *i.e.*, of the presumptive reversioner himself or his son, the presumption of the transaction being a proper one disappears, and it is necessary to adduce other evidence to establish the legal necessity. A TODAR MAL *v.* KISHAN LAL **1007**

——— **Joint family**—*Alienation by all adult members—Necessity—Presumption—Sons, failure of, to contest alienation, effect of.*

An alienation of joint family property by the representatives of all the branches of the family, and by all the adult male members of the family living at the time, raises a presumption of legal necessity.

The failure of the sons of a Hindu who has alienated joint family property to contest the validity of the alienation, supports an inference in favour of the validity of the transaction.

A right to challenge an alienation of family property is not co-parcenary property in which a son acquires an interest by birth.

Every co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth. A DHANRAJ RAI *v.* RAM NARESH RAI **1019**

——— *Alienation by father—Legal necessity—Burden of proof—Pre-emptor of property, position of—Antecedent debt, what is—Separation—Mutations in favour of individual members—Presumption.*

A pre-emptor of a sale of Hindu joint family property by the father does not stand in a better position against the sons than the vendee so far as the question of legal necessity is concerned except that being in a less favourable situation than the vendee to prove proper inquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of inquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons unless the sons were parties to the pre-emption decree.

An antecedent debt to be binding on Hindu sons must not only be antecedent in time to the transfer questioned by the sons but also dissociated in fact therefrom.

Even where property is held by a joint Hindu family mutations are often made in favour of andividual members of the family. Unsupported by any other circumstance of division, they do not raise a presumption of separation. O AWADH RAM SINGH *v.* MAHBUB KHAN, 10 O. L. J. 525; (1924) A. I. R. (O.) 255 **725**

——— *Alienation by father—Necessity—Antecedent debt, what is—Pious obligation of sons, whether can validate alienation.*

A voluntary alienation of joint family property by a Hindu father can be supported on two grounds only, *viz.*, (1) necessity, and (2) antecedent debt.

Hindu Law—contd.

To satisfy the validity of an alienation of joint family property on the basis of antecedent debt, the alienation must be by the father for his debts antecedent in time and in fact to the alienation supporting it.

The mere circumstance of the pious obligation of a Hindu son to pay his father's debts would not validate a mortgage of family property by the father, which is invalid for want of legal necessity or of the necessity for the payment of antecedent debts. O GAJADHAR BAKHSH SINGH *v.* BAIJNATH, 10 O. & A. L. R. 264; 11 O. L. J. 264; 27 O. C. 133 **104**

——— **Joint family**—*Alienation by father—Necessity—Burden of proof.*

When a purchaser of joint family property from a Hindu father proves that the sale was effected for a purpose which would constitute valid necessity for the transfer, the burden shifts on those who repudiate the transaction to prove that such necessity could have been satisfied by ways other than the sale of joint family property. O BASHIRUDDIN KHAN *v.* MAHADEO SINGH, 27 O. C. 26; (1924) A. I. R. (O.) 306 **663**

——— *Alienation by manager—Antecedent debt—Consideration for usufructory mortgage—Necessity—Rate of interest and other terms—Suit by one member to challenge alienation—Alienation, entire, whether can be set aside.*

The consideration for a purely usufructuary mortgage constitutes an antecedent debt which can support a subsequent alienation.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at the rate and upon the terms mentioned in the deed, and if it is not shown that there was necessity to borrow at that rate and on those terms, that rate and those terms cannot stand.

Under the Mitakshara Law a single member of a joint Hindu family, whose rights have been infringed by a sale of the joint family property, can have the entire sale set aside. O MUNNU LAL *v.* BISHAMBHAR NATH, 11 O. L. J. 415 **35**

——— *Alienation by manager—Necessity, absence of—Co-parcener, whether entitled to recover whole property.*

Where a sale of joint family property by the manager of the family is found to have been without family necessity, a co-parcener challenging the sale is entitled to recover possession of the whole of the property sold and not merely of his share in the property. L CHURANJI LAL *v.* KARTAR SINGH **171**

——— *Alienation—Partition—Right of afterborn son to challenge alienation—Old transaction—Adult members, consent of—Necessity—Presumption—Limitation Act (IX of 1908), ss.*

6, 7—Minor son, right of, to challenge alienation by father—Majority of other sons, effect of.

Where there is a partition of joint family property, the only property in which an afterborn son of a separated member acquires an interest in his father's property as it stands on the date of his birth, and he has no right to challenge an alienation of joint family property effected before partition by the co-parceners, so far as the shares of members other than his father are concerned.

The right of a minor Hindu son to challenge an alienation of family property effected by his father is not affected by the fact that his elder brother who presumably became manager of the family and capable of giving a discharge on attaining majority, had attained majority more than three years before suit and a suit by him to challenge the alienation would be barred by time.

In the case of old transactions full and detailed evidence of necessity is not to be expected and it is permissible to fill in the details by reasonable presumptions.

The fact that all the adult members of the family accept responsibility for an alienation is sufficient to raise a presumption that the transaction is valid. **A** ISHDAK TEWARI *v.* TAMESHAR **296**

——— **Joint family**—*Alienation, subsequently born co-parcener, whether can challenge—Separated member, alienation by—Necessity, question of, whether can arise.*

A separated Hindu who has no son or other person joint with him is the absolute owner of his property and is entitled to mortgage it for any reason he pleases.

A co-parcener born subsequently to the date of an alienation of family property is entitled to challenge the alienation on the ground of want of necessity, provided there were other co-parceners in existence at the time of the alienation who were competent to challenge it. **A** CHAUBE BENAIK RAO *v.* PUTTAIN SINGH **69**

——— *Brothers and sons—Mortgage by brothers—Mortgage by managing members—Presumption—Suit on mortgage—Sons, whether necessary parties.*

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members.

In a suit on a mortgage executed by certain brothers, forming along with their sons a joint Hindu family, an objection was taken that the sons also should have been joined as parties. On the day, however, the latter were added as parties the suit against them stood barred by limitation. The Court accordingly dismissed the entire suit. There was no allegation in the plaint that the brothers were being sued as managers: On appeal:

Held, that it should be taken that the brothers were being sued as managers and that the sons were sufficiently represented by their fathers and the suit ought not to have been dismissed. **A** CHETAN SINGH *v.* SARTAJ SINGH, 22 A. L. J. 702 **1001**

——— **Joint family**—*Debt incurred by father—Decree—Execution of decree—Family property, whether liable to be sold.*

Where the managing member of a joint Hindu family is the father, and the other members are his sons, he may, by incurring a debt, so long as it is not for an immoral purpose, lay the joint family property open to be taken in execution proceedings upon a decree for payment of that debt. **O** GOKARAN SINGH *v.* JOKHU SINGH, 11 O. L. J. 405 **21**

——— *Father's debt—Sons, liability of, when enforceable—Antecedent debt, when can be recovered.*

The doctrine of antecedent debt resting as it does on the theory of pious obligation, is only intended for the protection of the parties who may have acquired rights in good faith in the family property and it is not open to a creditor whose mortgage has been declared to be invalid to recover the debt represented by that mortgage while the mortgagor is alive from the share of his sons who have been exempted from liability out of the very property the mortgage of which has been declared to be unenforceable. **A** KISHEN SINGH *v.* CHHAJJU SINGH, 45 A. 90; (1923) A. I. R. (A.) 206 **238**

——— *Manager, powers of—Mortgage by Manager of family property for business purposes—Other members, whether liable.*

The Manager of a Hindu family has power to contract debts for the purposes of a family business which need not necessarily be ancestral.

When, therefore, the managing member in carrying on the family business obtains an advance necessary for the purpose of the business by pledging the joint family property, the mortgage is binding on all the members of the family. **A** MAHABIR PRASAD *v.* AMLA PRASAD RAI, 22 A. L. J. 295; 46 A. 364; (1924) A. I. R. (A.) 379 **517**

——— *Manager, rights of—Exclusive possession.*

The manager of a joint Hindu family cannot claim exclusive possession of the joint family estate as against the other members of the joint family unless they are his sons. **N** KHEDU SINGH *v.* BHAGWAN SINGH **400**

——— *Mortgage by all members—Necessity—Mortgagee, whether bound to make inquiries—Later born sons, position of.*

A simple mortgage was executed by four persons *K*, *G*, *M* and *S* members of a joint family,

Hindu Law—contd.

The mortgagee sued to enforce the mortgage impleading the subsequently born sons of *G* and *M*. The consideration for the mortgage consisted of money due on a previous deed executed by *K G* and *M* and *B* since deceased: *S* was *B's* widow:

Held, (1) that inasmuch as the four executants of the mortgage-deed even at the date of the mortgage sole owners of the property, the mortgagee was under no obligation to make enquiries as to the purpose for which the money was wanted;

(2) that the sons of *G* and *M* took from the moment of their birth an interest in the whole of the joint family property as it stood on the date of their birth and could not question alienations made prior to their birth;

(3) that for the same reason, they could not dispute the consideration for the mortgage. **A** PARTAP SINGH *v.* BOHRA NATHU RAM, (1923) A. I. R. (A.) 197; 45 A. 49 **234**

——— **Joint family**—*Mortgage by father—Mortgage-decree—Sons, whether can challenge decree—Immorality or illegality, proof of.*

A debt incurred by a Hindu father, secured by a mortgage containing a personal covenant to pay constitutes an antecedent debt equally with a debt secured only by a personal bond.

So long as a creditor is seeking to enforce a mortgage of family property executed by a Hindu father he is bound to prove as against the sons of the mortgagor that it was executed for valid necessity. But when once the mortgage has merged in a decree, it no longer subsists and the judgment-debt which the creditor is seeking to enforce is on the same footing as any other debt incurred by the father. When a decree for realisation of mortgage-money by sale of the mortgaged property has been obtained against a Hindu father, the sons of the mortgagor cannot get that decree set aside without alleging that the debt was of an illegal or immoral character. **O** GAURI SHANKAR *v.* JANG BAHADUR SINGH, 10 O. & A. L. R. 49; 11 O. L. J. 246; 27 O. C. 124 **1008**

——— *Mortgage decree against father—Legal necessity—Sons, whether bound.*

A mortgage-decree obtained against a Hindu father governed by the Mitakshara Law is binding on the sons, if the mortgage was executed for legal necessity, whether the sons are formally impleaded in the suit or not. **A** CHANDRADIP TEWARI *v.* JADUNANDAN SINGH **1041**

——— *Partition—Agreement to take by survivorship, validity of—Rule prescribing succession to last survivor, whether enforceable.*

It is perfectly open to members of a Hindu joint family when partitioning certain property among themselves to come to an agreement that on the death of each one of them his share should pass to the others until the entire inheritance should devolve on the last survivor. But it is not competent to claim to lay down a rule of inheritance for the property in the hands of the last survivor, in derogation of the ordinary rules of Hindu Law. **A** BAGESHAR RAI *v.* MAHADEI, 22 A. L. J. 419; (1924) A. I. R. (A.) 461; 46 A. 525 **514**

——— **Joint family**—*Partition—Father's debts—Son, liability of—Second appeal—Separation of Hindu joint family—Finding of fact or law.*

A Hindu is liable under the Hindu Law for his father's debts only to the extent of the share in the co-parcenary property that comes to him at a partition made after the debt has been incurred and to the extent of the property inherited from his father at his death whether the debt was incurred before or after partition.

A finding about the disruption of a joint Hindu family is not a finding of fact but an inference of the legal effect of the facts found and is not final and can be set aside in Second Appeal. **N** BED PRASAD *v.* NAKCHHED PRASAD **884**

——— *Partition—Joint and self-acquired property—Burden of proof—Manager, whether bound to keep accounts.*

Where there is a nucleus of joint family property yielding an income, the burden of proving that items of property claimed as self-acquired were not purchased out of joint funds lies on the person asserting it. Property purchased out of the savings of the income of joint family property or by raising loans on the security of joint family property would also be joint.

The manager of a joint Hindu family is not obliged to keep accounts while the family remains joint. When a partition is asked for, it takes place of the property as it exists in the hands of the manager. Although there is a severance of interest from the date of the suit, the property remains joint till it is actually divided. It is considered as one entity until the moment comes for division and each party gets his actual share. Any expenses which should properly be debited to the joint family purse are taken out of the joint family property and cannot be debited to any particular co-parcener. **N** JANARDHAN *v.* WASUDEO **19**

——— Partition, suit for—Court-fee payable. *See* COURT FEES ACT, s. 7 **913**

——— *Personal decree against father or grandfather—Joint family property in hands of sons and grandsons, whether liable—Pious obligation.*

The whole of the Hindu joint family property in possession of the son and grandsons of the deceased judgment-debtor is liable to be attached and sold in execution of a personal decree passed against the father or the grandfather. **O** HARIHAR PRASAD *v.* MAHABIR PANDEY, 10 O. & A. L. R. 893 **1055**

——— **Joint family** — *Religious endowment—Dedication of small plot, validity of.*

A dedication of a small portion of joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift 'ordained for pious purposes.' **N** VITHALDAS MARWARI *v.* GOMA, 20 N. L. R. 60 **173**

——— *Time-barred debt of father—Son, liability of.*

A Hindu son is under no obligation to pay a time-barred debt of his father and his estate is not liable to be sold for the payment of such a debt. **N** CHITNAVIS *v.* NATHU SAO, 20 N. L. R. 106; 7 N. L. J. 170 **1002**

——— **Marriage**—*Consent of guardian, absence of.*

A Hindu marriage is not invalidated by want of the guardian's consent. **L** BULLU MAL *v.* HARDWARI MAL, 6 L. L. J. 219; (1924) A. I. R. (L.) 570 **451**

——— **Minor**—*Guardian—Mortgage of minor's property by guardian—Necessity—Benefit to minor—Inquiry by mortgagee—Minor, whether can approbate part of transaction and repudiate rest.*

A minor cannot be allowed to approbate a transaction in so far as it has given an estate to him and to repudiate the liability that arises from the transaction.

In dealing with the guardian of a minor, a person who lends money to the minor on the security of his property, is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting in the particular instance for the benefit of the minor. But he is under no duty to enquire into the necessity for an altogether different transaction which has made the proposed transaction inevitable. Provided the necessity for the loan has not arisen from any misconduct to which the lender is or has been a party, he is not affected by the precedent mismanagement of the estate by the guardian.

What has to be considered in such a case is the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance. **Pat** KANHAI LAL KHEMKA *v.* THAKUR PRASAD SINGH, (1923) A. I. R. (Pat.) 268; 5 P. L. T. 594 **9**

——— *Guardian, power of, to bind minor's estate—Money borrowed to pay land revenue—Estate, whether liable.*

A guardian cannot bind his ward's estate except by a document purporting to bind it.

On a contract entered into on behalf of a minor by his guardian under which the guardian borrows

money but no charge is created on the minor's estate, no decree can be passed against the minor on his attaining majority or against his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the gurdian under the personal law to which he is subject.

The estate of a minor is liable for money borrowed by the guardian for payment of land revenue. **N** JAGESHWAR RAO *v.* GUJAB RAO **22**

——— **Mitakshara**—*Civil wrong by father—Decree for damages—Benefit to family property—Sons, whether bound—Immoral or illegal debt.*

Where a Hindu father governed by the Mitakshara Law cuts trees which do not belong to him or demolishes another's house and a decree for money is passed against him, the sons are bound by it, if the family has benefited by the action of the father.

A Hindu son is not bound to do anything to relieve his father from the consequence of his own vicious indulgences, but he is bound to do that which his father himself would do were it possible, namely, to restore to those lawfully entitled money he had unlawfully retained.

There is a distinction between a debt which a Hindu father incurs as the result of an offence under the Criminal Law and a debt for which he is made liable on the ground of the breach of a civil duty. In the former case debt incurred would be immoral and illegal but not so in the latter case. **A** CHANDRIKA RAM TIWARI *v.* NARAIN PRASAD RAI, 22 A. L. J. 468; 46 A. 617 **1036**

——— *Family residing in Bengal—System applicable—What must be proved.*

In order to show that a family residing in Bengal is governed by the Mitakshara School of Hindu Law, it is enough to prove their immigration from the North West and the continued practice of Mitakshara customs. It is not necessary to prove the further fact that immigration took place subsequent to the establishment of the *Dayabhaga* system of law. **C** RAMESH CHANDRA SINHA *v.* MOHAMMED ELAHI BUKSH, 50 C. 898; (1924) A. I. R. (C.) 383 **309**

——— **Stridhan** — *Inheritance by females—Estate taken.*

Under the Hindu Law a female inheriting the *stridhan* property of a female takes in it only a limited estate, which on her death goes not to her own heir, but to the *stridhan* heir of the original female owner. **A** LAKSHMI NARAIN MISR *v.* SUMARNI KUAR, 46 A. 439 **389**

——— **Succession**—*Migration—Law applicable to migrated family—Daughters, whether take absolute estate*—Mitakshara *and* Mayukha—*Nagar Brahmans of Vadnagar, settled in U. P.—Commentaries, value of.*

Hindu Law—contd.

The law of succession is, in any given case, to be determined according to the personal law of the individual whose succession is in question. *Prima facie*, any person governed by the Hindu Law is held to be subject to the particular doctrines of the Hindu Law recognized in the Province in which he is residing. That law becomes the personal law and part of the status of every family residing in it. Consequently where any such family migrates to another province governed by another law, it carries its own law with it.

Where a family migrates from one territory to another and preserves its ancient ceremonies and practices the presumption is that it also preserves its personal law of succession, unless there is proof of the renunciation of the original law for that of the place migrated to.

The Vyavahar Mayukha is considered to be a work of paramount authority in Gujerat, and where the *Mitakshara* and the *Mayukha* do not harmonise, the latter takes precedence of the former.

Under the *Vyavahar Mayukha* a daughter takes an absolute estate in property to which she succeeds as her father's heir.

Among Vadnagar Nagar Brahmans settled at Aligarh, daughters take an absolute estate in their father's property, and on the death of one of them, her share does not go by survivorship but devolves on her own issue.

Commentaries on the Hindu Law do not enact the law, they merely explain it, and are evidence of the congeries of customs which form the law. **A** JAWAHIR LAL *v.* JARAU LAL, 22 A. L. J. 49; 46 A. 192; (1924) A. I. R. (A.) 350 **861**

——— **Succession** – *Re-marriage, whether deprives mother of right of succession to son.*

Notwithstanding re-marriage, a Hindu mother remains competent to succeed as heir to the estate of her son by her first marriage, where succession to such estate opens after her second marriage. **N** HUSSAINBHAI BHORA *v.* BANSILAL **48**

——— **Temple property**—*Lease granted by trustee, validity of—Test—Building lease—Option for renewal.*

Where a lease of temple property granted by the trustee of the temple is challenged the question to be determined is whether it is a lease that a prudent man would grant under the circumstances in the interests of himself if it were his own property or in the interests of others if he were doing his best for them.

A lease of agricultural or undeveloped lands belonging to a temple granted by the trustee of the temple for building purposes for a period of twenty-one years with an option of renewal at an enhanced rate of rent for a further period of twenty-one years is perfectly valid. **M** KANNIAPPA CHETTIAR *v.* RAMACHANDRAIYAR, 46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 386 **92**

Hindu Law– contd.

——— **Widow,** *death of—Suit for possession by reversioner—Property of husband—Accretions—Burden of proof.*

In a suit by a reversioner to claim property in the possession of a Hindu widow, the onus lies on the plaintiff to show that the property claimed vested in the husband and if such property is claimed on the ground that it was an addition to the husband's estate, made with the help of savings from the income of such estate, to show that the widow did intend to make the acquisitions part and parcel of the parent estate. **N** JAIKRISHNA *v.* SAVITRI, 7 N. L. J. 187 **627**

——— *Ex-proprietary tenancy.*

A Hindu widow inheriting her husband's ex-proprietary tenancy has not the rights of a tenant but possesses merely a life-interest and cannot relinquish a part of the tenancy in favour of the landlord. Any such relinquishment, if made, can be set aside on her death by the reversioners. **O** SHEONANDAN SINGH *v.* JAI RAM SINGH, 10 O. & A. L. R. 445 **1022**

——— *Religious acts—Alienation, power of—Accretions—Specific Relief Act (I of 1877), s. 42—Will by life-tenant—Declaratory suit by reversioner.*

Hindu Law recognizes two sets of religious acts. One, those which are considered essential for the salvation of the soul of the deceased, and the other, acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. For an act of the first class a Hindu female can sell the whole estate if its income is not sufficient, and in the second case the widow can alienate a small portion of the property for the pious or charitable purposes she may have in view.

The rule of Hindu Law regarding accretions is that any accretion made by a widow partakes of the nature of the estate to which it is added and the question whether any property is an accretion to the estate is one of intention on the part of the widow to augment the estate by treating it as part thereof. In the absence of anything appearing to the contrary, any purchase made of the income of the estate may be presumed to be an accretion thereto.

The mere execution of a Will by a Hindu widow with a life-interest in her deceased husband's estate bequeathing that estate elsewere than to the next reversionary heir does not entitle that heir to obtain in the widow's life-time a judicial declaration that the Will is invalid against his reversionary rights. **L** TEHL KAUR *v.* AMAR NATH, 17 P. W. R. 1923 **670**

——— *Surrender—Transfer in favour of daughter on occasion of marriage, effect of.*

Where a Hindu widow divests herself entirely of her estate and transfers the entire estate to the next reversioner, the effect of which is an entire effacement of herself, it amounts to a vesting of the estate in the reversioner immediately upon

the making of the transfer, whether it is called a surrender or an acceleration. It is not the form in which the transfer is made that is to be looked at, but the effect which it would have on the estate itself. The mere fact that the transfer is made in favour of the daughter who is the next reversioner on the occasion of her marriage and is described as her dowry will make no difference to the nature and effect of the transfer. **A** SARTAJI *v.* RAMJAS, 21 A. L. J. 796; 9 O. & A. L. R. 1013; (1924) A. I. R. (A.) 166; 46 A. 59 **25**

——— **Widow's estate**—*Bequest by widow—Legatee, position of—Title as against trespasser.*

A bequest of her husband's property by a Hindu widow confers no title on the legatee to eject even a trespasser. **M** SRINIVASACHARIAR *v.* RAGHAVACHARIAR, 46 M. L. J. 560; 19 L. W. 621; (1924) M. W. N. 628; (1924) A. I. R. (M.) 676 **1011**

——— ——— ——— *Income, power over.*

A Hindu widow has absolute control over the income of the estate of her deceased husband.

N, a Hindu widow, employed the plaintiff to look after an engine which she had purchased for the construction of a *ghat*. After the completion of the *ghat* the engine was utilised for driving an oil mill. On the death of the widow the plaintiff sued her reversioners to recover his wages:

Held, (1) that the widow was perfectly justified in buying the engine out of the income and employing a competent man to look after it;

(2) that there was nothing wrong in her applying the engine to another useful purpose after the completion of the *ghat*;

(3) that the plaintiff was, therefore, entitled to recover his wages from the reversioners. **N** THAKUR KALLUSINGH *v.* BHURAJI **633**

——— ——— ——— *Relinquishment in favour of one out of several reversioners, whether valid.*

A relinquishment by a widow in favour of one out of several reversioners during her life-time is not valid. **A** PRAG NARAIN *v.* MATHURA PRASAD, 22 A. L. J. 472 **575**

——— **Widow, remarried**—*Son's property, succession to—Hindu Widow's Re-marriage Act (XV of 1856).*

Under the Hindu Law a widow after her remarriage can inherit to her son by her first husband, whether she is governed by the Hindu Widow's Remarriage Act or not. **C** JAMINI KUMAR SEAL *v.* THAKUR DHAN BAISHNAB, 39 C. L. J. 88 **1048**

——— **Will**, *construction of—Bequest by Hindu father to wife and daughters—Absolute estate.*

A Hindu testator made a bequest of his property in favour of four persons, his widow, his two daughters and his nephew in four equal shares, with a provision that in case any of the daughters, had a son born he should get the property of the two daughters, in case of there being no son the property to go to the nehpew and his heirs;

Held, that the Will gave an absolute estate to all the legatees. **A** LAKSHMI NARAIN MISR *v.* SUMARNI KUAR, 46 A. 439 **389**

——— **Will**, *construction of—Gift to daughters subject to life-estate in favour of widow—Death of daughter before widow—Devolution of estate.*

A Hindu testator directed in his Will that subject to a life-estate in favour of his widow his property would go to his two daughters in equal half shares:

Held, that the gift by the testator in favour of his daughters was in definite shares, so that if one of them happened to die before the widow, her heirs would step into her shoes and the entire estate would not devolve on the other daughter of the testator. **L** TASADDUQ HUSSAIN *v.* RAM KISHEN **86**

Hindu Widow's Re-marriage Act (XV of 1856)

Re-married widow—Son's property, succession to. *See* HINDU LAW—WIDOW **1048**

Income Tax Act (VII of 1918), s. 9 (2), cl. 7—*Machinery in state of repair, sale of—Loss—Assessee, whether entitled to reduction.*

Under section 9, sub-section (2), clause *(vii)* of the Income Tax Act an assessee is not entitled to a deduction from the annual profits, of loss incurred by him by sale of certain machinery in his business where the machinery is not sold or discarded as obsolete. The words "as obsolete" in clause 1 *(vii)* of the section govern not only the immediately preceding word "discarded" but also the earlier word "sold". **M** SECRETARY TO THE BOARD OF REVENUE, MADRAS *v.* RAMANATHAN CHETTIAR, 19 L. W. 34; 46 M. L. J. 42; (1924) M. W. N. 142; (1924) A. I. R. (M.) 455 **608**

——— **s. 19**. *See* INCOME TAX ACT OF 1922, S 68 PROVISO 2 AS AMENDED BY INCOME TAX ACT, 1923 **798**

Income Tax Act (XI of 1922), s. 22 (2)—*Statement of assessee about income—Burden of proof—Assessment based on general principles, validity of.*

When an assessee states that he has no income from a certain source and officers of the Income Tax Department disbelieve him, it is for them to prove that he has such income and not for him to prove the contrary. Any assessment based on the inability of the assessee to prove his negative statement and on general assumptions only is bad and should be cancelled. **C** BISHNU PRIYA CHOWDHURANI, *In re*, 50 C. 907; (1924) A. I. R. (C.) 337 **305**

——— **s. 68, proviso 2 as amended by Income Tax Act, 1923**—*Assessment to Super-tax for 1921-22, whether can be made in 1922-23—Real income liable to Super-tax—Income-Tax Act (VII of 1918), s. 19, scope of.*

Under the Second Proviso to section 68 of the Income-Tax Act, 1922, as amended by section 3 of

Income Tax Act—concld.

the Income-Tax Amendment Act 1923; assessments to super-tax for 1921-22 on the income of 1921-22 can be made in 1922-23 under the heading of adjustment in cases in which, during provisional assessment proceedings, it was found that the assessee's income was below the taxable amount for purposes of super-tax, but the real income is ultimately found in proceedings under section 68 of Income Tax Act of 1922 as amended by section 3 of the Act of 1923 to be large enough to be assessed to super-tax.

Under section 19 of Act VII of 1918, if the total income actually received has been ascertained by the Collector, the Collector is to compute the income-tax and super-tax which would have been payable if income-tax and super-tax had been levied in the previous year with reference to the true amount of the income so ascertained; and then the difference between the sums so computed and the aggregate of the sums already paid by the assessee for the previous year ought to be paid by or refunded to the asseessees as the case may be. The sum that should have been paid for super-tax in the preceding year, if the right figure had been before the Collector, is computed and from that is deducted any sum that has already been paid for super-tax. If no sum has been paid for super-tax, then there is no deduction to be made. **M** COMMISSIONER OF INCOME TAX, MADRAS *v.* CHIDAMBARAM CHETTIAR, (1924) M. W. N. 35; 19 L. W. 129; (1924) A. I. R. (M.) 485 **798**

Indian Soldiers' Litigation Act (XII of 1915), s. 4—*Indian soldier represented by Pleader—Default by Pleader—Notice to prescribed authority, whether necessary.*

Where an Indian soldier is represented in a proceeding by a person duly authorised to appear, plead and act on his behalf, the Court is under no obligation to give notice in the prescribed manner to the prescribed authority under section 4 of the Indian Soldiers' Litigation Act, merely because the Pleader refuses to produce evidence in the case. **A** FAKIRULLAH KHAN *v.* BALDEO SAHAI, (1923) A. I. R. (A.) 185 **225**

Instalment bond—Default in payment of instalment—Cause of action—Limitation. *See* LIMITATION ACT, SCH. I, ART. 75 **848**

——— *Provision as to default—Money, when becomes due—Acceptance of overdue instalment—Waiver.*

When money is payable by instalments with a proviso that the whole of the money shall become due on default of payment of one of the instalments, the general rule is, that the money becomes due when the default is made in any of the instalments; but if the right to enforce payment of the whole sum due upon default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment, on the one hand, and receipt, on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred.

Instalment bond—concld.

Payment and acceptance of part of an overdue instalment does not amount to waiver, nor can the payment and acceptance of interest alone constitute waiver.

There is a distinction, however, between a waiver by payment and receipt of an overdue instalment and mere omission to sue or takes steps on the default, and although there can be a waiver by the payment and receipt of the overdue instalment, there can be none by the mere fact of doing nothing. **C** SURENDRA NATH *v.* RAJA RESHEE CASE LAW, 27 C. W. N. 893; (1924) A. I. R. (C.) 139 **271**

Interest, cessation of—Deposit in Court. *See* TRANSFER OF PROPERTY ACT, SS. 83, 84 **40**

———, covenant for payment of—Burden of proof. *See* BOND, EXECUTION OF **55**

——— *Covenanted rate—Executant—Mortgagor whether entitled to relief*—Post diem *interest—Reasonable rate.*

In a suit for possession by redemption it appeared that the property had been mortgaged with possession for Rs. 1,800 it being stipulated that income from the land should count as interest on Rs. 800 while Rs. 1,800 should carry interest at the rate of Rs. 250 per annum, and that on the expiry of six years if the money was not paid with interest, the mortgage should be converted into a sale. Plaintiffs were purchasers of the equity of redemption for the relief of a third:

Held, (1) that interest at the stipulated rate was payable on one-third of Rs. 1,000 for the original period of six years.

(2) that there was nothing to show that there was any stipulation express or implied in the mortgage deed, for payment of *post diem* interest and, therefore such interest could not declared under the covenant;

(3) that *post diem* interest could be allowed by way of damages, and that it should be allowed at the rate of 18 per cent. per annum from the date when the term of the mortgage expired to the date of the decree. **L** GHANNU RAM *v.* HOTU RAM, (1923) A. I. R. (L.) 54 **984**

———, high rate of—Undue influence—Need for money—Mortgage. *See* CONTRACT ACT, S. 16 **995**

———, whether can be reduced—Execution of decree—Court executing decree, powers of. *See* CONTRACT ACT, S. 74 **916**

Interest Act (XXXII of 1839), s. 1. *See* CONTRACT ACT, s. 73 291

——— **s. 1.** *See* CONTRACT ACT, s. 73 ILLUS. (N.) 1049

——— **s. 1.** *See* NEGOTIABLE INSTRUMENTS ACT, ss. 4, 80 420

Interpretation of Statutes—*Taxing Statutes.*

The maxim that clear words are necessary in order to tax the subject does not mean that words are to be unduly restricted against the taxing authority. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. **M** BEST & CO., LTD. *v.* THE CORPORATION OF MADRAS, 19 L. W. 142; 46 M. L. J. 217; (1924) M. W. N. 249; 47 M. 262; (1924) A. I. R. (M.) 420 928

Jagir land—*Grant of revenue—Proprietary rights—*Zemindar, *position of—Unerpur* Jagir—*Right to cut trees—Custom.*

The right to cut trees and sell them in the *jagir* of Unerpur in Sind is, as between the *jagirdar* and the *zemindars*, vested in the *zemindars*, who have more proprietary interest in the soil than the *jagirdar*.

The general rule is that trees upon land are part of the land and the right to cut and sell them is incident to the proprietorship of the land.

In the case of a *Jagir* the grant ordinarily is of the royal share of the revenue and not of the soil.

In Sind the ordinary tenure is that of the *Zemindar* or landholder who exercises wholly or in part the privileges of the landholder. The extent of such privileges varies according to custom from that of an absolute proprietorship of the land, subject to the payment to Government of whatever may be the customary Government share of the produce, down to that of an ill-defined and often disputed claim to levy a *lapo* or rent on all cultivated land.

Though a *zemindar* may be the proprietor of the soil, yet by custom he may not have the right to cut trees without the permission of the *Jagirdar*. **S** PIR MAKHDUM *v.* MALIK BHOLA KHAN 16 S. L. R. 87 819

Judgment—Alteration of order—Judgment signed—Court, inherent power of. *See* CIVIL PROCEDURE CODE, s. 151, O. XX, R. 3, O. XXI, R. 53 (6) 900

——— based solely on result of local investigation by Trial Court, legality of. *See* APPEAL, SECOND—JUDGMENT 808

——— of Small Cause Court, contents of. *See* CIVIL PROCEDURE CODE, O. XX, R. 4 547

Judgment—concld.

——— Order for security and in default for attachment, whether judgment—Appeal, whether competent. *See* CIVIL PROCEDURE CODE, O. XXXVII, RR. 5, 6 242

———, *when operates by way of estoppel—Party, whether can be allowed to assume inconsistent positions.*

The principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the Code of Civil Procedure in this respect.

An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment though not as regards findings which did not form the basis of the decision or were in conflict therewith.

If both parties invoke the opinion of the Court upon a question, if it is raised by the pleadings and argued, the judgment upon it does not become *ultra vires* merely because an issue was not framed which strictly, construed, embraced the whole of it.

Where a defendant is entitled to set up in the same answer as many defences as he has, if a judgment is entered in his favour which contains no provision that it shall be without prejudice or any like limitation or restriction the estoppel raised by it will extend to every matter or fact in issue found by the Court in favour of the defendant.

A party litigant cannot be permitted to assume inconsistent positions in Court, to approbate and re-probate to the detriment of his opponent.

This doctrine applies not only to the successive stages of the same suit but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first. **C** DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA DEY, 39 C. L. J. 40; (1924) A. I. R. (C.) 600 520

Jurisdiction, absence of—Erroneous withdrawal of suit—Revision. *See* CIVIL PROCEDURE CODE, s. 115, O. XXIII, R. 1 1033

——— *Civil or Revenue Court—Suit for declaration of right to joint tenancy—Second appeal—Fresh evidence, whether can be admitted.*

A suit for a declaration that the plaintiff is a joint tenant with the defendant and entitled to joint possession with him is cognizable exclusively by the Civil Court.

Fresh evidence cannot be admitted in second appeal especially where it was not tendered in

Jurisdiction—concld.

the lower Appellate Court and no application was made for tendering it in the High Court. **A** NOHAR AHIR *v.* PARTAP AHIR, 21 A. I. J. 899; (1924) A. I. R. (A.) 231 **367**

———, erroneous exercise of—Mandamus—High Court, power of. *See* SPECIFIC RELIEF ACT, s. 45 **1042**

——— Land ordinarily submerged in water and not under cultivation, whether *raiyati* land—Mesne profits, suit for—Civil Court, whether has jurisdiction. *See* MADRAS ESTATES LAND ACT, ss. 3 (16), 45, 163 **718**

———, *objection as to.*

It is clearly the policy of the law that when any question of jurisdiction is raised, it should be raised in the Court of first instance at the earliest stage and that it should be given effect to by the Appellate Court only if there has been prejudice caused by the trial in the First Court. **M** ADURI CHALMAYYA *v.* ADURI LAKSHMI DEVAMMA **857**

———, original—Property situate outside limits of original jurisdiction, title to, whether can be investigated—Leave of Court, whether necessary. *See* LETTERS PATENT (BOM.), CL. 12 **780**

———, refusal to exercise—Decree of Small Cause nature—Order for execution—Second appeal if competent—Erroneous decision—Revision. *See* DECREE OF SMALL CAUSE NATURE **605**

——— Suit for return of ornaments given at betrothal. *See* PRESIDENCY SMALL CAUSE COURTS ACT, s. 19 (*q*) **517**

——— to grant decree *nisi*—Domicile of choice, acquisition of—Requisites—*Animus Momendi* not proved. *See* DIVORCE ACT, ss. 2, 7 **719**

———, transfer of—Execution of decree—Court competent to execute decree—Objection to jurisdiction taken in appeal, whether can be entertained. *See* CIVIL PRODEDURE CODE, ss. 21, 37, 38, 39 **806**

——— of Civil Court—Application for partition—Subsequent suit for exclusive possession, whether maintainable. *See* U. P. LAND REVENUE ACT, s. 233 (*k*) **345**

——— Document creating tenancy rights, interpretation of. *See* U. P. LAND REVENUE ACT, s. 233 **784**

——— of Insolvency Court—Determination of questions of title to insolvent's property—Civil Court, reference to, whether necessary. *See* PROVINCIAL INSOLVENCY ACT, s. 4 (1) **552**

——— of Small Cause Court—Suit for rent of homestead land. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II ART. 8 **557**

Land Acquisition Act (I of 1894), s. 23—*Market-value, meaning of—Best evidence, what is—Adaptability of agricultural land as building site—Compensation, basis for award of.*

The market-value of land may be roughly described as the price that an owner willing, and not obliged, to sell might reasonably expect to obtain from a willing purchaser with whom he is bargaining for the sale and purchase of the land.

The best evidence to prove what a willing purchaser would pay for the land under acquisition would be the evidence of genuine sales effected about the time of the Notification for acquisition, either in respect of the same land or any portion thereof or the sale of lands precisely parallel in all its circumstances to the sale of land under compulsory acquisition.

The fairest and most favourable basis on which compensation should be awarded to the owner is to estimate the market-value of the property according to the most lucrative and advantageous way in which such land can be laid out at the time of acquisition but the operative effect of special adaptability or future utility of land mus be estimated not by idle speculation and unpractical imagination but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled had the land been exposed for sale when it was to be compulsorily acquired.

Adaptability of agricultural lands as building sites is a factor to be taken into consideration in fixing the value of land under compulsory acquisition, deductions being made for payment of the ordinary premium and revised assessment which may be leviable on conversion of agricultural lands into building sites.

Much importance should not be attached to evidence of offers in ascertaining the market-value of the land. **S** GOBINDRAM VORHOMAL *v.* THE ASSISTANT COLLECTOR OF SHIKARPUR **376**

Land acquisition proceedings — *Market—Value, assessment of—Experts, opinions of, value of—Offers, value of—Procedure.*

In assessing the value of land for purposes of land acquisition the opinions of experts are admissible in evidence, but the value to be attached to such evidence depends upon the quality of the evidence.

The evidence of offers made by irresponsible brokers on behalf of undisclosed principals, or perhaps for their own purposes without any principal behind them, is, however, useless.

The fairest and most favourable principle of compensation to the owners is to estimate the market-value of the property not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it. **L** SECRETARY OF STATE FOR INDIA *v.* SARLA DEVI CHAUDHRANI, 5 L. 227; (1924) A. I. R. (L.) 548 **74**

Landlord and tenant—*Agricultural tenant, whether can sell house*—Zemindar, *rights of*.

A person agriculturist or agricultural tenant, who is allowed by a *zemindar* to build a house for his occupation in the *abadi*, obtains if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, *i.e.*, prevents its falling down and so long as he does not abandon the house by leaving the village.

When, therefore, a tenant sold the house in which he lived and certain customers sued to set aside the sale:

Held, that the plaintiffs were entitled to obtain possession of the land and the vendee could remove the materials of the house sold. **O** PARAG DIN *v.* SHEO MANGAL, 9 O. & A. L. R. 309 **285**

——— *Agricultural village—Sale of house by tenant, validity of—Special custom.*

Apart from special custom, a tenant in an agricultural village has no right to sell his house together with a right of residence.

A sale by the tenant in favour of another tenant is just as much prohibited as a sale in favour of an outsider, but a sale in favour of the landlord stands on a different footing. **A** CHAMPA KUNWAR *v.* TULSHI RAM **954**

——— *Character of tenancy, how determined.*

In order to determine the character of a tenancy, the Court has to look to the intrinsic evidence afforded by the documents themselves and also, if necessary, to the surrounding circumstances and the conduct of the parties. **C** MUHAMMAD SULAIMAN KHAN *v.* UMA CHARAN SIL **648**

——— *Ejectment suit against trespassers—Suit against rival landlord—Tenants, whether necessary parties.*

It cannot be said as an abstract proposition of law that where land is in occupation of tenants the landlord has no right to maintain a suit against a trespasser or if the land is in the occupation of the trespasser's tenants he cannot bring a like suit against him alone.

The question whether a suit for possession is maintainable by the landlord against a rival claimant depends very much upon the status of the tenants.

When one landlord is dispossessed by another landlord it is not necessary that the plaintiff should make all the tenants of the defendant parties to the suit. **C** KALI PROSANNA BHADURI *v.* HEMANTA KUMARI DEBI **1038**

——— Enhancement of rent, application for—Application on behalf of all landlords—Subsequent withdrawal of same, effect of. *See* BENGAL TENANCY ACT, ss. 105, 107 **5**

——— *Forest lands in* zemindari—Zemindar, *rights of—Reclamation of forest land—Tenant, whether acquires occupancy rights—Burden of proof.*

Landlord and tenant—contd.

A tenant who sets up an occupancy right has to establish it.

The *zemindar* owns an absolute estate in forest lands in the *zemindari*.

A man who reclaims *zemindari* forest land and makes it cultivable does not thereby acquire permanent occupancy right in that land. **M** BADARU CHELLAMMA *v.* DUNGALA PENTAYYA, (1924) M. W. N. 440; 20 L. W. 478 **845**

——— Nakdi *holding—Suspension of rents—Landlord's failures to provide irrigation facilities.*

In the absence of a condition of the tenancy that the landlord should provide the necessary irrigation facilities, the tenant paying *nagdi* rent are not entitled to suspension of the rent on the landlord's failure to provide those facilities. **Pat** PARTAP NARAYAN SINGH *v.* NATHAN SINGH, (1924) Pat. 173 **858**

——— *Occupancy tenant—Tanks and well constructed for manufacture of indigo, whether can be sold.*

Tanks and wells constructed by an occupancy tenant for the manufacture of indigo are not a part of his holding and he is competent to sell them. **A** RAM NARAIN *v.* MUHAMMAD AKBAR, (1923) A. I. R. (A.) 180 **508**

——— *Possession of property as tenant-at-will, when becomes adverse—Burden of proof—Non-payment of rent, effect of—Possession of tenants' heir, nature of.*

When a person occupies a property as a tenant-at-will the onus is on him to prove that the relationship so created subsequently ceased to exist and that his possession became adverse to that of the lessor.

Mere non-payment of rent or discontinuance of payment of rent for twelve years by a tenant would not create adverse possession as against the owner.

Nor would the carrying out of any alterations in the house by the tenant to suit his convenience be evidence of adverse possession.

When a person is in possession of a property as a tenant-at-will, the possession of his heir after his death does not *ipso facto* become adverse against the owner and he must show that by some subsequent act his possession became adverse to that of the owner.

Where an occupant of a house paid rent to nobody, used the place as his own openly and in his own right, to the knowledge of the person claiming to be the landlord, unequivocally disclaiming to hold it as a tenant, kept it under his lock and key when it was not required, and his name was shown in the Municipal registers as an occupant and he continued to receive Municipal house tax bills:

Held, that he acquired title to the house by ad-

Landlord and tenant—contd.

verse possession on the expiry of 12 years from the date of the disclaimer.

A tenant can, without giving up possession as such acquire right to a property by adverse possession. S MAHOMED FARUQ *v.* SIDIK **59**

——— *Suit for rent in respect of different holdings—Separate causes of action, joinder of.*

It is not open to a landholder to sue a tenant in the same suit in respect of different holdings A HIRA LAL *v.* MOTI LAL, 22 A. L. J. 459 **560**

——— *Tenancy, origin of, not known—Nature how determined—Conduct of parties—Evidentiary value of—Long occupation on same terms—Uniform rent—Inference.*

When the origin of a tenancy is not known, evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy.

Where in a suit in ejectment against tenants, it was found that for at leaset three generations the defendants' family had been occupying the land without any alteration in terms and during that period, the rent had been for below the economic rent, and uniform and fixed rent had been paid:

Held, that under the circumstances, the Court was entitled to infer permanent rights of tenancy. M CHIDAMBARAGURUKKAL *v.* SIVAGNANA SUNDARAM PILLAI, (1924) M. W. N. 487; 47 M. L. J. 598 **619**

——— Tope poramboke—*Paramount title, where vests—Tree* patta—Pattadar, *title of, whether defeasible—Intermediate landlord, ouster of, by title paramount—Tenant, whether can prove cesser of landlord's title—Evidence Act (I of 1872), s. 116.*

Prima facie, the paramount title to land registered as *tope poramboke* is with Government. Where a tree *patta* is granted by Government in respect of such a land, the occupation of the *pattadar* is subject to the paramount title of the Government and his title is a defeasible one liable to be defeated at any time by the entry of the Government.

A person having a paramount title may put an end to the rights of the intermediate landlord thereby extinguishing the sub-tenancy as well.

It is open to the tenant to prove a cesser of his landlord's title by ouster by the holder of the title paramount and to attorn to the latter without actually going out of possession.

Section 116 of the Indian Evidence Act is no bar to a tenant showing that his landlord had no title at a date previous to the commencement, of the tenancy, or that, since its commencement, it has expired or has been defeated, because the bar operates only during the continuance of the tenancy. In a case of eviction by the title paramount actual and open surrender of possession to the intermediate landlord is not necessary to terminate the tenancy with the latter. M RAMASWAMI THEVAN *v.* ALAGA PILLAI **881**

Landlord and tenant—concld.

——— *Trees, right to transfer—Custom*—Wajib-ul-arz, *entry in, construction of.*

A *wajib-ul-arz* declared that such trees as were in possession of the persons who had planted them on the fields or on the ridges could be cut and sold by the tenants of the fields:

Held, that this included the right to transfer standing trees which a tenant had planted on his holding with the consent of the *zemindar*. A HAR DAYAL SINGH *v.* GAR DAYAL SINGH, (1923) A. I. R. (A.) 181 **542**

Lease, *construction of—Lease on printed form—Words used, effect of.*

In case of leases on printed forms indiscriminately used, much reliance cannot be placed on words and expressions used therein. C MUHAMMAD SULAIMAN KHAN *v.* UMA CHARAN SIL **648**

———, *darpatni*—Rent fixed in perpetuity—Increase of rent. *See* CONSTRUCTION OF DOCUMENT **369**

Legal practitioner—*Professional misconduct—Disbarment—Re-admission.*

When a legal practitioner, who has been disbarred on account of professional misconduct, applies to be restored to his former position, the test to be applied is whether the sentence of exclusion, however right, has had the salutary effect of awakening in him a higher sense of honour and duty and whether in the interval his conduct has been so irreproachable that notwithstanding a delinquency in early life, he might be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation. An application to strike off the rolls or re-admit to them ought not to be looked at with respect to punishment of the individual himself. S *In re* MIRZA JALAL-UD-DIN, 16 S. L. R. 11 **564**

Legal Practitioners Act (XVIII of 1879), ss. 36, 38—*Court, discretion of—Order including name in the list of touts—Opportunity to show cause—Appeal—High Court, powers of superintendence—Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107.*

The powers conferred on the High Court by section 107 of the Government of India Act are extensive enough to authorise the Court to send for the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper.

The High Court will not interfere in the exercise of its powers of superintendence on the sole ground that the decision of the District Judge is against the weight of the evidence.

Legal Practitioners Act—concld.

Section 38 of the Legal Practitioners Act, 1879, confers on the Courts therein mentioned including the Court of a District Judge, a very wide discretion in the matter, with the only qualifications that the District Judge must be satisfied by evidence of general repute or otherwise, and that no person's name is to be included in the list of touts until he has had an opportunity of showing cause against such inclusion.

It was never the intention of the Legislature to allow anything of the nature of an appeal against the decision of a competent Court under section 36 of the Legal Practitioners Act. **A** KASHI NATH *v.* EMPEROR, 9 O. & A. L. R. 696 **693**

Letters Patent (Bom.) cl. 12 - *Administration suit, whether suit for land—Property situate outside limits of Original Jurisdiction, title to, whether can be investigated—Leave of Court, whether necessary.*

An administration suit, as such, is not a suit for land within the meaning of clause 12 of the Bombay High Court, and the question whether certain immoveable property situate outside the limits of the Original Civil Jurisdiction of the High Court formed part of the estate of the deceased can be appropriately considered in such a suit. Such a question is only an incident of the administration suit and no question of leave under clause 12 of the Letters Patent arises with reference to it. **B** MAHOMEDALLY ADAMJI *v.* ABDUL HUSSAIN ADAMJI, 26 Bom. L. R. 163; 48 B. 331; (1924) A. I. R. (B.) 313 **780**

———, **cl. 15**—*Appeal against order in revision.*

An order in revision is not subject to appeal under the Letters Patent of the Bombay High Court. **B** MAHOMED VALLI ASMAL *v.* VALLI ASMAL, 26 Bom. L. R. 171; (1921) A. I. R. (B.) 324 **723**

——— **cl. 39.** *See* CIVIL PROCEDURE CODE, s. 109 (*a*) **210**

Letters Patent (Cal.), cl. 15. *See* CIVIL PROCEDURE CODE, O. XXXVII, RR. 5, 6 **242**

Letters Patent (Lah.), cl. 10—*Appeal—New point, whether can be urged.*

In an appeal under the Letters Patent a party is not entitled to be heard on a point which was not raised before the Judge in Chambers. **L** MOHAMMAD TAQI *v.* ABDUL RAHMAN, (1923) A. I. R. (L.) 151 **281**

Letters Patent (Mad.), cl. 15—*Judgment, definition of—Test—Order refusing stay of execution pending appeal, whether appealable.*

In order to decide whether any particular order amounts to a judgment or not within the meaning of the Letters Patent, the test is not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding the adjudication is a judgment within the meaning of the clause.

The order of a Single Judge of the High Court refusing stay of execution of a decree pending disposal of an appeal in the High Court is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable.

Per *Krishnan, J.*—An order refusing an interim injunction is a judgment but an order refusing stay of proceedings is not. **M** SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR, 46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 127; 47 M. 316; (1924) A. I. R. (M.) 597 **109**

———, **cl. 16**—*Civil Procedure Code (Act V of 1908), s. 115—Madras Estates Land Act (I of 1908), ss. 171, 172—Board of Revenue, orders of—Revision—High Court, jurisdiction of.*

The High Court will not interfere in revision under section 115 of the Civil Procedure Code with an order of the Board of Revenue passed in the exercise of its jurisdiction under section 171 of the Madras Estates Land Act, as an another remedy by way of a civil suit is provided in such a case by section 173 of the Act.

Per *Spencer, J.*—An order of the Board of Revenue passed under section 171 or section 172 of the Madras Estates Land Act is not a judicial proceeding of a Court subordinate to the High Court and is not open to revision by the latter under section 115 of the Civil Procedure Code.

Per *Devadoss, J.*—The Board of Revenue as such is not a Court exercising judicial functions subject to the appellate jurisdiction of the High Court but being a Civil Court when it acts judicially under section 171 or section 172 or any other section of the Madras Estates Land Act, it is subject to the revisional jurisdiction of the High Court.

Section 173 of the Madras Estates Land Act provides a separate remedy by suit in a Civil Court and where that is the case there is no power of revision. **M** BURLA APPANNA *v.* ANALA LATCHAYYA, 45 M. L. J. 735; 33 M. L. T. 92; 18 L. W. 849; (1924) A. I. R. (M.) 119; 47 M. 250 **372**

Letters Patent (Ran.), cl. 13—*Appeal—Application for certificate—Delay, effect of.*

No period of limitation has been prescribed for an application under clause 13 of the Rangoon Letters Patent to obtain a declaration that a case is fit one for appeal, but long delay in making the application may disentitle the applicant from obtaining the declaration, especially where the declaration is sought on a technical ground in a case in which the order complained of has done substantial justice between the parties. **R** MAUNG HMAN *v.* MA SHIN, (1924) A. I. R. (R.) 45; 2 Bur. L. J. 161 **441**

Limitation—Application by Official Receiver to set aside alienation by insolvent. *See* PROVINCIAL INSOLVENCY ACT, s. 36 **443**

——— *Bisardar*, suit for wages by. *See* LIMITATION ACT, SCH. I, ARTS. 7 AND 102 **576**

———, commencement of—Mortgage decree—Application for personal decree. *See* LIMITATION ACT, SCH. I, ART. 181 **85**

——— Damages caused by action of Canal Officers—Suit to recover damages. *See* NORTHERN INDIA CANAL AND DRAINAGE ACT, ss. 6, 15, 58 **208**

——— Damages caused by construction of canal—Suit to recover damages. *See* LIMITATION ACT, SCH. I, ART. 2 **185**

——— Ejectment by one member of proprietary body—Ejectment by landlord—Suit to contest ejectment. *See* AGRA TENANCY ACT, s. 79 **1025**

——— Execution of decree—Certification of payment after decree has become barred, whether revives limitation. *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 **799**

——— Landlord originally party but given up in appeal—Question, whether can be agitated—Limitation, question of, when can be taken. *See* BENGAL TENANCY ACT, SCH. III, ART. 3 **569**

——— Mortgage—Subrogation—Part payment of mortgage-debt—Charge, creation of—Suit to recover payment. *See* MORTGAGE—SUBROGATION **766**

——— Mutual accounts, what are—Cash advances and re-payment in kind—Suit to recover balance. *See* LIMITATION ACT, SCH. I, ARTS. 57, 85 **998**

——— Objection to attachment—Withdrawal of objection—Order without jurisdiction—Declaratory suit. *See* CIVIL PROCEDURE CODE, O. XXI, R. 63, O. XXIII, R. 1 **1002**

———, operation of—Alienation by Hindu father—Suit by after-born son. *See* LIMITATION ACT, ART. 126 **1010**

———, operation of—Mortgage decree—Application to make decree final—Step-in-aid of execution. *See* LIMITATION ACT, SCH. I, ART. 182 **407**

———, starting point of—Hindu Law—Alienation by father—After-born son, right of—Fresh cause of action. *See* HINDU LAW—ALIENATION BY FATHER **666**

——— Suit against auction-purchaser from mortgagee. *See* MORTGAGE **466**

——— Suit by Company against Director to recover losses due to his negligence. *See* LIMITATION ACT, s. 10, SCH. I, ARTS. 36, 90 **740**

Limitation—concld.

——— Suit by one of joint promissees, maintainability of—Non-joinder of parties—Subsequent joinder by order of Court. *See* CIVIL PROCEDURE CODE, O. I, R. 10 **914**

——— Suit for possession by reversioner—Adoption, invalidity of, involved. *See* LIMITATION ACT, SCH. I, ARTS. 118, 141 **971**

——— Suit to enforce payment of money charged on property. *See* LIMITATION ACT, SCH. I, ART. 132 **942**

Limitation Act (IX of 1908)—*Provisions, whether applicable to Buddhist monasteries—Burmese Buddhist monk—Right to monastery extinguished by adverse possession—Death of trespasser—Right, whether revived.*

The provisions of the Limitation Act apply to suits for possession of Buddhist monasteries.

After the right of a Buddhist monk to a monastery has become extinguished by the operation of the Law of Limitation, it cannot come into life again merely because the person who acquired adverse possession died without dedicating the monastery to any one. **R** WISEIKLA *v.* PARAMA, (1923) A. I. R. (R.) 40 **273**

——— **s. 5.** *See* COURT, ACT OF **651**

——— **s. 5**—*Appeal, delay in filing—Extension of time—Diligence, absence of.*

An appellant who does not show any sort of diligence in the matter of obtaining the necessary copies for the purposes of his appeal is not entitled to any indulgence by way of extension of time under section 5 of the Limitation Act. **L** NAZKS *v.* GOPAL, (1923) A. I. R. (L.) 208 **812**

——— **s. 5**—*Appeal filed in wrong Court—Mistake*, bona fide—*Extension of time, whether should be allowed.*

A suit for ejectment was filed in the Revenue Court. The defendants' plea of proprietary title was negatived by the Court which, however, dismissed the suit on other grounds .The plaintiffs appealed to the Commissioner and, naturally, did not raise the question of proprietary title against the defendants who tried to support the decree on the ground that they were proprietors. The appeal was allowed and the suit decreed. On appeal by the defendants, the Board of Revenue held that, as soon as the question of proprietary title was raised before the Commissioner, he ceased to have jurisdiction and directed that the appeal be returned for presentation to the District Judge. Accordingly, the Commissioner returned the memorandum of appeal to the plaintiffs on the 31st August 1920 and they filed it before the District Judge on the 4th September. The District Judge dismissed the appeal as time-barred. Plaintiffs appealed to the High Court:

Held, that the plaintiffs had in good faith filed the appeal in the Commissioner's Court and as they had filed it before the Judge within five days of the return of the memorandum of appeal

Limitation Act—contd.

by the Commissioner, the District Judge ought to have granted an extension of time under section 5 of the Limitation Act. **A** AKBARI BEGAM *v.* SHAIKH ZAMIN ALI, (1923) A. I. R. (A.) 364 **402**

——— **s. 5**—*Extension of time—Sufficient cause—Mistake—Illness in family—Discretion of Court.*

In cases where an application for extension of time under section 5 of the Limitation Act is presented a rule is generally issued on the respondent to show cause why an extension of time should not be granted. This procedure has been insisted upon by the Judicial Committee.

If the applicant succeeds in establishing due diligence, good faith and the absence of neglect he is entitled to persuade the Court to extend the time for presentation of the memorandum of appeal.

There is no authority for the broad proposition that when there is a chance of mistake the Court should in every case excuse the delay.

Serious illness in the family or that some time was required for making arrangements for filing the appeal are not sufficient reasons for extension of time. **C** ELAHINEWAZ KHAN *v.* BISESWAR BAISYA **924**

——— **ss. 6, 7.** *See* HINDU LAW—JOINT FAMILY **296**

——— **s. 6, Sch. I, Art. 126**—*Suit to challenge alienation—Limitation, commencement of—After-born son, position of.*

Under Article 126 of Schedule I to the Limitation Act, limitation for a suit to challenge an alienation of family property runs from the date on which the alienee takes possession of the property.

If the plaintiff is a minor on the date when limitation commences this period will be extended in virtue of section 6 of the Limitatian Act, but section 6 cannot be pleaded by a plaintiff who was not in existence when the alienee took possession. He is entitled to take advantage of the existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years from the date of his birth. **A** DHANRAJ RAI *v.* RAM NARESH RAI **1019**

——— **ss. 9, 17**—*Execution of decree—Death of decree-holder—Application for execution by executor—Limitation, computation of.*

Where a decree-holder does not take any steps during his lifetime to execute the decree, section 9 of the Limitation Act will apply to an application for execution made by his executor and the latter will not be entitled to deduct the time spent in obtaining Probate of the decree-holder's will. **R** BURN *v.* PAUL, (1923) A. I. R. (R.) 98 **284**

——— **s. 10, Art. 116**—*Auction-purchaser of company shares, position of—Suit for dividend due before purchase—Company, whether trustee for purchaser.*

Limitation Act—contd.

A person who has purchased the shares of a judgment-debtor share-holder in a company in Court auction but whom the company refuses to register as such is not a share-holder of the company and a suit by him for recovery of dividends due before the date of his purchase is not governed by Article 116 of Schedule I to the Limitation Act. Nor does the company hold the dividends for share-holders in trust so as to render section 10 of the Limitation Act applicable. **M** GURUNADHARAMA SESHAYYA *v.* SRI TIRUPURASUNDARI COTTON PRESS, BEZWADA, 46 M. L. J. 563; 19 L. W. 623 **947**

——— **s. 10, Sch. I, Arts. 36, 90**—*Suit by Company against Director to recover losses due to his negligence—Limitation—Director of Company, position and liability of.*

In each case it is a question of fact whether a Director of a Company whose acts are brought into question, was under the particular circumstances of the case in the position of a trustee, a partner, or an agent to the Company or to the body of share-holders.

A suit by a banking Company to recover from a Director the amount of losses incurred by the Company on certain loans made by the Company on the authority of the Director, in sanctioning which the latter was guilty of gross negligence is goverened by Article 90 and not by Article 36 of Schedule I or section 10 of the Limitation Act. **L** DAULAT RAM *v.* BHARAT NATIONAL BANK, LTD., DELHI, 5 L. 27; (1924) A. I. R. (L.) 435 **740**

——— **s. 14**—*Judgment-debtor adjudicated insolvent—Application by decree-holder to be entered in the schedule of creditors, rejection of—Order of adjudication, annulment of—Subsequent application for execution—Decree, whether time-barred—Execution, whether can proceed.*

The petitioner made an application on 1st August 1917 to be declared an insolvent, and the order of adjudication was made on 1st November 1917. *N*, a creditor, obtained a Small Cause Court decree on the 3rd August 1917. On 14th May 1921, the minor sons of *N* applied to the Insolvency Court to be entered in the schedule of creditors but the application was rejected on 11th February 1922. The order of adjudication was eventually annulled on 27th October 1922. Thereupon a fresh application was made for execution of the decree :

Held, that the rejection of the application asking that the names of the decree-holder's sons be entered in the schedule of creditors was not due to any defect of jurisdiction of section 14 of the Limitation Act did not apply;

(2) that time began to run against the decree-holder from the date of his decree, *viz.*, the 3rd August 1917 and the decree was barred on the date when application for leave to execute it was made ;

(3) that the execution could not, therefore, proceed. **Pat** AKHAJ KHALIFA *v.* RAMLAL MARWARI, (1923) Pat. 271; (1924) A. I. R. (Pat.) 40 **696**

——— **s. 19.** *See* CONTRACT ACT, s. 25 **77, 489**

Limitation Act—contd.

——— **s. 19**—*Acknowledgment—Admission of liability coupled with arrangement for satisfaction.*

An unqualified admission of liability, coupled with an arrangement proposed for its satisfaction, amounts to an acknowledgment within the meaning of section 19 of the Limitation Act and operates to save limitation. **N** DAJI MAHAR *v.* MAHADEO KUNBI **66**

——— **s. 19**—*Execution petitions—Acknowledgment.*

Section 19 of the Limitation Act applies to execution petitions. **Pat** RESHMA KUARI *v.* RAMESHWAR OJHA **897**

——— **ss. 19, 22.** *See* CIVIL PROCEDURE CODE, O. I, R. 10 **914**

——— **s. 19, Sch. I, Art. 144**—*Adverse possession—Co-sharers—Acknowledgment of co-sharer's title—Demand for share of expenses of repairs.*

The possession of one co-sharer is, as a general rule, the possession of all the other co-sharers. The co-sharer in possession, in order to claim adverse possession, must show some clear and unmistakable act on his part evidencing his intention to hold possession on his own account.

Plaintiff sued to recover his share in certain ancestral property from the defendants and produced in evidence a post card written by one of them in which the plaintiff was called upon to pay his share of the monies expended on repairs or surrender his interest in the house:

Held, (1) that the post card amounted to an acknowledgment of the plaintiff's title;

(2) that as the post card indicated that, up to the date of writing it, the writer had not formed any intention to exclude the plaintiff from the joint property the acknowledgment could not be said to have been made beyond limitation;

(3) that the acknowledgment contained in the post card was not conditional, as the condition attached to the future and not to the past. **L** BALMOKAND *v.* WAZIR CHAND, 5 L. L. J. 47 **279**

——— **Sch. I, Art. 2.** *See* NORTHERN INDIA CANAL AND DRAINAGE ACT, ss. 6, 15, 58 **208**

——— **Art. 2,** *applicability of—Damage caused by construction of canal—Suit to recover damages—Limitation—Northern India Canal and Drainage Act, ss. 6, 15.*

In consequence of the construction of the Raya Branch Tail Distributary of the Upper Chenab Canal, flood water was driven on to the plaintiff's property and caused serious damage. Plaintiff sued the Secretary of State to recover damages for the injury so caused:

Held, that the action taken by the Canal Officers in constructing the channel fell under sections 6 and 15 of the Northern India Canal and Drainage Act and the suit was, therefore, governed by Article 2 of Schedule I to the Limitation Act. **L** THE PUNJAB COTTON PRESS CO. *v.* SECRETARY OF STATE, 4 L. 432; (1924) A. I. R. (L.) 192 **185**

——— **Arts. 7, 102**—Bisardar, *suit for wages by—Limitation.*

Limitation Act—contd.

A *bisardar* is neither a household servant nor an artisan or labourer and consequently a suit for wages brought by him does not fall within the purview of Art. 7 but is governed by Art. 102 of Sch. I to the Limitation Act. **O** GHASI RAM *v.* UMA DATT, 9 O. & A. L. R. 554; 10 O. L. J. 348; 26 O. C. 327; (1924) A. I. R. (O.) 189 **576**

——— **Sch. I, Art. 11.** *See* CIVIL PROCEDURE CODE, O. XXI, R. 63, O. XXXIII, R. 1 **1002**

——— **Art. 11**—*Attachment before judgment—Order for sale—Claim petition—Limitation.*

An attachment made before judgment assumes the character of an attachment in execution when an order is passed for the sale of the attached property.

Therefore, a claim petition arising out of proceedings in execution in respect of property originally attached before judgment is governed by Art. 11 of the Limitation Act. **M** VELLAYAN ASARI *v.* SIVAGNANAM ASARI, 34 M. L. T. 193 **917**

——— **Arts. 57, 85**—*Mutual account, what are—Creditor and debtor—Cash advances and repayments in kind—Account, nature of—Suit to recover balance—Limitation.*

An account is said to be mutual within the meaning of Article 85 of Schedule I of the Limitation Act when there are transactions on each side creating independent obligations on the other. When the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account cannot be said to be mutual.

When it was found that the transaction between the parties where those of creditor and debtor and that the defendants borrowed money from the plaintiffs and sent them commodities, the proceeds of which were applied to re-paying cash loans, and the accounts disclosed no independent obligations on both sides or occasions for mutual demands:

Held, (1) that the account was not a mutual one within the meaning of Article 85 of Schedule I to the Limitation Act;

(2) that the case was governed by Article 57 of Schedule I to the Limitation Act. **L** THAKUR DAS *v.* BISHAN DAS, (1923) A. I. R. (L.) 636 **998**

——— **Art. 75**—*Instalment bond—Default in payment of instalment—Cause of action—Limitation.*

An instalment bond provided for the payment of the debt in twelve monthly instalments and authorised the obligee to sue for the unpaid balance either on default in payment of any of the instalments or on the expiry of one year fixed for the payment of the entire debt:

Held, that Art. 75 of Sch. I to the Limitation Act applied and in the absence of any waiver, time began to run from the date of the first default. **O** MOHANYA *v.* PANNA LAL, 10 O. & A. L. R. 534; 11 O. L. J. 513 **848**

——— **Art. 109.** *See* RES JUDICATA, **520**

Limitation Act—contd.

——— **Sch. I, Art. 113.** *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 (3) 278

——— **Arts. 118, 141**—*Suit for possession by reversioner—Adoption, invalidity of, involved—Limitation.*

A suit for possession of immoveable property by a reversioner involving the invalidity of an alleged adoption by a Hindu widow is governed by Article 141 of Schedule I to the Limitation Act and not by Article 118 of the Act. **P C** KALYANDAPPA *v.* CHANBASAPPA, 22 A. L. J. 508; 46 M. L. J. 598; 28 C. W. N. 666; 26 Bom. L. R. 500; (1924) A. I. R. (P. C.) 137; (1924) M. W. N. 414; 34 M. L. T. 111; 20 L. W. 109; 11 O. L. J. 181; 48 B. 411 (P. C.) 971

——— **Art. 120**—*Suit by mortgagee to recover from co-mortgagee share of mortgage money received by latter—Limitation, commencement of.*

A suit by a mortgagee to recover from his co-mortgagee his share of the mortgage-money received by the latter from the mortgagor is governed by Article 120 of Schedule I to the Limitation Act and limitation begins to run from the date on which the money was received by the defendant. **L** MUHAMMAD IBRAHIM *v.* MUHAMMAD ISMAIL, 5 L. L. J. 111 294

——— **Art. 126**—*Alienation by Hindu father—Suit by after-born son—Limitation, operation of.*

A suit by a Hindu son governed by Mitakshara Law to contest an alienation by his father is governed by Article 126 of Schedule I to the Limitation Act and the time begins to run from the date when the alienee takes possession of the property. The son does not get a fresh start of limitation on his birth, where the alienation to be contested took place before he was born. **A** SANKET NARAIN PANDE *v.* RAM BHAROS 1010

——— **Art. 126**—Limitation, starting point of. *See* HINDU LAW—ALIENATION BY FATHER 666

——— **Art. 132**—*Handnote—Subsequent execution of security-bond—Suit to enforce payment of money charged on property—Limitation.*

Where a handnote is first passed for a certain debt and subsequently immoveable property is hypothecated under a security-bond, the proper article governing the period of limitation of a suit to recover the loan is Article 132 of Schedule I of the Limitation Act, the suit being one for the enforcement of a charge created by the security bond.

In such a case as the above, where the creditor's remedy for enforcing the personal obligation of the debtor in respect of the loan is barred by limitation, the debt is not extinguished thereby, for the reason that the remedy for enforcing the charge on immoveable property still subsists. **O** KUAR BEHARI LAL *v.* LALA BENI MADHO, 10 O. & A. L. R. 371 942

Limitation Act—contd.

——— **Sch. I, Art. 134.**

Article 131 of Schedule I to the Limitation Act in terms applies to property purchased from the mortgagee and not to the right, title and interest of the mortgagor purchased through Court at the instance of a decree-holder against the mortgagee. **S** MAHOMED MOOSA *v.* KAZI FATEHULLAH 466

——— **Art. 134**—*Mortgage—Transfer by mortgagee—Suit to redeem.*

In a suit for redemption it appeared that the rights of the original mortgagor has lapsed by virtue of a transfer effected by the mortgagee the purchaser from the mortgagors in favour of the predecessors-in-interest of the contesting defendants. This sale-deed recited the earlier sale by the mortgagor in favour of the mortgagee:

Held, that Article 131 of the Limitation Act protected the purchasers from a claim of the mortgagor, and the suit having been brought more than 12 years from the date of the transfer was barred. **O** MUHAMMAD ABBAS *v.* SHAHAMAT HUSAIN, 26 O. C. 64; 9 O. & A. L. R. 1; (1923) A. I. R. (O.) 246 274

——— ——— **Arts. 142, 144,** *scope of—Suit for possession—Dispossession—Adverse possession—Burden of proof.*

In cases falling under Article 142 of Schedule I to the Limitation Act the claimant must prove his possession within twelve years next preceding the date of the institution of the suit, and in such cases an enquiry into the question of adverse possession is irrelevant. In cases falling under Article 144 of Schedule I of the Indian Limitation Act, where the defence is one of title acquired by adverse possession for more than twelve years, it is not necessary for the plaintiff to prove his possession within twelve years from the commencement of the suit.

Plaintiffs who were the purchasers of a house, sued to recover possession of the house from the defendants on the allegation that the latter were the tenants of the plaintiffs' vendor and that in a suit brought by the plaintiffs for recovery of rent they had denied the plaintiffs' title and had set up a title to the house in themselves. It was found that the defendants were not the tenants of the plaintiffs:

Held, that the suit was governed by Article 142 of Schedule I to the Limitation Act, and the plaintiffs were bound to prove possession within twelve years of the institution of the suit. **O** GUR SAHAI KANDU *v.* CHHEDI, 10 O. & A. L. R. 67; 11 O. L. J. 251; 27 O. C. 130 964

——— **Arts. 142, 148**—*Dispossession, what amounts to—Mortgage—Adverse possession by mortgagee—Limitation.*

Mere paper dispossession does not amount to dispossession within the meaning of Art. 142 of Schedule I to the Limitation Act, and the *terminus a quo* under that Article is actual physical dispossession.

The period of sixty years prescribed in Article 148 of Schedule I to the Limitation Act for suits for redemption can only be availed of where the

defendant has no better title than that of a mortgagee.

Where a mortgage confers no right of possession on the mortgagee and the latter obtains possession of the mortgaged property in assertion of a proprietary title his possession will be adverse to that of the mortgagor. **L** MUNNA LAL *v.* HAMID ALI **39**

——— **Sch. I, Art. 144.**

When a person who had originally been in mere permissive occupation or possession subsequently asserts adverse possession, Article 144 and not Article 139 of the Indian Limitation Act applies.

Neither Article 139 nor Article 144 of the Indian Limitation Act contemplate that a lessee or tenant-at-will or a tenant at sufferance should give up possession of his property before the period of limitation commences to run. **S** MAHOMED FARUQ *v.* SIDIK **59**

——— **Arts. 144, 148.** *See* MORTGAGE **466**

——— **Art. 148**—*Transfer of Property Act (IV of 1882), s. 75—Prior and subsequent mortgagees—Property sold in execution of decree obtained by prior and subsequent mortgagees—Pusine mortgagee, position of—Redemption, suit for, maintainability of—Limitation.*

Certain mortgaged property was sold in execution of a mortgage decree obtained by a puisne mortgagee to which the prior mortgagee was not a party and was purchased by the pusine mortgage. It was subsequently sold in execution of a mortgage decree obtained by the prior mortgagee to which the puisne mortgagee was not a party and was purchased by the prior mortgagee. In a suit by the representative of the puisne mortgagee to redeem the representative of the prior mortgagee:

Held, that the puisne mortgagee's right of redemption was still alive and the suit being one for redemption was governed by Article 148 of Schedule I to the Limitation Act. **A** PRIYA LAL *v.* BOHRA CHAMPA RAM, (1923) A. I. R. (A.) 271; 45 A. 268 **498**

——— **Art. 181**—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage-decree—Application for personal decree—Limitation, commencement of.*

In execution of a mortgage-decree the Court directed the mortgaged properties to be sold through a Receiver. The Receiver obtained the sanction of the Court to the bargains proposed by him on 23rd February 1918, but the sale-deeds with respect to some of the items were not completed till 31st August 1918. On 29th March 1921 the decree-holders made an application under O. XXXIV, r. 6 of the Civil Procedure Code, asking for a decree for the balance of the decretal amount still due, on the ground that the proceeds of the sales had proved insufficient to satisfy the amount of the decree:

Held, that the sale of the mortgaged properties was not complete till the last sale-deed had been executed and the decree-holders were entitled

under Article 181 of Schedule I to the Limitation Act to a period of three years from 31st August 1918 to make the application and the application was, therefore, within limitation. **A** RAJ NARAIN MAL *v.* SANTI LAL, 21 A. L. J. 37; (1923) A. I. R. (A.) 203 **85**

——— **Sch. I, Arts. 181, 182**—*Civil Procedure Code (Act V of 1908), ss. 48, 100, 102, 115—Execution of decree—Decree executable after sometime—Limitation, operation of.*

Under the Limitation Act, the period of three years for the enforcement of a decree or order must be taken to commence from the date when the decree or order becomes executable.

The period of limitation for execution of a decree or order which becomes executable on a date subsequent to that of the decree or order, is governed by Art. 181 of Schedule I to the Limitation Act.

A date capable of being made certain by the computation of time provided for payment is as certain for the purposes of Art. 182 of Schedule I to the Limitation Act as a specific date entered in or provided for by the decree.

Section 48 of the Code of Civil Procedure deals with the maximum limit of time provided for execution of a decree and does not prescribe the period within which each application for execution is to be made. Under it the right to apply accrues from the date when the default in making the payment occurs; and there is nothing in that section governing the provisions applicable to periodical applications for the execution of a decree which can be made after the right to apply for execution has accrued, so long as the decree subsists and is capable of execution. **A** SURAJMAN CHAUBE *v.* ANJORE SHUKUL, 21 A. L. J. 861; 9 O. & A. L. R. 989; 46 A. 73; (1924) A. I. R. (A.) 263 **605**

——— **Arts. 181, 182**—*Claim proceedings—Title suit—Application for execution—Limitation.*

When an execution application is brought and properties are attached in execution of that application, if any obstacle is placed in the way of the properties being sold and assets realised for the purpose of meeting the decree-debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Art. 182 of Schedule I to the Limitation Act, but is in the nature of a revival of the original execution application and Art. 181 of Schedule I to the Limitation Act will apply. **M** MAÑYAM SURAYYA *v.* SUNKAVALLI VENKATARATNAM, 45 M. L. J. 822; 19 L. W. 20; (1924) A. I. R. (M.) 210; 47 M. 176 **779**

——— **Art. 182.** *See* MORTGAGE—SUBROGATION **766**

——— **Art. 182**—*Decree providing for management of trust property by turns—Execution, right of, when arises.*

A suit relating to a dispute for trusteeship of certain properties was compromised and a decree was passed which provided that plaintiff was to manage the trust properties for two years and the defendant the next two years thereafter, with a further clause that they were to manage alternatively in turns of two years each. An application for execution of the decree for possession and management of the trust properties was filed by the plaintiff more than three years from the date of his previous execution application but within three years of the time when the right to his turn accrued :

Held, that the right to execute the decree arose in part from time to time and a fresh application for execution was permissible within three years of any of the periods in which the plaintiff was entitled to be in possession and management of the trust properties. **M** KOTHANDARAMASWAMI NAIDU *v.* PAPPAMMAL **891**

——— **Sch. I, Art. 182**—*Mortgage-decree—Application to make decree final—Step-in-aid of execution—Limitation, operation of.*

A decree was passed upon a mortgage on 18th April 1913 for a certain sum payable by yearly instalments, the first of which was payable on 31st March 1914. On failure to pay any one instalment in time, the decree provided for sale of the mortgaged property or a sufficient portion thereof to recover the amount of the instalment overdue. The creditor sought to make the decree final on default instead of applying for sale. The Court, instead of pointing out the error, made orders from time to time as instalments became due, for making the decree final with regard to those instalments. On 30th October 1919 the creditor applied to make the decree final as regards the instalment due on 31st March 1917, but the application was rejected. The decree-holder then applied for execution on 26th July 1920 with regard to the four instalments then overdue. This *darkhast* was dismissed for default on 15th February 1921. On 8th July 1921, the decree-holder having again applied in execution for those four instalments and the fifth which fell due in 1921:

Held, (1) that the application of 30th October 1919 was a step-in-aid which started a new period of limitation running ;

(2) that the application of 26th July 1920 was in time with regard to the instalment due in 1917 and, consequently, the *darkhast* of 1921 was also in time and the execution should proceed for the full amount of the five instalments.

An application to make a decree final may in one case be considered as a step-in-aid although it may, in other cases, be not so. **B** BINDU GOVIND NAIK KURBET *v.* HANMANT GOVIND BHAT, (1924) A. I. R. (B.) 171 **407**

——— **Art. 182**—*Proceedings necessary to ascertain set off—Decree, whether declaratory.*

If in a case where no appeal really lies an appeal is *bona fide* presented to the Court which would have the power to entertain an appeal if such a one lay, the proceedings are sufficiently of the nature of an appeal to be considered an appeal for the purposes of Article 182 of the Limitation Act.

The mere fact that in a certain view of the matter further proceedings might be necessary to ascertain what set off the judgment-debtor is entitled to against a decree: adjustment does not make the decree declaratory.

Per *Madgowkar*, A. *J.C.*—It is now well settled that at least where the appeal imperils the whole decree, the words where there has been an appeal in Art. 182 of Schedule I to the Limitation Act must be construed in their plain sense, and that the Courts cannot add to these words provisions such as 'where an appeal lies' or 'by the judgment-debtor proceeded against.' **S** DONALD GRAHAM & Co. *v.* KEWALRAM, 16 S. L. R. 245 **477**

——— **Sch. I, Art. 182 (2)**—*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against several sets of defendants—Appeal by one set—Dismissal of entire suit—Appeal to His Majesty in Council—Restoration of decree of Trial Court—Execution—Decree, whether barred against defendants who did not appeal.*

Rule 33 of O. XLI of the Civil Procedure Code enables an Appellate Court to deal with the entire decree, although the appeal may be as to a part of the decree, and also to give directions in favour of parties who have actually not filed any appeal or objection. In this way, in an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal.

Clause (2) of Art. 182 of Schedule I to the Limitation Act, applies where there has been an appeal from a part or whole of the decree, or when some only of the parties to the suit have brought the appeal.

Plaintiffs obtained a decree for contribution against three sets of defendants, which proceeded upon a common foundation, but specified the liability of each set of defendants. Defendant No. 1 appealed against the decree and plaintiffs filed cross-objections. Defendants Nos. 2 and 3 were impleaded as respondents. The High Court dismissed the plaintiffs' suit *in toto*. Plaintiffs appealed to His Majesty in Council, and the latter restored the decree of the Trial Court. When plaintiffs sought to execute the Order-in-Council, defendants Nos. 2 and 3 objected that as against them the decree of the Trial Court had become barred by time, inasmuch as they had never appealed against it, and as the Order-in-Council merely restored the decree of the Trial Court, it could not be executed against them :

Held, (1) that the Courts in India were bound to carry out the directions contained in the Order-in-Council and could not go behind it;

(2) that on the appeal of defendant No. 1 the entire decree was before the High Court and it had jurisdiction under O. XLI, r. 33 of the Civil Procedure Code to dismiss the entire suit of the plaintiffs;

(3) that before the Order-in-Council was passed there was nothing which the plaintiffs could execute and their application was not, therefore, barred. **Pat** SOMAR SINGH *v.* PREMDEI, 5 P. L. T. 21; (1924) Pat. 105; 3 Pat. 327 **794**

Limitation Act—concld.

——— **Sch. I, Art. 182 (5)**—*Attachment in execution—Objections by owner—Decree-holder's application for summoning witnesses to contest objection—Step-in-aid of execution.*

A decree for money having been passed on the 10th January 1916 the decree-holder applied for execution on the 14th August 1917 and attached certain property. On the 25th January 1918, one A put in an objection claiming the property to be her own. On the 16th February 1918, the decree-holder put in his application to summon witnesses in reply to the objection. The property was released from attachment and the application for execution was dismissed in default. On the 14th November 1920 the decree-holder again applied for execution:

Held, (1) that the application by the decree-holder on the 16th February 1918 to summon witnesses to contest the objection was a step-in-aid of execution and a fresh period of limitation started from that time;

(2) that the application for execution was, therefore, within time. A ABDUL QUDDUS *v.* SAYED AHMED HUSAIN, (1923) A. I. R. (A.) 415 **411**

——— **Art. 182 (5)**—*Decree directing execution individually—Application for joint execution—Application, whether in accordance with law—Step-in-aid of execution—Application for substitution of heirs of deceased judgment-debtor.*

A decree-holder who had a decree directing execution individually against several judgment-debtors, applied for joint execution, after various attempts to execute the decree individually. The application was dismissed. The question was whether the application could be considered as one in accordance with law within the meaning of Art. 182 of the Limitation Act so as to save limitation:

Held, that although the application was incompetent being against the terms of the decree, nevertheless it could well be considered as one in accordance with law, as it was made *bona fide* without knowledge that the Court could not grant such an application.

The words "in accordance with law" in Art. 182, Schedule I to the Limitation Act should not be pressed too far in favour of a judgment-debtor who has not paid his debt and an application does not become contrary to law merely because it has been dismissed.

An application by the decree-holder for substitution of the heirs of one of the deceased judgment-debtors is a step-in-aid of execution within the meaning of Art. 182 of Schedule I to the Limitation Act. O BABU RUDUR PARTAB SINGH *v.* SAEO PRASAD, 10 O. & A. L. R. 413 **880**

——— **Art. 187.** *See* PROVINCIAL INSOLVENCY ACT, s. 36 **443**

Madras City Municipal Act (IV of 1919), s. 110, Sch. IV, r. 7—*Incorporated company with paid up capital in foreign currency, whether liable to company tax.*

All incorporated companies which transact business in the City of Madras are liable to be

Madras City Municipal Act—concld.

assessed to the tax on companies under section 10, and r. 7 of the Taxation Rules in Schedule IV of the Madras City Municipal Act, 1919, irrespective of their paid up capital being in British Indian currency or any other currency. M BEST & Co. *v.* THE CORPORATION OF MADRAS, 19 L. W. 112; 46 M. L. J. 217; (1924) M. W. N. 249; 47 M. 262; (1924) A. I. R. (M.) 420 **928**

Madras City Tenants' Protection Act (III of 1922), s. 9, *applicability of—Decree for ejectment, not executed—Tenant, whether can exercise option—Market-value, ascertainment of, mode of.*

Section 9 of the Madras City Tenants' Protection Act applies to pending suits and also to suits in which decrees have been passed but not executed.

The whole object of section 9 of the Madras City Tenants' Protection Act is to allow a tenant who is liable to ejectment, whether under a decree or not, to purchase the landlord's right. So long as the decree for ejectment has not been executed, what the reasons for non-execution may be, and whether or not it was due to an application by the tenant himself for stay of execution do not matter and cannot affect the applicability of the section.

Under section 9 of the Madras City Tenants' Protection Act, the Court has to fix the price of the landlord's interest according to the market-value of the land on the date of the order. The principle of valuation in a case where the option is exercised by sub-tenants against their landlord, would be to ascertain the market-value of the landlord's interest in the land as on the date of the order. In arriving at that market-value the Court will have to take a reasonable rent from the day of the expiration of the notice to quit until the date of the order, and then to capitalise the value of the rent for the remainder of the landlord's term, *less* the amount of rent for the balance of the term which the landlord was liable to pay to his superior landlord, and which will now become payable by the sub-tenants. It will also take into account any enforceable power to review that the landlord may have. M KANNIAPPA CHETTIAR *v.* RAMACHANDRAIYAR, 46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 386 **92**

Madras Estates Land Act (I of 1908), ss. 3 (16), 45, 163—"Ryoti *land*," *definition of——Land, ordinarily submerged in water and not under cultivation, whether* ryoti *land—"Cultivable," meaning of—Mesne profits, suit for—Civil Court, whether has jurisdiction.*

Waste land in an estate usually submerged in water in the rainy season and not under cultivation is not "*ryoti* land" within the meaning of section 3 (19) of the Madras Estates Land Act.

A suit for mesne profits for such a land is properly maintainable in the Civil Court.

The words "cultivable land" in the definition of "*ryoti* land" means land that is ordinarily and usually cultivated and does not refer to waste land, though even waste land can at times be cultivated with labour and expenditure of money.

Madras Estates Land Act—concld.

M ARETI SUBBAYYA *v.* SREE RAJA VENKATARAMIAH, 34 M. L. T. 233; 19 L. W. 626; (1924) M. W. N. 630; 47 M. L. J. 469 718

——— **ss. 171, 172.** *See* LETTERS PATENT (MAD.), CL. 16 372

Maintenance, order for—Wife expelled by husband—Restitution, whether ought to be decreed. *See* RESTITUTION OF CONJUGAL RIGHTS 634

———, *suit for*—Quantum *of maintenance, determination of—Decree—Relief—Practic.*

Once a right to maintenance has been established, the *quantum* of maintenance should be ascertained in the suit itself, even though the parties may not in the first instance have provided the Court with materials, and the parties entitled to maintenance, who are generally females, should not be left to separate proceedings for the purpose of ascertaining the *quantum* of maintenance. B NILAWA IRAYA MATHAPATI *v.* REVANSHIDAYA SHIDLINGYA, (1923) A. I. R. (B.) 419 208

Majority Act (IX of 1875), s. 2 (a)—*Indian Christians—Minority, period of—Suit for divorce—Plaintiff what must prove.*

The effect of section 2 (*a*) of the Indian Majority Act is to extend the period of minority till the age of 21 in the case of Indian Christians, in the case of suits for divorce.

Where a person is attempting to set aside a contract of marriage, it is not sufficient for him to prove that he was eccentric or deficient to a certain extent merely in his mental capability, but it must be shown that the whole mental being was so affected that he was incapable of appreciating not necessarily the nature of the act, but its validity. S G. E. G. R. *v.* E. M. R., 16 S. L. R. 267 535

Malicious prosecution—*Conviction by Trial Court—Acquittal on appeal*—Bona fide *prosecution—Civil Court, position of.*

A suit for malicious prosecution does not necessarily fail where there has been a conviction by the Court of first instance and an acquittal by the Appellate Criminal Court, if on the evidence the Court is convinced that the charge was utterly false and, therefore, malicious. A MADHO SINGH *v.* MANGAL SINGH, (1924) A. I. R. (A.) 536 1023

——— *Innocence of accused—Doubt as to guilt—Setting law in motion.*

In an action for malicious prosecution the plaintiff has to prove,—

(1) that he was prosecuted by the defendant;

(2) that he was innocent of the charge upon which he was tried;

(3) that the prosecution was instituted against him without any reasonable and probable cause;

(4) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.

There is malicious prosecution if a person is innocent and is falsely prosecuted, but the fact that a guilty person is prosecuted for private ends and not from a sense of helping the cause of justice is immaterial. By itself malice is not actionable.

To succeed in an action for malicious prosecution it is not enough for the plaintiff merely to raise such doubt regarding his guilt as were sufficient to save him from conviction.

If a Court takes action as the result of prior malicious proceedings originated by the defendant, the latter cannot escape liability on the excuse that the Court had acted of its own motion. Inquiry should be aimed at a discovery whether the Court in taking action was or was not influenced by the proceedings of the defendant. O BADRI SAH *v.* BALBHADDAR SINGH, 10 O. L. J. 468; (1924) A. I. R. (O.) 145 697

Mamlatdars' Courts Act (Bom. II of 1906), ss. 23, 24—*Collector's order—Revision.*

Under section 24 of the Mamlatdars' Courts Act, the Court of the Judicial Commissioner of Sind has powers of revision over orders of the Collector passed in his jurisdiction under section 23 of the Act.

When the Collector has set aside an order of the *Mamlatdar* which is based on no evidence, the Judicial Commissioner's Court will not interfere in revision.

Per Madgavkar, A. J. C. Two conditions must co-exist before the Court of the Judicial Commissioner will interfere in revision with an order of the Collector passed under section 23 of the Mamlatdars' Courts Act. The first is illegality or patent material irregularity and the second that no remedy except by way of revision is open to the applicant. S MOTUMAL PERUMAL *v.* LEKHUMAL, (1922) A. I. R. (S.) 18; 16 S. L. R. 106 847

Marumakkatayam Law *Gift to daughter—Tarwad given powers of enjoyment—Intention of donor—Daughter, whether takes absolutely.*

A gift deed executed by a Muhammadan governed by the Marumakkatayam Law in Malabar in favour of his daughter recited that the gift was "to you" (in the singular) and then went on to say that "in future except for you and your offspring (*santanam*) there is no claim, concern or right of entry for me over this paramba.....you and your *santanam* should hold the said paramba in possession and enjoy the same as your *jenmom*."

Held, that the gift was not for the donee's exclusive benefit but to her as the head of a *tavazhi* formed of herself and her children, and that the property gifted was '*patravakasam*' property belonging to the donee's tarwad. M CHATHOTH PARKUM *v.* PARAMBATH CHATHENKANDI, 31 M. L. T. 238; 20 L. W. 41; (1924) M. W. N. 480 886

Minor, benefit of—Specific performance—Agreement to sell by guardian on behalf of minor, whether can be enforced. *See* SPECIFIC RELIEF ACT, s. 22 201

———, *contract with—Minority—Burden of proof—Contract Act (IX of 1872), ss. 2, 11—Money*

Minor—concld.

obtained during minority—Contract to re-pay after majority, validity of.

In a suit to enforce a contract, if the defendant alleges that he was a minor on the date of the contract, the burden of proving his minority lies on him.

A contract by a minor is void and unenforceable against him, but there is nothing to prevent money received during minority forming the consideration of a contract after attaining majority, having regard to the definition of consideration in section 2 of the Contract Act, which includes services already rendered to the promisor.

Under section 11 of the Contract Act if a minor accepts money except for necessaries he cannot be compelled to re-pay it and any contract to do so made by him as a minor is void against him, but if when of full age he takes it upon himself to re-pay there is no reason either in law or equity why his agreement should be deemed unlawful. **A** NARAIN SINGH *v.* CHIRANJI LAL, 22 A. L. J. 461; 46 A. 568 **945**

———, death of, before suit—Plaint presented in minor's name—Next friend, whether can continue suit as representative. *See* CIVIL PROCEDURE CODE, O. I, R. 10 **284**

——— Ejectment, suit for, by guardian of minor landlord, whether maintainable. *See* RANGOON RENT ACT, S. 10 **505**

——— Guardian, power of, to bind minor's estate—Money borrowed to pay land revenue—Estate, whether liable. *See* HINDU LAW—MINOR **22**

———, interests of, protection of—Guardian, appointment of—Consent, whether can be implied—Guardian, irregular appointment of, whether material. *See* CIVIL PROCEDURE CODE, O. XXXII, R. 4 (3) **572**

——— Minor girl, married—Guardian, whether can be appointed. *See* GUARDIANS AND WARDS ACT, S. 19 (A) **451**

——— Mortgage of minor's property by guardian—Necessity—Benefit to minor—Minor, whether can approbate part of transaction and repudiate rest. *See* HINDU LAW—MINOR **19**

———, whether properly represented—Guardian *ad litem* with adverse interest—Mortgage by guardian, where voidable by minors. *See* GUARDIANS AND WARDS ACT, S. 30 **556**

——— Mother, sale by, of minor's property, validity of. *See* MUHAMMADAN LAW—MINOR **260**

Mortgage—Adverse possession of mortgagee—Limitation. *See* LIMITATION ACT, SCH. I, ARTS. 142, 148 **39**

——— by conditional sale—Sale-deed—Agreement to reconvey—Pre-emption. *See* TRANSFER OF PROPERTY ACT, S. 58 (*c*) **626**

——— by managing members of a joint Hindu family—Suit on mortgage—Sons, whether necessary parties. *See* HINDU LAW—JOINT FAMILY **1001**

———*Gift by mortgagors—Sale by donee—Vendee, rights of—Registration, whether amounts to notice,*

Mortgage—contd.

The mortgagors, defendants Nos. 1 and 2, remained in possession of the land in suit for six years as mere squatters paying revenue to Government. They then gifted the land to their children, defendants Nos. 3 and 4, who occupied the land, worked it, paid revenue thereon for 3 years, and then sold it to defendant No. 5 who made no inquiries as to their title. Plaintiffs mortgagees sued on foot of his mortgage:

Held, (1) that defendants Nos 1 and 2 had no doubt the right to transfer their interest in the property to any body they pleased;

(2) that defendants Nos. 3 and 4 must be held to have taken their property subject to the mortgage in favour of the plaintiffs if they had legal notice of it and defendant No. 5 got nothing more than her vendors had;

(3) that as the mortgage was by a registered deed the defendants must be deemed to have notice of it and plaintiffs were entitled to succeed. **R.** AUNG KAING SAING *v.* MAUNG SAN, (1923) A. I. R. (R.) 41 **249**

——— in favour of lunatic, whether enforceable—Executed and executory contracts. *See* CONTRACT ACT, S. 11 **995**

——— Interest, high rate of—Donee from mortgagor's widow, whether can object. *See* CONTRACT ACT, S. 16 **995**

——— Mortgagee decree-holder purchasing property—Question relating to satisfaction of decree—Suit, whether barred. *See* CIVIL PROCEDURE CODE, S. 47 **486**

——— *Mortgagee put in possession of area larger than that mortgaged—Redemption—Mortgagor, whether can recover excess area.*

Where on a partition between a mortgagor and his co-sharers a mortgagee is by mistake put in possession of a larger area of land than was originally mortgaged to him, the mortgagor is entitled on redemption, to the whole of the area of which the mortgogee was put in possession. **B.** NANCHI *v.* SHITITI KULSAMBI, (1923) A. I. R. (B.) 42 **491**

——— *Prior mortgagee, suit by—Subsequent mortgagee impleaded as party—Omission to redeem prior mortgage—Subsequent suit to redeem, whether maintainable—Prior mortgage—Mesne incumbrance—Puisne mortgagee, right of, to redeem—Right to redeem, nature of—Transfer of Property Act (IV of 1882), s. 89, nature of.*

If a subsequent mortgagee, on being impleaded in a suit upon the prior mortgage, omits to set up his mortgage and claim to redeem the prior mortgage when he has an opportunity to do so, he cannot afterwards sue for that purpose on the mortgage he omits to plead.

A puisne mortgagee can redeem a prior mortgage even when there is a mesne incumbrance. But this is not an absolute right and arises when he comes in Court to obtain his remedy for his own mortgage.

The true construction of section 89 of the Transfer of Property Act is that when a final decree is passed, the security is extinguished and is replaced by the decree. **O** DUBER *v.* RAM SAHAI, 10 O. L. J. 305; (1924) A. I. R. (O.) 56 **654**

Mortgage—contd.

——— Redemption—Deposit in Court—Interest, cessation of—Mesne profits, right as to. *See* TRANSFER OF PROPERTY ACT, ss. 83, 84 40

——— *Redemption suit—Mortgagor's title—Redemption suit, nature of—Suit against auction-purchaser from mortgagee—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 144, 148.*

It is not open to the mortgagee to raise in a suit for redemption the question of the title of the mortgagor from whom he obtained possession.

A suit for redemption against an auction-purchaser, puchasing the right, title and interest of the mortgagee under a mistake that the mortgagee was the full owner of the property sold, is governed by Article 148 and not by Article 144 of Schedule I to the Limitation Act.

A suit for redemption is not a suit for possession pure and simple. S MAHOMED MOOSA *v.* KAZI FATEHULLAH 466

——— *Simple mortgage—Subsequent usufructuary mortgage—Decree on foot of simple mortgage—Third mortgage to satisfy decree—Payment to decree-holder by third mortgagee—Priority.*

One *J K* executed a deed of simple mortgage in favour of *N* hypothecating a certain village by way of security. Subsequently she executed a deed of usufructuary mortgage in favour of one *J P* hypothecating the same village by way of security. The first mortgagee obtained a decree on foot of his mortgage. In order to satisfy this decree *J K* executed a third mortgage in favour of *R* the mortgage-money being left with him for payment to the decree-holder. The payment was made by *R* and his widow *C* sued for recovery of the amount:

Held, that the mortgage in respect of which the decree was passed was extinguished by the decree and the plaintiff could not claim priority over *J P*. A JAGANNATH PRASAD *v.* CHHATUR KUNWAR, 45 A. 149; (1923) A. I. R. (A.) 171 308

——— *Subrogation—Part-payment of mortgage-debt—Charge, creation of—Suit to recover payment—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 132.*

A partial payment of the debt on an earlier mortgage by a subsequent mortgagee does not give a claim for subrogation.

Subrogation is by redemption and that there can be no subrogation, where there has been no redemption.

Where a person interested in a mortgaged property makes partial payment of the mortgage-debt to save the property, although the doctrine of subrogation does not strictly apply, the payment constitutes a charge on the property.

A suit to recover a payment made in the above circumstances is governed by Article 132 of Schedule I to the Limitation Act. R MA LON *v.* MA NYO, 1 R. 714; (1924) A. I. R. (R.) 204 766

——— with possession—Mortgagee ousted by person claiming adversely to mortgagor—Duty of mortgagor—Mortgagee, whether entitled to sue for mortgage money. *See* TRANSFER OF PROPERTY ACT, s. 68 815

Mortgage—contd.

——— **suit**—*Decree by consent—Provision for payment by instalments and execution of decree in default—Decree, whether merely preliminary—Decree, execution of.*

A suit on a mortgage executed by defendant No. 1 for himself and as guardian of defendant No. 2 was compromised with the permission of the Court and the compromise decree provided that the money due was to be paid in two instalments on stated dates, and that in default the plaintiff was to recover the whole amount by executing the decree (1) personally against the adult defendant No. 1; (2) by selling the mortgaged property, and (3) out of the other property of defendants. The defendants defaulting, the plaintiff applied for execution of the decree and the minor defendant contended that it was a merely preliminary decree and was not executable:

Held, (1) that the decree was a compromise decree and could not be treated merely as a preliminary decree, the intention of the parties being that in default the decree-holder should be entitled at once to realise the amount due to him by the sale of the properties covered by the decree;

(2) that the minor having been properly represented and the Court having granted permission for the compromise, the decree was binding upon the minor and he could not question it. M SIVA SUBRAMANIA PILLAI *v.* RAKKUMUTHU MOOPAN, 19 L. W. 502; (1924) M. W. N. 451; (1924) A. I. R. (M.) 645 418

——— *to enforce mortgage—Person in possession of mortgaged property, whether necessary party—Decree in favour of prior mortgagee—Subsequent mortgagee, whether bound—Puisne mortgagee, suit by—Prior mortgagee, duty of—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.*

Merely because a person is in possession of mortgaged property he cannot be said to have such interest in the mortgage-security or the right of redemption, as would make his joinder as co-defendant to a suit to enforce a mortgage, absolutely necessary under O. XXXIV, r. 1, Civil Procedure Code.

A decree obtained against the mortgagor by a prior mortgagee on the basis of his mortgage without impleading the subsequent mortgagee cannot bind the latter.

It is only in a suit brought by a puisne mortgagee for the express purpose of selling the mortgaged property free of prior encumbrance that the prior mortgagee is bound to set up and prove his mortgage. N BALAJI VINAYAK BUTI *v.* VITHOBA 614

———, **usufructuary** — *Redemption before expiry of term when allowable.*

Unless in a usufructuary mortgage securing possession to the mortgagee for a fixed term, there is either a special condition for the earlier redemption or there is a pleading and proof of fraud, duress or undue influence owing to which the period was fixed, the mortgagor or his representative or transferee cannot offer or claim to redeem and recover back possession from the

mortgagee before the expiry of the specified period. **N** RAMA *v.* WAMANRAO **870**

——————— Suit for redemption, nature of. *See* REGISTRATION ACT, ss. 17, 49 **510**

Muhammadan Law—*Construction of document —Ariat, essentials of—Marriage settlement—Revocation.*

A Muhammadan *taluqdar* executed a marriage settlement whereby he purported to transfer a half share in a certain village to the defendant for life in consideration of her marrying his son and on her death to her male child, if any, absolutely; failing which the property was to go to her husband and his heirs. The marriage was duly performed but no transfer was effected. The defendant, however, sued for possession and obtained a decree on the basis of a compromise. In a subsequent suit by the father-in-law to revoke the said settlement on the ground of its being an *ariat* under the Muhammadan Law:

Held, (1) that none of the essentials of an *ariat* appertained to the marriage settlement in suit;

(2) that the deed was a contract between the donor and the bride who only consented to marry on condition that the settlement was made in her favour;

(3) that once the contract was complete by the marriage on one side and the gift of property on the other, the donor had no longer any interest in the property and no right to revoke the deed.

The essentials of an *ariat* under the Hanafi Law are (1) that it cannot be revoked; (2) that it cannot be a transfer of the property; (3) that it must be for a definite period, and (4) that it does not devolve upon the heirs of the recipient. **O** MOHAMMAD SHER KHAN *v.* KAMAL-UN-NISSA, 10 O. & A. L. R. 597 **716**

——— **Co-heirs**—*Alienation by co-heir—Suit for partition—Partial partition.*

A co-sharer under the Muhammadan Law suing to recover his share in a portion of his ancestral property wrongfully alienated by another co-sharer to a stranger who is in possession, is not required to seek for partition of the whole estate and can maintain a suit for partition of the portion alienated.

In the case of Muhammadans the co-heirs are only tenants-in-common, and there is no joint family in the Hindu Law sense of the term. **S** VAZIR *v.* DWARKOMAL, 16 S. L. R. 133; (1922) A. L. R. (S.) 41 **841**

———————, *position of—Ouster, proof of—Transfer of Property Act (IV of 1882), s. 41—Transfer by ostensible owner, validity of—Co-heir allowing co-heir to continue in possession.*

A Muhammadan co-heir who obtains possession of the property of the deceased is in the position of a co-sharer and his possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of the other co-heirs.

Where a Muhammadad co-heir permits another co-heir to obtain possession of the entire property of the deceased and to get himself recorded in

the Revenue papers as sole owner, and the latter makes an alienation of the property, the alienation cannot be avoided by the other co-heir where it is found that the transferee acted in good faith and gave consideration for the transfer, and that there were no circumstances which could have put the transferee on enquiry. **A** MUBARAK-UN-NISSA *v.* MUHAMMAD RAZA KHAN, 22 A. L. J. 307; 46 A. 377; (1924) A. I. R. (A) 384 **174**

——— **Conjugal rights,** *restitution of—Wife, if to establish cruelty such as would justify divorce —Ill-treatment, simple chastisement if amounts to—Inability to maintain wife, if ground for separation.*

Under the Muhammadan Law where the wife seeks to resist the enforcement of a claim for restitution of conjugal rights, it is not necessary for her absolutely to establish that there was cruelty such as would justify a divorce from her husband. It is enough if she proves that there has been ill-treatment of some sort which would create in her an apprehension as to her life or safety.

Simple chastisement of the wife by the husband does not amount to such cruelty or ill-treatment as would be sufficient to create a reasonable apprehension that her life, health or safety would be endangered on her return to the husband.

Mere inability to maintain the wife is no ground for separation under the Hanafi Law. **C** ASMATI BIBI *v.* SAIMUDDI PATHAN **991**

——— **Dower**—*Reasonable amount—Oudh Laws Act (XVIII of 1876), s. 5—Means of the husband.*

Where the amount of dower settled at the time of a Muhammadan marriage was Rs. 70,000, while the assets left by the deceased husband who had died issueless, amounted to Rs. 11,465:

Held, that under section 5 of the Oudh Laws Act the sum of Rs. 4,000 would be a reasonable amount of dower to grant to the widow. **O** AMJAD HOSAIN *v.* UMMATUL ASKARI, 10 O. L. J. 409; (1924) A. I. R. (O.) 232 **644**

——— **Gift** *and* **hiba-bil-ewaz,** *distinction between—Delivery of possession, whether necessary.*

A *hiba-bil-ewaz* has incidents very different from those of a simple gift. Under the Muhammadan Law delivery of possession is necessary to validate a gift pure and simple, whereas in the case of a *hiba-bil-ewaz*, delivery of possession is not necessary. **L** FEROZ-UD-DIN AHMAD *v.* SIRDAR SHAH, 6 L. L. J. 221; (1924) A. I. R. (L.) 562 **81**

——— **Guardian,** *natural, powers of.*

A natural guardian under the Muhammadan Law has no power to deal with the property of the minors and an alienation made by him or her would be altogether null and void. **L** TAHAN *v.* SHADI, (1923) A. I. R. (L.) 601 **579**

——— **Inheritance**—*Representation, doctrine of, whether applicable.*

Under the Muhammadan Law there is no representation of the family as under the Hindu Law, by one or more members of it so that the

act of the *karta* or the head binds the other members of the family. As soon as succession opens under that law, each heir gets his specified share in the inheritance.

N died leaving three sons a widow and three daughters as his heirs. The property left by him was sold in execution of a decree obtained in a suit brought on a mortgage executed by him. Thereafter two of his sons sold a portion of the land to the plaintiff and a portion to another person and with the money thus realised they paid off the mortgage-decree and got back the property. The defendants purchasers from the other heirs of *N* dispossessed the plaintiff whereupon he brought this suit for recovery of possession:

Held, that the sale to the plaintiff was not binding on the other heirs of *N* and he was, therefore, entitled only to the share of his vendors. **C** SUKUR MAHOMED *v.* ASMOT MANDAL, 50 C. 978; (1924) A. I. R. (C.) 384 **491**

——— **Minor**—*Mother, sale by, of minor's property, validity of*—Parda nashin *lady, transfer by—Fraud—Burden of proof.*

Under the Muhammadan Law a mother has no power to dispose of immoveable property belonging to her minor children, and a sale of such property by the mother is *ab initio* void.

If a transferee from a *parda nashin* lady comes into Court to enforce a deed executed by her, it lies upon him to prove that it was obtained from her fairly, that the terms of the deed were explained to her, that she had independent advice before executing the deed, and that she had benefited by it.

On the other hand, when a *parda nashin* lady comes into Court as a plaintiff with specific allegations of fraud and deception it lies upon her to make out a *prima facie* case before the transferee can be called upon to show that the deed had been properly obtained from her. **L** MUHAMMAD SHAFI *v.* KALSUM BI, 4 L. 467; (1924) A. I. R. (L.) 200 **260**

——— **Pre-emption**—*Demands by pre-emptor—Transfer of pre-emption property—Fresh demands, whether necessary—Pre-emption right, nature of.*

Under the Muhammadan Law it is not necessary for a pre-emptor to make fresh demands when the vendee, to whom he has already made the demands required by law, transfers the property sought to be pre-empted to another person.

The right to claim pre-emption is not affected by any intermediate dealings with the property. The proceedings must in any case be taken against the original purchaser, but when a decree has been obtained against him it can be enforced against any person deriving title from him by purchase, gift, inheritance, or otherwise. **A** MUHAMMAD ABDUL RAHMAN KHAN *v.* MUHAMMAD AYYUB KHAN, 22 A. L. J. 817 **1053**

——— **Shia Law**—*Females—Marriage—Majority—Puberty.*

Under the Shia Muhammadan Law a female is considered to have attained majority for the purpose of giving consent to marriage on attaining puberty and in the absence of evidence the age has to be considered. **A** ZAITUN SHAIKH *v.* KOMMAL, 22 A. L. J. 423 **907**

——— **Waqf**—Mutwalli, *powers and position of—Mortgage of* waqf *property, whether valid—Necessity*—Onus.

A *mutwalli* has no power under the Muhammadan Law to mortgage or transfer the *waqf* property or any portion of it without the leave of the *Kazi* or of the Court. Such a transfer is under the law void.

The curator of a *wakf* whether called *mutwalli* or *sajjadanashin* or by any other name, is merely a manager.

Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *wakf* the whole mortgage fails.

For an advance of money otherwise than to satisfy the legitimate needs and purpose of the *wakf*, no part of the property held in *wakf* is chargeable either by the settler or by the Court.

It is well-established in law that the exercise of a particular power must be considered in connection with the condition under which the power has been conferred. The *mutwalli* in this case could only mortgage the *wakf* property if it was necessary for the purpose of the *wakf*. The onus, therefore, lies heavily upon the mortgagee to prove the existence of any such necessity. **C** MAHIMJAN BIBI *v.* MIR RAHIM ALI **360**

——— ——— Wakif, *whether can be* mutwalli—Wakf *property in possession of* wakif *as* mutwalli, *effect of—Income, major portion of, devoted to purposes of* wakf—Wakf, *whether illusory—Dedication to mosque, whether public* wakf—*Civil Procedure Code (Act V of 1908), s. 92, applicability of.*

Under the Hanafi Law a *wakif* can appoint himself the *mutwalli* of the *wakf* created by him.

Where a *wakif* appoints himself the *mutwalli* of the *wakf* and remains in possession of the *wakf* property as such *mutwalli* and carries out the objects of the *wakf*, the *wakf* is validly constituted.

Where the major portion of the income of the *waqf* property is directed to be devoted to the purposes of the *wakf*, cannot be described as illusory.

A dedication in favour of a mosque is a public *wakf*, and falls within the purview of section 92 of the Civil Procedure Code. **L** TAFAZZAL BEG *v.* MAJID ULLAH, 5 L. 59; (1924) A. I. R. (L.) 432 **120**

Negotiable Instruments Act (XXVI of 1881), ss. 4, 80—*Document containing request to plaintiff to pay money to defendant—Undertaking to re-pay with interest—Ambiguity about rate of interest—Oral evidence, whether admissible—Evidence Act (I of 1872), s. 92 (b)—Rate of interest permissible—Interest Act (XXXII of 1839), s. 1.*

Plaintiff sued to recover Rs. 600 with interest at Re. 1-8 per cent. per mensem on the foot of a document which was in the shape of a request to the plaintiff to pay the defendant Rs. 500 which

Negotiable Instruments Act—concld.

the defendant undertook to re-pay with interest at the rate of Re. 1-8 per cent :

Held, (1) that the document as executed was not an unconditional contract and was not, therefore, a promissory-note under section 4 of the Negotiable Instruments Act ;

(2) that consequently the plaintiff was not entitled to interest at the rate of Rs. 6 per cent. per annum under section 80 of the Act ;

(3) that as it was not mentioned whether the rate of interest was to be per mensem or per annum, the document was ambiguous and under clause (6) of section 92 of the Evidence Act no evidence could be given to clear up the ambiguity ;

(4) that as no time was fixed for the payment of the loan in the document the plaintiff was, under the Interest Act, entitled to interest at a rate not exceeding the current rate from the date of demand. **Pat** SARJU SAHU *v.* SUKHI LAL, 4 P. L. T. 577; (1924) A. I. R. (Pat.) 96 **420**

——— **ss. 46, 50**—*Bill of exchange—Indorsement, effect of—Delivery, conditional, effect of.*

Under section 50 of the Negotiable Instruments Act, indorsement of a negotiable instrument alone is not sufficient to transfer the property in the instrument to the indorsee ; in order to have that effect the indorsement must be followed by delivery, and section 46 of the Act provides that it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein. **L** PUNJAB NATIONAL BANK LTD. *v.* BALKISHAN DAS, 6 L. L. J. 230 **461**

Northern India Canal and Drainage Act (VIII of 1873), ss. 6, 15. *See* LIMITATION ACT, SCH. I, ART. 2 **185**

——— **ss. 6, 15, 58**, *scope of—Limitation Act (IX of* 1908), *Sch. I, Art.* 2, *applicability of—Damage caused by action of Canal Officers—Suit to recover damages—Limitation.*

The words "may execute all works, etc." in section 15 of the Northern India Canal and Drainage Act are independent of the preceding words of the section.

The expression "in this behalf" of section 6 of the Northern India Canal and Drainage Act, applies to the application or use of the said water, and the word "use," coupled with the preceding words, covers all actions necessary both for construction and maintenance and whether taken at the time of construction or later.

Section 58 of the Northern India Canal and Drainage Act contemplates permanent work, for the carrying out of which the Local Government has previously authorised some of its officers, and any acts committed by them after that definite authorisation are covered by the section.

All that is necessary in order to bring a suit within the purview of Art. 2 of Schedule I to the Limitation Act, is that a public officer should have done what he did with the honest intention of acting as the Statute authorised.

Northern India Canal and Drainage Act—concld.

Owing to the inefficient manner in which certain flood water which had collected along the bank of a Canal was dealt with by the Canal Officers, by means of cutting the channel of the canal in various places to allow the water to escape, the flood water was diverted from its natural course and eventually reached the property of the plaintiff and injured it. Plaintiff sued the Secretary of State for damages :

Held, that the action of the Canal Officers was covered by sections 6 and 15 of the Northern India Canal and Drainage Act, and the suit was, therefore, governed by Article 2 of Schedule I to the Limitation Act. **L** PUNJAB COTTON PRESS CO. *v.* SECRETARY OF STATE, 4 L. 428; (1924) A. I. R. (L.) 169 **208**

Oaths Act (X of 1873), s. 9, *whether mandatory—Discretion of Court—Agreement to refer by agent, validity of—Agreement to abide by statement of third person, whether reference to arbitration—Civil Procedure Code (Act V of 1908), Sch. II, para. 1.*

Section 9 of the Oaths Act is not mandatory and under special circumstances the Court has a discretion to refuse to refer the matter to the referee.

The agent or Vakil of a party may bind the party by an agreement under section 9 of the Oaths Act.

During the pendency of an appeal the parties made a statement that the case may be decided in accordance with the statement of a particular person, but the statements of the parties were not recorded and before the matter could be referred to the person named the defendant made an application that as the referee had colluded with the other side he desired to withdraw from the agreement. On this the Court made an order that the case should be proceeded with and decided it on the merits :

Held, (1) that the agreement between the parties did not amount to a reference to arbitration within the meaning of paragraph 1, of Schedule II to the Civil Procedure Code ;

(2) that as it was not clear that the statement of the referee by which the parties had agreed to be bound was to be on oath or solemn affirmation, the agreement did not fall within the scope of section 9 of the Oaths Act;

(3) that in any case the Court was not bound to refer the matter to the referee as the provisions of section 9 of the Oaths Act were not mandatory. **A** MASITA BIBI *v.* KHUDA BAKSH, (1923) A. I. R. (A.) 65 **246**

Oudh Laws Act (XVIII of 1876), s. 5. *See* MUHAMMADAN LAW—DOWER **644**

——— **s. 9.** *See* PRE-EMPTION **950**

Oudh Rent Act (XXII of 1886), s. 52. *See* U. P. LAND REVENUE ACT, S. 233 **784**

——— **s. 107E, cl. (a), s. 107H**—*Declaration by Revenue Court that* guzaradars *are under-proprietors—Suit in Civil Court to challenge deci-*

Oudh Rent Act—contd.

sion, whether maintainable—Jurisdiction of Civil and Revenue Courts—Guzara *land, whether can be regarded rent free.*

Where a Revenue Court in proceedings for resumption of land held in lieu of maintenance under cl. (*a*) of section 107E of the Oudh Rent Act makes a declaration under section 107H of the Act that the *guzaradars* are under-proprietors in relation to the said land, a Civil Court is debarred from entertaining a suit by the *taluqdar* for a declaration that they are not under-proprietors and do not possess heritable and transferable rights in the land.

Land held in lieu of *guzara*—maintenance—is land held as rent free and as such is within the exclusive jurisdiction of the Revenue Courts. **O** JAI INDAR BAHADUR SINGH *v.* BACHUN SINGH **1051**

——— **s. 107G**—*Rent-free grant—Will, construction of—Legatee, whether can repudiate terms of Will—*Sir *land, meaning of—Privy Council record—Courts, duty of.*

R, a *Taluqdar* of Oudh, made a Will which provided that in the event of *R* dying sonless, his brother's son, *J*, shall be the owner and take possession of all his moveable and immoveable properties, and that his wife *B* shall get Rs. 500 per mensem from the estates in cash besides the *sir* lands in her possession. Subsequently, *R* gifted *Mouza* C. to *B*. and applied to the Revenue Authorities for mutation praying that the *mouza* may be entered in her name as *muafi*. After the death of *R J* having sued to assess the *mouza* to rent, *B* sued for a declaration that she was entitled to hold it for her life rent-free:

Held, (1) that *R* intended by his Will to bequeath to *B* an absolute estate for her life in the '*sir* lands in her possession' and not merely a right of tenancy or other subordinate interest in them;

(2) that in confirmation of his gift of *Mouza C.* to his wife *B* rent-free for her life, *R* did by his Will intend to bequeath and did bequeath to her the *mouza* for her life as a proprietor and without any liability to have it assessed to rent;

(3) that *J* who took his interest in the *taluqa* under the Will could not repudiate the condition of the Will that *Mouza* C. should be held by *B*. for her life rent-free.

The word *sir* as used in Oudh applies to the land frequently assigned to junior branches of a family for their support instead of breaking up the estate and giving them the ancestral shares to which they may be entitled.

It is the duty of the Court to exercise control upon the wholesale inclusion of irrelevant documents in the preparation of a record of appeal to the Privy Council. **P. C.** JAI INDRA BAHADUR SINGH *v.* BIJAI RAJ KUNWAR, 21 A. L. J. 125; 27 C. W. N. 221 (P. C.) **250**

——— **s. 127,** *application of—Cultivated grove—Suit for rent, maintainability of.*

A suit for rent of cultivated grove land is not maintainable under section 227 of the Oudh Rent Act. **O** THAKUR RUDRA PARTAP SINGH *v.* HAUSLA PRASAD, 10 O. L. J. 524; (1924) A. I. R. (O.) 295 **722**

Partnership, *dissolution of—Partner, right of—Accounts—Misconduct, effect of.*

In the case of a partnership at will a partner is entitled to dissolution of partnership and accounts of the partnership. It is a legal right, and a finding that a partner has been guilty of gross misconduct and falsification of accounts does not deprive him of this right. **P C** RAM SINGH *v.* RAMCHAND, (1924) A. I. R. (P. C.) 2; 19 L. W. 4; 22 A. L. J. 14; (1921) M. W. N. 76; 46 M. L. J. 158; 26 Bom. L. R. 196; 10 O. & A. L. R. 156; 2 P. L. R. 91; 28 C. W. N. 566; 5 L. 23; 40 C. L. J. 276 **944**

Patna High Court Rules, Chap. VI, r. 6. *See* CIVIL PROCEDURE CODE, O. XXII, r. 9 (2) **414**

Pleadings *Defendant, whether can set up new cases in appeal—Principal and agent—Money paid under directions of another—Payment, whether creates agency.*

A defendant cannot be allowed to make out a new case in appeal altogether different from the case which he made out both in his written statement and in his evidence before the Trial Court.

The fact that money is paid by *A* to *B* under the direction of *C* would not make *B* the agent of *C*. It must be proved that *C* intended that the money should be paid to *B* on behalf of *C* and that *B* accepted the money as payment on behalf of *C*. **C** HARI CHARAN DAS *v.* TARAPRASANNA SEN **354**

——— *New case in Appeal—Hindu Joint family Father and sons—Suit for recovery of money—Actual partition, plea of—Separation in eye of law, whether may be pleaded in appeal.*

Where, in a creditor's suit for recovery of money against a Hindu father and sons in respect of certain business debts, a plea of the sons of an actual out and out partition before suit between the father and themselves is negatived, it is not open to them in appeal to set up a fresh case of division of status on the basis of a notice by one of the sons to the father. **M** NIDADAVOLU ACHUTAM *v.* VEERINA SURAYYA, (1921) M. W. N. 185 **902**

——— *Plaintiff suing in personal capacity—Subsequent amendment of plaint beyond limitation—Plaintiff, status of, alteration in—Amendment, effect of—Suit, whether time-barred.*

Where, in a suit for money which was instituted by the plaintiff in his personal capacity within the period of limitation, the plaintiff, after the expiration of that period, prayed to be permitted to sue not only in his personal capacity but also as the administrator to the estate of the deceased proprietor and the plaint was amended accordingly:

Held, that the suit was not barred by limitation as there had been no change in the person to whom the money was payable and the alteration in the capacity of the plaintiff did not affect the defendant's liability to pay. **C** NABA KUMAR CHOUDHURY *v.* HIGHEAZANY **403**

Pleadings and proof—*Possession, suit for—Mutual arrangement for purposes of cultivation, cancellation of.*

Certain *shamilat* land was partitioned and the plot in dispute was allotted to the plaintiffs, and another plot was allotted to the defendants, but, as a matter of convenience, the defendants continued in cultivating possession of the former plot and the plaintiffs of the latter plot. At some time the defendants got their names recorded in the revenue papers as proprietors of the plot in dispute and subsequently ejected the plaintiffs from the plot of which they were in possession. The plaintiffs thereupon sued to recover possession of the plot in dispute:

Held, that the plaintiffs' suit was based not on an alleged exchange but on an arrangement which was convenient to both parties, and the arrangement having come to an end owing to the action of the defendants the plaintiffs were entitled to recover possession of the plot in dispute. **L** MUGHLA *v.* ABHE RAM, (1923) A. I. R. (L.) 172; 4 P. W. R. 1923 **494**

Possession and ownership—*Trees on land—Land belonging to one person—Trees in possession of another—Ownership in trees—Presumption—Burden of proof.*

A person who is the owner of a certain land may be presumed to be the owner of the trees standing on the land, but this presumption is not very strong in India where the ownership of the trees is very frequently divorced from the ownership of the land they stand on. On the other hand, the presumption that a person in possession has title is always strong and is of universal application.

Therefore, in a case where the ownership of certain land is in one person but the trees standing on it are in the possession of another, the stronger presumption is that the latter is the owner of the trees, and the burden of proof is on the former to prove, his title to them. **O** BHAGWAN *v.* GANGA BAKSH, 9 O. & A. L. R. 412; (1924) A. I. R. (O.) 301 **545**

Post Office Act (VI of 1898), ss. 6, 34—*Parcel sent V.-P. P.—Goods not delivered to consignee—Suit for value of goods, whether maintainable.*

Plaintiff sent a parcel containing brass rings from M to B. The parcel was sent V.-P. P. but never reached the consignee at B. It appeared that the label had been torn and no clue could be found to the address. The parcel eventually reached the Dead Letter Office and was sold. Plaintiff sued to recover the value of the rings:

Held, that the suit being for the value of property sent by post was maintainable and sections 6 and 34 of the Post Office Act did not apply as the goods were not lost and the plaintiff was entitled to succeed. **A** SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RADHEY LAL, 46 A. 455 **334**

Power-of-attorney, *construction of.*

Where a Court has to ascertain whether a particular act of a person holding a power-of-attorney for another is within the scope or in excess of the authority conferred by the power, it is necessary to show that on a fair consideration

Power-of-attorney—concld.

of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. The decision of this question must depend upon the construction of the instrument in each case and the intention of the parties as evidenced by the circumstances. **N** HUSSAINBHAI BHORA *v.* BANSILAL **48**

Practice—*Original Side—Costs to several respondents—Order, meaning of.*

Where, on the Original Side, more parties than one appear as defendants, or respondents, and the decree or order directs payment of the defendants or respondent's costs by the plaintiff or appellant, the order must be taken to mean that the losing party should only pay one set of costs to be divided amongst the successful parties. If the latter appear separately and want separate sets of costs, an application must be made on their behalf at the time when judgment is delivered for separate sets of costs, and an order obtained to that effect. **B** RUSTOMJEE HEERJIBHAI *v.* COWASJEE DADABHAI, 26 Bom. L. R. 209; 48 B. 348; (1924) A. I. R. (B.) 317 **704**

Pre-emption. *See* CUSTOM—PRE-EMATION **41**

———*Acquiescence—Person taking active part in registration of sale-deed, whether barred from suing.*

The mere presence of a person at the time of registration of a sale-deed is not sufficient to prove his acquiescence in the sale so as to debar him from suing to pre-empt the bargain.

But a person who is not a merely a silent spectator of the registration but takes an active part in collecting the purchase-money and in getting the sale-deed registered must be deemed to have acquiesced in the sale and is precluded from pre-empting it. **L** BHAGAT RAM *v.* RAGHBAR DIAL **132**

———*Contract by pre-emptor to transfer property—Pre-emption, right of, if effected—Oudh Laws Act (XVIII of 1876), s. 9.*

Where a person claiming pre-emption enters into a contract with a stranger to transfer the suit property to him on payment of the pre-emption money, he forfeits his own right of pre-emption whether the stranger is joined as co-plaintiff in the suit or not.

To allow a stranger to acquire the subject-matter of a pre-emption suit by entering into a contract to that effect with the pre-emptor is to stultify the law of pre-emption enacted in section 9 of the Oudh Laws Act. **O** SARABJIT SINGH *v.* JAIKARAN SINGH, 10 O. & A. L. R. 240; 11 O. L. J. 423; 27 O. C. 137 **950**

———*Co-sharer pre-emptor—Status lost after decree—Appeal pending—Suit, dismissal of.*

It is not competent to Courts on appeal to pay regard to any events which have happened subsequent to the date of the Frst Court's decree.

Where a person has obtained a pre-emption decree as co-sharer, his suit cannot be defeated in appeal, merely because by reason of some event happening subsequent to the date of the

Pre-emption--contd.

First Court's decree, he has lost his status of a co-sharer. A UMRAO *v.* LACHHMAN, 22 A. L. J. 234; 46 A. 321; (1924) A. I. R. (A.) 448 217

——— *Exchange--Right, when can be exercised --Plaintiff what must prove*--Wajib-ul-arz.

In a case where the plaintiff claims a right of pre-emption in respect of an exchange the question for consideration is whether the incidents of the particular custom set up cover an exchange.

The plaintiff in each case must prove not merely that some custom prevails but he must prove a custom under which he is entitled to claim pre-emption.

By an agreement some land situated in village R was given by one *A* in exchange for other land situated in another village given by one *S* with the object of constructing a road. Plaintiffs, as co-sharers in the village R, sought to pre-empt the land given by *A*. The *wajib-ul-arz* provided that any co-sharer wishing to sell or mortgage his property should first offer it to his co-sharers and only on their refusal to a stranger:

Held, that the custom recorded in the *wajib-ul-arz* was not applicable to an exchange. A BABU SAMAR BAHADUR SINGH *v.* JIT LAL, 22 A. L. J. 292; 46 A. 359; (1924) A. I. R. (A) 390 495

——— Mohtamim's *rights, nature of--Alienation by* mohtamim--*Custom of pre-emption, whether applicable.*

The rights of a *mohtamim* as vendor in the Settlement of 1883-84 are transferable proprietary rights of a kind to which the custom of pre-emption recorded in the *wajib-ul-arz* can be made applicable. A MAHABIR SINGH *v.* MATABADAL SINGH, 22 A. L. J. 441; 46 A. 549 327

——— *Pre-emptor associating stranger in suit, effect of--Amendment, whether can be allowed.*

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, that is, a person who has no such right, he thereby forfeits his right to pre-empt and this disability cannot be overcome by amending the plaint by striking out the name of the stranger. A BADRI SINGH *v.* GOBARDHAN, (1923) A. I. R. (A.) 187 220

——— Sale-deed--Agreement to reconvey--Mortgage by conditional sale. *See* TRANSFER OF PROPERTY ACT, s. 58 (c) 626

——— Sir *plots, interest in, nature of--Custom* --Wajib-ul-arz, *construction of.*

The interest of an owner in *sir* plots is a proprietary interest and a transfer of *sir* plots is, therefore, a transfer of proprietary interest.

The *wajib-ul-arz* of a village provided that a right of pre-emption would accrue whenever a proprietor transfers his *haqiat*. Certain *sir* plots in the village lying within the *zemindari* of the vendor were sold and a suit was brought to pre-empt the sale:

Held, that the sale was subject to pre-emption under the terms of the *wajib-ul-arz*. A PURAN SINGH *v.* DAT RAM, 22 A. L. J. 5; 46 A. 165; (1924) A. I. R. (A) 447 645

Pre-emption--contd.

——— *, suit for--Acquiescence--Estoppel--Lease taken by pre-emptor from vendee--Partition proceedings, participation in.*

The action of a pre-emptor in taking on lease from the vendee a portion of the land sold cannot be treated as acquiescence in the sale so as to debar him from suing to pre-empt the sale; nor does his participation in partition proceedings instituted by the vendee operate to have that effect. L VIR SINGH *v.* NIHAL CHAND 140

——— *Village custom*--Wajib-ul-arz--*Inhabitants generally given right of pre-emption--Custom, whether reasonable.*

A custom recorded in the *wajib-ul-arz* of a village giving a right of pre-emption to the inhabitants generally in the case of the co-sharers of the village refusing to exercise the right, is not necessarily unreasonable and can be enforced.

An entry in a *wajib-ul-arz* is *prima facie* evidence of the existence of the custom recorded unless there is anything in the *wajib-ul-arz* itself which negatives the existence of the custom or there is other evidence to the contrary. A GAYAN SINGH *v.* BABU LAL, 21 A. L. J. 822; 9 O. & A. L. R. 1019; (1921) A. I. R. (A) 86 438

——— **Custom**, *proof of*--Wajib-ul-arz, *entry in, value of--Later and earlier* wajib-ul-araiz--Wajib-ul-arz *of Settlement of* 1885 *in Basti and Gorakhpur Districts--Presumption--Lapse of custom.*

The Courts ought, in dealing with the question of the existence of a custom of pre-emption, to begin with the last record. If the last record contains a record of a custom of pre-emption, a similar custom set out in earlier *wajib-ul-araiz* is corroborative evidence. It is not proper to start with the earliest *wajib-ul-arz* and to consider whether it was possible that a custom could have grown up by that time and then to proceed to consider subsequent *wajib-ul-araiz*. The proper starting point is the last *wajib-ul-arz*.

In the Gorakhpur and Basti Settlement Rules relating to the Settlements which were made about the year 1885 the Board of Revenue issued special instructions regarding the preparation of a record of a custom of pre-emption .

Settlement Officers were directed to record a custom of pre-emption when the proprietors, (being other than Muhammadan proprietors) expressly demanded, that a note of the custom should be made and further, proved conclusively, that the custom existed. Therefore, where a *wajib-ul-arz* prepared under the instructions contains a statement that a custom exists it must be assumed that the necessary proof was forthcoming before the Settlement Officer before that record was made—in other words, that there was proof which conclusively satisfied the Settlement Officer of the existence of the custom.

It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family any custom relating to pre-emption must necessarily lapse. The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which it relates eventually comes

Pre-emption—concld.

into the hands of a single individual proprietor the custom is there and then extinguished. **A** BABBAN PANDEY *v.* LACHHMAN CHAUDHRI, 22 A. L. J. 62; 46 A. 205; (1924) A. I. R. (A) 371. **584**

——— **Custom**, *proof of*—Zamima, Khewat, *entry in, value of—History of village*—Wajib-ul-arz.

Particular value attaches to a record of custom in the *Zamima Khewat* of 1885 of villages in the Gorakhpur District.

The early history of a village in the Gorakhpur District deduced from the *Kaifyat serishta nizamat* showed that the first Settlement of the village was made in 1838 and that up to 1813 there was no *Zemindar* or *mustajir* recorded as being in possession. A custom of pre-emption was, however, recorded in the *Wajib-ul-arz* of 1860 and the *Zamima Khewat* of 1885, although the categories into which the pre-emptors were divided were slightly different in the *Zamima Khewat* from those laid down in the *wajib-ul-arz*, the former being probably an amplification of the latter:

Held, (1) that the early history of the village was not sufficient to overturn the presumption attaching to the entries in the *wajib-ul.arz* and the *Zamima Khewat*;

(2) that a custom of pre-emption prevailed in the village. **A** NANDAN SINGH *v.* GUPTAR SINGH, 22 A. L. J. 7; (1924) A. I. R. (A.) 424 **630**

——— Wajib-ul-arz *ambiguous—Burden of proof.*

When the language of a *wajib-ul-arz* is ambiguous the onus lies upon the plaintiff to establish his right of pre-emption—evidence which would satisfy the Court that the custom is certain. **A** NAGESHAR PRASAD *v.* RAM HARAKH PANDE, 22 A. L. J. 342; 46 A. 370; (1924) A. I. R. (A.) 541 **417**

——— **Hindu Law**—Joint family—Alienation by father—Pre-emptor of property, position of. *See* HINDU LAW—JOINT FAMILY—ALIENATION BY FATHER **725**

Presidency Small Cause Courts Act (XV of 1882), s. 19 (q)—*Suit for return of ornaments given at betrothal—Jurisdiction.*

A suit for the return of ornaments presented by custom by the prospective bridegroom at the time of betrothal is not after the marriage negotiations have failed, a suit for compensation for breach of promises of marriage within the meaning of section 19 (*q*) of the Presidency Small Cause Courts Act and is cognizable by the Small Cause Court. **B** MADHAVRAO VISVANATH *v.* SHRIKRISHAN GOVINDRAO, (1923) A. I. R. (B.) 393 **517**

Presidency Towns Insolvency Act (III of 1909), ss. 7, 36—*Official Assignee, fraudulent, transfer by—Insolvency Court, power of, to order reconveyance.*

An Insolvency Court has, under sections 7 and 36 of the Presidency Town Insolvency Act, power to order the purchaser of the insolvent's property by means of a fraudulent conveyance from the Official Assignee to reconvey and revert in a substituted Assignee the property so fraudulently acquired. **N** THE OFFICIAL ASSIGNEE OF MADRAS *v.* THE OFFICIAL ASSIGNEE OF RANGOON **910**

Presidency Towns Insolvency Act, 1909—contd.

——— **s. 49 (4)**—*Partners, insolvency of—Creditors, rights of*, inter se—*Separate debts.*

First and second insolvents carried on a business at Madras in partnership, but the creditors of the firm were not aware that second insolvent was a partner in the firm. First insolvent also carried on a business at Cuddappah. On a question as to priority arising in regard to the assets at Cuddappah, between the Cuddappah creditors and Madras creditors:

Held, that the Madras creditors were entitled to elect as to which assets they would proceed against, the general assets of the two partners or the separate assets of the first insolvent.

Per *Schwabe, C. J.*—The Madras creditors can elect until the very end of the proceedings and only when they have actually received a dividend there is an election. Even after they have received a dividend, they can still pay it back and prove against the other assets.

Per *Ramesam, J.*—The debts due to the Madras creditors were "separate debts" within the meaning of the expression in section 49 (4) of the Presidecy Towns Insolvency Act. **M** SUBBRAMIAH *v.* BANSILAL ABEERCHAND, 19 L. W. 46; (1924) M. W. N. 164; (1924) A. I. R. (M.) 595 **966**

——— **s. 52,** *applicability of—Legal and equitable interests—Reputed ownership of equitable interest—Withdrawal of consent—Letter posted to correct address—Presumption.*

Under the terms of an agreement an insolvent gave the garnishee his motor car as security for an advance of Rs. 3,000. The insolvent was to have the right to use the car and keep it in good order and deliver it upon demand. The loan was also secured by a pro-note of the insolvent and another person. Some months later the garnishee sent a letter to the insolvent through her Vakil demanding under threat of criminal proceedings that the car should be returned to her. Three months thereafter the insolvency proceedings commenced, and the Official Assignee claimed the car free from any charge, under section 52 of the Presidency Towns Insolvency Act:

Held, (1) that the insolvent was the legal owner of the car and the garnishee the true owner of the equitable interest therein; (2) that the insolvent who had the power to use the car was the reputed owner of the equitable interest within the meaning of section 52 of the Presidency Towns Insolvency Act, but that the letter of the garnishee's Vakil demanding the return of the car was a sufficient determination of the consent of the true owner of the equitable interest; (3) that the insolvent had thus ceased to be the reputed owner of the equitable interest with the consent of the true owner at the time of the commencement of the insolvency and section 52 of the Presidency Towns Insolvency Act was, therefore, inapplicable to this case.

The words "true owner" in section 52 of the Presidency Towns Insolvency Act include the

Presidency Towns Insolvency Act, 1909—concld.

owner of an equitable interest and there can also be a reputed owner of that interest. But it is essential for section 52 to apply that the insolvent should at the commencement of the insolvency be the reputed owner with the consent of the true owner and the question whether the true owner was at that time consenting or not to the reputation of ownership to the reputed owner is a question of fact.

Where a letter is proved to be posted to the right address, a presumption arises that the letter was in fact received by the addressee.

Per *Schwabe, C. J.*—Even if the letter of the garnishee's Vakil was not received by the insolvent the consent of the garnishee to the insolvent's possession of the car was proved to have been determined by her instructions to the Vakil to send the letter and the sending of that letter and this was enough to take the case out of section 52 of the Presidency Towns Insolvency Act. **M** ABURUBAMMAL *v.* THE OFFICIAL ASSIGNEE OF MADRAS, 45 M. L. J. 817; 19 L. W. 54; 33 M. L. T. 217; (1924) A. I. R. (M) 214; 47 M. 215 **809**

Presumption—Hindu Law—Joint family—Alienation by father—Legal necessity—Antecedent debt, what is—Seperation—Mutation in favour of individual members. *See* HINDU LAW—JOINT FAMILY—ALIENATION BY FATHER **725**

——— Land belonging to one person—Trees in possession of another—Burden of proof. *See* POSSESSION AND OWNERSHIP **545**

——— Letter posted to correct address. *See* PRESIDENCY TOWNS INSOLVENCY ACT, *s.* 52 **809**

——— of marriage, when arises—Absence of evidence—Legitimacy, whether can be presumed. *See* EVIDENCE ACT, ss. 112, 114 **623**

——— Presentation of document for registration—Endorsement, correctness of. *See* UPPER BURMA REGISTRATION REGULATION II OF 1897, RULES FRAMED UNDER, RR. 5, 7 **940**

———Settlement *parcha*—Presumption of correctness. *See* C. P. LAND REVENUE ACT, s. 80 **621**

——— Several mortgages—Payment of earlier mortgage by owner, effect of—Priority charge, whether kept alive. *See* TRANSFER OF PROPERTY ACT, s. 101 **592**

——— *Transaction standing in name of wife—Husband's transaction.*

There is no presumption that transactions which stand in the name of the wife are husband's transactions. **N** JAIKRISHNA *v.* SAVITRI, 7 N. L. J. 187 **627**

Principal and agent—*Fraud by agent—Principal, liability of, to third persons.*

A principal is liable to third persons in a civil suit for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. **N** VARDHAMAN *v.* MESSRS. RADHAKISHAN AND JAIKISHAN, 7 N. L. J. 74; (1924) A. I. R. (N.) 70 **139**

Principal and agent—concld.

——— Money paid under directions of another—Payment, whether creates agency. *See* PLEADINGS **354**

——— *Transaction negotiated by agent—Remuneration, when payable—Contract for remuneration to be strictly* meruit—Quantum meruit, *principle of, whether applicable.*

Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and, except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed, falls through provided that it does not fall through in consequence of any act or default of the agent.

Where the parties have made an express contract for remuneration, the amount of the remuneration and the condition under which it becomes payable must be ascertained by a reference to the terms of that contract and no implied contract can be set up to add to, or deviate from the original contract through it can be interpreted by a reference to custom, not inconsistent with it.

The defendant *S* gave a letter of authority to one *G* to negotiate the lease of the premises belonging to him and on the strength of this letter one *K* intimated to *S* his willingness to the lease on certain conditions. Subsequently, *S* granted another authority to the plaintiff to negotiate the lease of the properties on specified terms. This letter stipulated that the remuneration due to *M* will be paid only after the negotiation of the lease. On the following day *S* sent another letter to *M* promising to pay an additional remuneration provided the transaction was completed on the terms mentioned in the previous letter. As a result of this letter one *K D* intimated to *S* his willingness to accept the terms of the lease subject to certain qualifications, thereupon *K D* published a notification warning any one against dealing with *S* in respect of the properties, as he, *K D*, had accepted a lease thereof. Later on, *K* contended that he had got a concluded agreement from *S* who repudiated the allegations of both *K* and *K D*. *M* then instituted the present suit for his commission alleged to have been earned by him in respect of the lease.

Held, (1) that on the true construction of the contract between the parties the plaintiff could not succeed;

(2) that the plaintiff was not ever entitled to have a decree in his favour on the basis of *quantum meruit*.

It is competent to the Court to allow a plaint to be amended even after the expiry of the period prescribed for the institution of a new suit. **C** SATCHIDANANDA DUTT *v.* NRITYA NATH MITTER, 50 C. 878; 27 C. W. N. 1007; (1924) A. I. R. (C.) 517 **287**

Principal and broker—*Sale of land—Transaction not completed owing to default of purchaser—Brokerage, whether payable.*

Principal and broker—concld.

It is the duty of a broker to introduce a person willing and able to complete the purchase.

Ordinarily, a broker is entitled to a percentage which he succeeds in realising for his principal, but, where the transaction cannot be completed because the money is not forthcoming and consequently the principal realises nothing the broker cannot be said to have earned his brokerage.

Defendant commissioned the plaintiff as a broker to obtain a purchaser for a piece of land, agreeing to pay him brokerage at a certain rate on the price on completion. A would-be purchaser was obtained by the broker and an agreement in writing was entered into between the defendant and the purchaser, but the latter was unable to complete the purchase owing to lack of funds:

Held, that the plaintiff was not entitled to any brokerage. R FOUCAR AND CO. *v.* M. C. T. MUDALIAR, 2 R. 45; (1924) A. I. R. (R.) 232 **750**

Probate and Administration Act (V of 1881), s. 50—*Letters of Administration, binding nature of—Application for revocation—Just cause—Judgment of Probate Court, when* res judicata.

Letters of Administration with the Will annexed were granted to the widow of a testator. The appellant, an undivided brother of the testator, was a party to the proceedings. On account of some differences arising on account of the widow refusing to adopt his son, the appellant applied for revocation of Letters of Administration granted to the widow but the application was dismissed. Later on, the petition of two other brothers of the appellant, the Letters were re-called and the matter becoming contentious took the form of a suit and ultimately the Will was upheld and Letters orderd to be re-issued. The appellant then filed a fresh application for revocation of the original grant of Letters:

Held, that inasmuch as the appellant was aware of the Probate proceedings and had an opportunity to contest them he was barred by the application of the principle of *res judicata* from re-opening the matter any more.

Per *Odgers, J.*—So long as the judgment of a Court of Probate is in force it is conclusive not only upon all parties who may be before the Court but also upon all other persons whatsoever in all proceedings arising out of the Will or claims under or connected therewith.

Per *Wallace, J.*—Any order passed after contention in a Probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it.

When a party has an opportunity to put forward a particular just cause and has not chosen to put it forward he cannot be heard to agitate the same cause later.

The grant of Probate by a competent Court is binding on all persons who had an opportunity of putting forward their objection before it was passed unless they can make out a good case under section 50 of the Probate and Administration Act for setting it aside. M RALLABANDY VENKATARATNAM *v.* YANAMANDRA SATYAVATI, 46 M. L. J. 383; 34 M. L. T. 141; (1924) A. I. R. (M.) 578 **44**

Promissory-note—Agreement—Construction of document. *See* CONTRACT ACT, s. 25 **77**

——— payable on demand—Oral evidence to prove one executant signed as surety, admissibility of—Agreement to proceed first against principal, whether can be proved. *See* EVIDENCE ACT, s. 92 **445**

———, *suit on—Consideration, absence of—Burden of proof—Plaintiff, evidence of, disbelieved, effect of.*

In a suit upon a pro-note where execution is not denied, the onus lies on the defendant to prove that no consideration had passed. Where, however, the passing of consideration is denied by the defendant in his written statement, and the plaintiff goes into the witness-box and the result of his examination is such that he fails to establish the point which he set out to make, namely, that he gave consideration for the pro-note and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and can ask that the suit be dismissed. This, in no way, trenches upon the ordinary rule that the defendant must prove absence of consideration if that is his case. A MUHAMMAD SHARIF KHAN *v.* MUHAMMAD MOAZZUM ALI KHAN, (1923) A. I. R. (A.) 214 **464**

Provincial Insolvency Act (III of 1907), ss. 16 (5), 31—*Proceedings in insolvency—Secured crditor, rights of—Sale of insolvent's property—Official Receiver, notice by, to mortgagee—Mortgagee, failure of to reply—Application to set aside sale, dismissal of—Suit to recover money due on mortgage, whether maintainable.*

Under the Provincial Insolvency Act only the property of the insolvent vests in the Official Receiver. The Act contains no provision for selling the whole property free from all encumbrances even with the consent of the mortgagees and the rights of secured creditors are entirely unaffected by proceedings in insolvency.

On the adjudication of a person as insolvent, the Official Receiver gave a notice to his mortgagees in which he stated that he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale-proceeds as they might have on the properties, and called upon them to consent to the proposal. He added that in case they did not intimate to the contrary before a certain day, he would take it that they had consented to the above proposal. The mortgagees did not reply to the notice and the Official Receiver after proclamation sold the properties free from incumbrances. The mortgagees thereupon applied for cancellation of the sale and the petition was ultimately dismissed as being out of time.

Subsequently the mortgagees brought the present suit for recovery of the principal and interest

Provincial Insolvency Act—1907—concld.

due on the mortgage; the purchasers of the property contended that the suit was not sustainable:

Held, (1) that the mere silence of the mortgagees to the Official Receiver's notice did not amount to a relinquishment of their security within the meaning of section 31 of the Provincial Insolvency Act;

(2) that the plaintiffs were not estopped from maintaining the present suit by the proceedings in insolvency, nor did the mere fact that they once chose the wrong remedy of applying to set aside the sale in insolvency jurisdiction, preclude them from their legitimate remedy. **M** KANNIAPPA MUDALIAR *v.* RAJU CHETTIAR, 47 M. L. J. 16; 20 L. W. 45; (1924) M. W. N. 520; 47 M. 605 **850**

——— **s. 36**—*Limitation Act (IX of 1908), Sch. I, Art. 181—Application by Official Receiver to set aside alienation by insolvent—Limitation.*

An application under section 36 of the Provincial Insolvency Act by the Official Receiver to set aside an alienation made by the insolvent is not governed by Art. 181 of Schedule I to the Limitation Act. **M** PITTA RAMASWAMIAH *v.* SUBRAMANIA AIYAR **443**

——— **s. 43**—*Application by creditor—Order of dismissal without enquiry—Creditor, whether person aggrieved—Appeal.*

A creditor is not a "person aggrieved" by a final order passed after enquiry by the Court under section 43 of the Provincial Insolvency Act, 1907. But when the application of the creditor is dismissed without inquiry without receiving any report from the Receiver and without stating any reasons except that the creditor is not interested in making the application, the creditor is a "person aggrieved" by the order and can prefer an appeal against it to the High Court. **M** K. P. S. KARUTHAN CHETTIAR *v.* R. M. N. RAMAN CHETTY, (1923) M. W. N. 838; 18 L. W. 837; 45 M. L. J. 804; 33 M. L. T. 188; (1924) A. I. R. (M.) 185 **340**

Provincial Insolvency Act (V of 1920), *whether retrospective.*

The provisions of the Provincial Insolvency Act, 1920, are applicable to all proceedings, on petitions filed under the old Act and pending at the time of its coming into operation. **M** RANGIAH CHETTIAR *v.* ANNASWAMY ALWAR AYYANGAR, (1923) M. W. N. 840; 18 L. W. 836; (1924) A. I. R. (M.) 368 **408**

——— **s. 4**—*Insolvency Court, power of, to decide questions of title—Court, when can decline to adjudicate.*

Section 4 of the Provincial Insolvency Act, enables an Insolvency Court to adjudicate upon questions of title in the interests of justice, and reserves to the Court the power to decline to decide questions which it does not deem it necessary or expedient to decide in those proceedings.

Where, therefore, the Insolvency Court, even if it adjudicated upon the title of the insolvent as against his sons, would have no power to recover the property from the sons free of their obstruction, the Court would be justified in not deciding questions of title. **M** THE OFFICIAL RECEIVER OF SOUTH ARCOT *v.* PERUMAL PILLAI, 18 L. W. 884; 33 M. L. T. 230; (1924) A. I. R. (M.) 387 **322**

Provincial Insolvency Act—1920—contd.

——— **s. 4**—*Insolvent, conveyance by—Creditor, whether can institute proceedings for annulment.*

Under the Provincial Insolvency Act the property of the insolvent vests in the Receiver. The provisions of section 4 of the Act cannot, therefore, be taken to authorise a creditor to prosecute an enquiry in regard to a conveyance executed by the insolvent shortly before his adjudication. **C** RAM SUNDAR RAM *v.* RAM CHARIT BHAKAT, 51 C. 663 **326**

——— **s. 4 (1)**—*Insolvency Court, jurisdiction of—Determination of questions of title to insolvents' property—Civil Court, reference to, whether necessary.*

Where, in the course of insolvency proceedings, the question arises whether the mortgagee rights in certain properties belong to the insolvent or to his wife, it need not be referred to a Civil Court as the Insolvency Court has jurisdiction, under section 4 (1) of the Provincial Insolvency Act, to decide it finally after framing issues and recording evidence. **O** SURJA *v.* GIRINDRO NATH CHATTERJEE, 9 O. & A. L. R. 419 **552**

——— **s. 28**—*Adjudication of insolvency—Vesting of property—Death of insolvent, whether divests Receiver—Right of son to take by survivorship.*

Where property has vested in a Receiver after an order of adjudication, the death of the insolvent does not divest the Receiver of the property and his son is not entitled to take it by survivorship.

The death of a debtor does not put an end to an insolvency proceeding initiated on an application by the debtor. **L** LACHHMAN DAS *v.* JAI SINGH, 4 L. L. J. 262; (1922) A. I. R. (L.) 399 **548**

——— **s. 28**—*Insolvent undischarged, whether can sue to recover debt due after adjudication.*

Quære:—Whether a person who has been declared an insolvent can, while his estate is still in the hands of the Receiver, maintain a suit for the recovery of his share in the dower of his daughter which has become due since the adjudication order was made against him. **Pat** UMAR BAHADUR *v.* KHAJA MOHAMAD KARIM NAWAB, (1923) Pat. 287; 2 P. L. R. 276; 5 P. L. T. 606 **56**

——— **ss. 28, 29,** *scope of—Suit against insolvent—Permission of Insolvency Court not obtained—Permission to continue suit, grant of—Civil Court, power of.*

Section 28 of the Provincial Insolvency Act does not contemplate the grant of permission by the Insolvency Court to continue a civil suit filed against an insolvent without such permission. Section 29 of the Act, however, contemplates not only a suit filed before an order of adjudication

Provincial Insolvency Act—1920—contd.

has been made, but also one filed after the order but in real ignorance of it.

Therefore, when a suit is filed against an insolvent in the Civil Court in ignorance of the adjudication order and consequently without obtaining the permission of the Insolvency Court, the plaintiff cannot obtain permission of the Insolvency Court to continue the suit under section 28 of the Provincial Insolvency Act, but the Civil Court can, under section 29 of the Act, either stay the suit or allow it to continue on such terms as it might impose. **N** UMAR SHARIF *v.* JWALA PRASAD **662**

——— **ss. 53, 54, 68, 75, 78**—*"Act," meaning of—Application for leave to appeal—Delay, whether excusable—Alienation in fraud of creditors—Receiver, duty of—Notice, what is—Receiver, refusal of, to move Court—Creditor, whether can apply—Order refusing to entertain application—Creditor, whether "person aggrieved"—Appeal.*

Where an appeal is filed in time under section 75 of the Provincial Insolvency Act the mere fact that an application for leave to appeal under clause (3) was not filed in time does not render the appeal itself out of time. In any case, section 78 empowers the Appellate Court in a proper case to excuse the delay in the presentation of the appeal or application.

A mere omission or refusal to take action at the request of a creditor does not amount to "an act" within the meaning of section 68 of the Act.

Ordinarily, the Receiver is the person to impeach any fraudulent transfer or conveyance by the insolvent of his property. But if the Receiver refuses to move the Court under section 53 or 54 of the Provincial Insolvency Act even though a creditor offers to indemnify him against costs in the event of an adverse order against him, such creditor can apply to the Court to permit him to use the Official Receiver's name or make him a party to the proceedings and may move for an order under section 53 or 54 and if the order is against him, if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal.

When a creditor challenges an alienation or a payment as being in fraud of creditors, it is the Official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation.

A general notice, which is sent as soon as a person is adjudicated insolvent asking the creditors to prove their claims, is not such a notice, as should be given to a creditor who impeaches a particular transaction of the insolvent as being in fraud of creditors. The Official Receiver should fix a date for enquiring into the *bona fides* of the particular transaction of the insolvent and should give notice to the creditors and others concerned to appear before him and state their objections. If, after examination, he finds that a certain alienation or other transaction is in fraud of creditors he should himself move to have it set aside by a Court. But if he is not satisfied that such is the case and, if a creditor is willing to indemnify him against costs in the event of failure, it is his duty to move the Court for setting aside the alienation or other transaction as being in fraud of creditors.

The Official Receiver should not consider it the duty of the creditors alone to bring to his knowledge the nature of any doubtful transaction, but it is his duty to enquire into the nature of every transaction which *prima facie* does not appear to be proper and *bona fide* and valid.

Where a District Judge refuses to entertain an application of a creditor under section 53 or 54 of the Provincial Insolvency Act the creditor is a "person aggrieved" within the meaning of the Act and is entitled to appeal.

A creditor can at any time during the pendency of Insolvency proceedings move the Court under section 53 or 54 on the ground that the Official Receiver has refused to move in the matter, as there is no period of limitation provided for such an application. **M** PANNAI ANANTHANARAYANA AIYAR *v.* PANNAI RAMASUBBA AIYAR, 18 L. W. 857; 33 M. L. T. 196; (1924) A. I. R. (M.) 345 **395**

——— **ss. 53, 55**—*"Parchaser," whether includes trustee—"Valuable consideration," meaning of—Transfer in favour of trustees, whether voidable.*

The word "purchaser" in section 53 of the Provincial Insolvency Act is used in the wider sense given to the term in English Law and not in the mercantile sense of a person who has brought something by a contract of purchase and sale and includes a trustee.

A responsibility to discharge onerous work taken upon himself by a person to whom properties are transferred, in consideration of his taking such responsibility, falls within the expression "valuable consideration" found in sections 53 and 55 of the Provincial Insolvency Act.

A transfer in favour of trustees who undertake to discharge onerous duties is in favour of a "purchaser for valuable consideration" within the meaning of section 53 of the Insolvency Act. Such a transfer, if *bona fide*, cannot be annulled under that section. **O** CHAUDHRI SHARF-UZ-ZAMAN *v.* DEPUTY COMMISSIONER, BARABANKI, 10 O. & A. L. R. 514 **888**

——— **s. 54**—*Surety paying off debt, whether creditor—Transfer in favour of surety—Fraudulent preference.*

Appellant stood surety for the price of certain goods purchased by *A*. When the sellers pressed for payment *A* agreed to execute a conveyance of certain immoveable property in favour of appellant in order to enable him to pay off the debts for which he had become surety and also to pay himself the balance of a debt due from *A*. Appellant paid off the price of the goods and obtained the conveyance. A few days afterwards *A* became insolvent:

Held, that on payment of the price of the goods, appellant had become a creditor of *A*, and

Provincial Insolvency Act—1920—concld.

the conveyance in his favour, in the absence of any pressure put by him on A, amounted to a fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act and was void. **R** SADDIK AHMAD *v.* M. K. M. FIRM, 2 Bur. L. J. 52; (1923) A. I. R. (R.) 149 **813**

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—*Suit for rent of homestead land—Small Cause Courts, jurisdiction of—Agricultural land.*

A suit for rent of homestead land is excluded from the jurisdiction of the Small Cause Court and, therefore, a second appeal in such a suit is maintainable even though it is valued at less than Rs. 500.

This principle does not extend to agricultural land, nor does it apply to the Bengal Tenancy Act. **C** SHEBAITS OF IDOL SRIDHAR JIN *v.* NALINAKSHA RAI **557**

——— **Art. 35 (ii)**—*Suit to recover value of tree cut and removed by defendant, nature of—Suit, whether cognisable by Small Cause Court.*

A suit to recover to value of a tree alleged to have been cut and removed by the defendant from the plaintiff's field falls within the purview of Article 35 (*ii*) of Schedule II to the Provncial Small Cause Courts Act and is, therefore, not cognisable by a Small Cause Court. **L** SUNDAR MAL *v.* KAMAL DIN **138**

——— **Arts. 35, 43A.** *See* AGRA TENANCY ACT, s. 57 **599**

Public nuisance—*Special damage, proof of.*

A person who sues to remove a nuisance on a public thoroughfare must prove special damage over and above that suffered by him along with the public at large. **A** KALIDIN *v.* CHANDIKA PRASAD (1923) A. I. R. (A.) 182 **503**

Punjab Courts Act (IV of 1919), ss. 41 (c), 44—*Appeal, second—Custom, question of—Certificate, refusal to grant—Procedure.*

One of the questions raised in the lower Appellate Court was whether certain property would revert to a certain line by the law of reversion in accordance with custom, and the lower Appellate Court found that such a right of reversion did exist. The aggrieved party applied for a certificate to enable them to file a second appeal, but their application was rejected on the ground that no question of custom was involved. On second appeal:

Held, (1) that a question of custom was involved in the case;

(2) that the case must be remanded to the lower Appellate Court to re-consider the question whether it was prepared to grant a certificate. **L** HAR PHUL *v.* BHAGMAL **488**

Punjab Municipal Act (III of 1911), s. 175—*Order directing removal of encroachment—Court, power of, to interfere.*

Punjab Municipal Act—concld.

Where a Municipal Committee directs, under the provisions of section 175 of the Punjab Municipal Act, the removal of a structure as constituting an encroachment on a street and the action of the Committee is found to be *intra vires* and not actuated by dishonesty or malice the Court cannot interfere with it merely because in the opinion of the Court it is unnecessary in the public interest to remove the structure. **L** THE MUNICIPAL COMMITTEE OF JHANG *v.* DEVI DIAL **8**

Punjab Pre-emption Act (II of 1905), s. 3 (1)—*Tea garden, whether agricultural land.*

A tea garden is "agricultural land" within the meaning of section 3 (1) of the Punjab Pre-emption Act of 1905. **P C** KAJU MAL *v.* SALIG RAM, (1924) A. I. R. (P. C.) 1; 5 L. 50; 22 A. L. J. 40; (1924) M. W. N. 172; 10 O. & A. L. R. 261; 46 M. L. J. 536 (P. C.) **946**

Punjab Pre-emption Act (I of 1913), s. 15 fourthly—*Co-sharer on date of sale, whether entitled to pre-empt—Decree for pre-emption against pre-emptor, effect of.*

In determining the question whether a pre-emptor's right to pre-empt is superior to that of the vendee, the situation existing at the time of sale alone is to be regarded. The mere fact that the pre-emptor subsequently loses the property by virtue of which he claimed a superior right of pre-emption is immaterial. **L** AMAR CHAND *v.* SATYA PAL **43**

——— **s. 22**—*Withdrawal of deposit pending appeal by vendee, effect of.*

Plaintiff pre-emptor obtained a decree and deposited in Court the sum mentioned in the decree as payable to the vendee. The latter appealed and obtained a stay of execution. The pre-emptor thereupon obtained an order from the Appellate Court permitting him to withdraw the money deposited by him in pursuance of the decree. The money was accordingly withdrawn:

Held, that the withdrawal of the amount pending appeal did not entail the dismissal of the pre-emptor's claim under the provisions of section 22 (5) (*a*) of the Punjab Pre-emption Act. The object of an order under section 22 (1) of the Punjab Pre-emption Act is to guarantee vendees against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree, the need for a deposit no longer exists so far as the Trial Court is concerned. No doubt such deposits are available for the discharge of costs under clause (3) of the section, but such satisfaction is not the *raison detre* of the deposit and there is nothing to suggest that a vendee appellant is entitled to any advantage of the kind. **L** SANWAL DAS *v.* JAIGO MAL, (1924) A. I. R. (L.) 68 **448**

Railway Company—*Consignment of goods—Maund rate charged—Reservation of power of re-calculation of freight—Waggon rate, if can be charged.*

Where a Railway Company has agreed to carry goods at maund rate, the fact that under the note

Railway Company—concld.

of consignment the Company have reserved a right of re-weighment re-measurement, and re-calculation of freight, etc., does not entitle it to alter the maund-rate into waggon rate, if the goods turn out in bulk beyond the capacity of one waggon and have to be carried in two or more waggons. **A** BOMBAY, BARODA AND CENTRAL INDIA RY. CO. *v.* BUDH SEN PUSP CHAND, 21, A. L. J. 830; 9 O & A. L. R. 1074; 46 A. 55; (1924) A. I. R. (A.) 180 **562**

Railways Act (IX of 1890), s. 72—*Goods consigned under Risk Note, Form B—Suit for compensation for loss of goods—Burden of proof—Authority to sign Risk Note, whether can be questioned.*

In a suit to recover compensation for the loss of goods consigned to a Railway Company for carriage under Risk Note, Form B, the burden is on the consignor to prove that the loss was due to the wilful neglect of the Company or theft by or wilful neglect of its servants. The *onus* is not discharged by proving that the loss must have occurred while the goods were in the custody of the Company.

It is not necessary for a Railway Company when a person comes to consign goods to enquire whether he has been authorised to make the consignment.

If a person comes toward and delivers goods for carriage and signs a Risk Note, the owner of the goods cannot afterwards be heard to complain that that person had no authority to sign the Risk Note and that the Railway Company must be held liable for any loss in spite of the terms of the Risk Note. **Pat** BADRI DAS *v.* EAST INDIAN RAILWAY COMPANY, 4 P. L. T. 185; (1923) A. I. R. (Pat.) 325 **571**

——— **s. 72**—*Risk Note, Form B, goods consigned under—Loss of goods—Railway Company, negligence of—Burden of proof.*

In the case of loss of goods consigned under Risk Note, Form B, the burden of proving that the loss was caused by the wilful neglect of Railway servants lies *prima facie* on the consignor.

But where circumstances are established either by direct evidence produced by the plaintiff or by the cross-examination of the defendants' witnesses, from which circumstances wilful neglect or neligence can be inferred, the burden must then be shifted to the Railway Company.

Plaintiff sued to recover damages for the loss of certain bags consigned to a Railway Company under Risk Note, Form B. It appeared that the waggon carrying these bags was intact at the time of its arrival at its destination, but was allowed to remain on a siding for two days before being unloaded. It appeared further that the wall of the Railway yard was broken on the jungle side of the waggon and had been broken open and the goods stolen in the yard :

Held, that under the circumstances it was open to the Court to infer that there had been wilful neglect by the Railway Company. **A** EAST INDIAN RAILWAY COMPANY *v.* SRI RAM MAHADEO, 21 A. L. J. 896; 46 A. 125; (1924) A. I. R. (A.) 177 **341**

Railways Act—contd.

——— **s. 72**, *scope of—Risk Note, Form B—"Loss," meaning of—Onus of proving loss, onus on whom lies.*

The object and effect of section 72 of the Railways Act is to limit the liability of the Railway Companies during the transit of goods consigned to them for carriage and to substitute the obligations of a bailee for the obligations of an insurer of such goods. The section was enacted to confer a benefit upon Railway Companies and, except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred.

The object and effect of section 72 is not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to a Railway Company, but to lessen the burden of the obligation which, prior to the passing of section 72, had lain on Railway Companies as insurers of such goods.

The term "loss," as used in the Risk Note and in Chapter VII of the Railways Act, does not mean pecuniary or other loss suffered by the owner of goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit and such "loss" occurs whenever the Railway Company involuntarily or through inadvertence loses possession of the goods and, for the time being, is unable to trace them. The term "loss" denotes a fact, not a cause of action.

A valid cause of action against a Railway Company in India for damages for the non-delivery of goods consigned to it for carriage must be based either on contract or on tort, and must arise from the breach of some duty owed to the plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occurred may sometimes found, sometimes defeat, such a cause of action : but a cause of action for loss without more is not known to the law. Non-delivery of goods consigned to a Railway Company for conveyance may be due to the fact that the goods are being deliberately detained by the Railway Company or that they have been misdelivered to some person other than the consignee, or that they are "lost." It does not, therefore, necessarily follow that by proving the non-delivery of such goods the "loss" of the goods is also proved, for non-delivery or misdelivery of goods may be due to "loss" or may be due to other causes.

Proof of non-delivery or misdelivery is by no means conclusive evidence as to whether or not a loss has incurred. **C** EAST INDIA RAILWAY COMPANY *v.* JAGPAT SINGH, 51 C. 615; 28 C. W. N. 1001; (1924) A. I. R. (C.) 725 **126**

——— **ss. 72, 76**—*Risk Note, Form B—Loss of goods—Damages, suit for—Burden of proof.*

In a suit to recover damages from a Railway Company for loss or deterioration of goods

Railways Act—contd.

consigned to the Company for carriage under Risk Note, Form B, the *onus* is upon the plaintiff to establish how the loss or deterioration was caused. He must prove wilful neglect of or theft by Railway servants, before any question of robbery from a running train is reached, this being an exemption to wilful neglect the mere fact that the Railway sets out to prove robbery from a running train and fails will not relieve the plaintiff of the initial *onus*. **M** THE MADRAS AND SOUTHERN MAHRATTA RY. CO., LTD. *v.* KRISHNASWAMI CHETTY **137**

——— **ss. 72, 77, 140**—*Loss of goods—Damages, suit for—Risk Note, Form B—"Running train," what is—Notice to Railway—Notice sent to Secretary Railway Department forwarded to Agent, whether sufficient.*

A "running train" within the meaning of Risk Note, Form B, means a train in motion between station and does not include a train standing at a station during the course of its journey.

A notice purporting to be under section 77 of the Railways Act, instead of being addressed to the Agent of the defendant Railway, was addressed to the Secretary to the Government of India, Railway Department, but in the acknowledgment which the latter sent to the plaintiff it was stated that the plaintiff's letter had been sent to the Agent of the defendant Railway for disposal:

Held, that it could reasonably be presumed that the Agent of the defendant Railway had received notice of the claim. **L** SECRETARY OF STATE *v.* CHARANJIT LAL, 6 L. L. J. 237 **428**

——— **s. 77**—*Claim for compensation for loss—Notice to Railway—Plaintiff unaware of loss, effect of.*

Plaintiff sued for damages for the loss of a cask of methylated spirit consigned to him from Cawnpore on the 25th July 1921 alleging that it was lost by the railway staff in transit and that in June 1922 a cask was delivered to him which on being opened was found to contain water. The railway pleaded section 77 of the Railways Act, in bar of the suit:

Held, that the fact that no notice was given under section 77 of the Act, was fatal to the suit and the fact that the plaintiff did not discover the substitution of water for methylated spirits till June 1922 more than seven months after the goods were consigned, did not exclude the case from the operation of the section. **A** DR. MOTI LAL *v.* AGENT, O. & R. RAILWAY] **893**

——— **s. 77**—*Short delivery of goods—Loss—Claim for damages—Burden of proof—Notice, whether necessary.*

In a suit for recovery of damages against a Railway Company for short delivery of goods consigned to it, the onus lies on the Railway Company to prove the loss in order to claim exemption under the Risk Note and the plaintiff must prove wilful neglect of the Company's servants as the cause of the loss, in order to fasten the liability for it on the Company.

Railways Act—concld.

Mere allegation of loss by the Company or admission of the non-delivery by the plaintiff is not sufficient to discharge the burden of proving the loss.

No notice is required to be served on a Railway Company under section 77 of the Railways Act where the claim is for non-delivery or short delivery of goods. **N** MULCHAND *v.* G. I. P. RY., CO. **602**

Rangoon Rent Act (Act II of 1920), s. 10—*Ejectment, suit for, by guardian of minor landlord, whether maintainable.*

The guardian of a minor cannot sue to eject a tenant on the ground that he requires the premises for the occupation of the minor, as he is not the landlord within the meaning of section 10 of the Rangoon Rent Act. **R** MG PE THEIN *v.* S BOON KYAN, 2 Bur. L. J. 280; 1 R. 772; (1924) A. I. R. (R.) 163 **505**

Registration Act (XVI of 1908), s. 17—*Division of status—Document containing list of properties falling to each share—Admissibility in evidence—Othi deed of palmyra trees—Registration, whether necessary.*

A document containing merely a list of properties which have fallen to the share of each sharer in a partition but not containing any operative words of division must be treated as merely a *de facto* division into specific shares following a prior division of status. Such a document, therefore, would be admissible in evidence without registration.

An *Othi* deed for over Rs. 100 of palmyra trees does not create any interest in immoveable property and is admissible in evidence without registration. **M** GNANAMUTHU NADAN *v.* VEILUKANDA NADATHI, 19 L. W. 491; (1924) M. W. N. 451; (1924) A. I. R. (M.) 542 **2**

——— **s. 17 (2) (vi)**—*Compromise deed—Agreement to lease—Agreement embodied in decree—Registration.*

A compromise incorporating an agreement by way of lease is inadmissible in evidence unless registered even though it has been embodied in a decree. Such an agreement is not within the exception contained in sub-section (2), cl. (*vi*) of section 17 of the Registration Act. **C** SARAT CHANDRA DAS *v.* SARAJINI RUDRAJA, 27 C. W. N. 897; (1924) A. I. R. (C.) 135 **257**

——— **ss. 17, 49**. *See* TRANSFER OF PROPERTY ACT, ss. 107, 117 **26**

——— **ss. 17, 49**. *See* TRANSFER OF PROPERTY ACT, s. 54 **429**

——— **ss. 17, 49**—*Usufructuary mortgage—Suit for redemption, nature of—Unregistered mortgage-deed, whether admissible in evidence.*

Plaintiff sued to enforce the terms of an unregistered usufructuary mortgage-deed praying for a decree for redemption:

Held, (*Spencer, J.*, dissenting), (1) that the suit being for redemption of a usufructuary mortgage was in substance a suit for possession of property;

(2) that the mortgage-deed though inadmissible in evidence to prove the mortgage could be looked

Registration Act—concld.

at for the collateral purpose of showing the nature of the defendants' possession.

Per *Spencer*, *J.*—A plaintiff who sues for redemption on the strength of an unregistered mortgage-deed can never succeed, because for obtaining a decree to redeem it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself. **M** NADEPENA APPAMMA *v.* SARIPILLI CHINNAVADU, (1923) M. W. N. 825; 45 M. L. J. 667; 33 M. L. T. 146; 47 M. 203; 19 L. W. 37; (1924) A. I. R. (M.) 292 **510**

——— **s. 28**—*Mortgage-deed—Fraudulent registration—Fictitious property included—Mortgagee unaware of fraud—Registration, validity of.*

When a mortgagor includes in the mortgage-deed for purposes of registration property which does not belong to him, the registration is not invalid at least so far as the interests of the mortgagee are concerned if no collusion by the latter to assist the mortgagor in the fraud is made out. **M** MAMILLAPALLI VEERESALINGHAM *v.* PONNUKOLLU KONDAYYA **869**

——— **ss. 47, 49, 77,** *scope of—Suit for compulsory registration of document—Question in issue—Claim for possession and mesne profits, whether can be coupled with prayer for registration—Registrable document, when takes effect*—Res judicata—*Doctrine, applicability of.*

In a suit instituted under section 77 of the Registration Act, the Court is concerned not with the validity but with the genuineness of the document sought to be registered that is whether the document has been executed by the person by whom it is alleged to have been executed; the question of its validity must be determined in a suit properly framed for that purpose.

Although the scope of the inquiry in a suit under section 77 may be of a restricted character it does not follow that the doctrine of *res judicata* is excluded from full operation.

A document which is compulsorily registrable does not affect any immoveable property comprised therein till it has been registered but as soon as it has been registered it takes effect not from the date of registration but retrospectively from the date of execution.

So far as suits under section 77 of the Registration Act are concerned, it is well settled that no other claim such as a claim for possession and mesne profits can be coupled with the prayer to enforce registration of the document. **C** DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA DEY, 39 C. L. J. 40; (1924) A. I. R. (C.) 600 **520**

——— **s. 49**—*Unregistered instrument, admissibility of, in evidence—Collateral purpose, what is.*

While an instrument which is compulsorily registrable but is not registered, may be used in evidence to prove a collateral fact, to be collateral the fact must be independent of or divisible from the purpose to effect which the law requires registration. **N** JANARDHAN *v.* WASUDEO **19**

Religious Endowments Act (XX of 1863), s. 18—*Application for leave to sue—Particulars—Leave to sue all or any of the respondents, propriety of—Judge, whether can delegate powers—Report made by person making enquiry, whether evidence.*

An application under section 18 of the Religious Endowments Act, for leave to sue must give definite particulars of the charges sought to be made. Leave will not be granted on vague and indefinite allegations.

Leave granted against any or all of the respondents, leaving the petitioners to choose which of them they will proceed against, is improper as it supplies the petitioners with an instrument for extortion and makes it possible for them to let off the persons most responsible and get other members who are less guilty to account severally for the trust property.

Under section 18 of the Religious Endowments Act, the Judge is not entitled to delegate to others the duty of forming an opinion upon the facts before him, and the report of a person who is asked to inquire into the allegations contained in the petition is not evidence. **M** SUBRAMANIA MUDALIAR *v.* PARASURAMAIER, (1924) M. W. N. 51; (1924) A. I. R. (M.) 644 **953**

Relinquishment—*Transfer.*

The relinquishment of a holding amounts to a transfer of property and is one of the various forms of alienation. **O** SHEONANDAN SINGH *v.* JAI RAM SINGH, 10 O. & A. L. R. 445 **1022**

Res judicata between co-defendants—Decision of question necessary to give relief to plaintiff. *See* CIVIL PROCEDURE CODE, s. 11 **803**

——— between co-defendants, requisites of. *See* CIVIL PROCEDURE CODE, s. 11 **22**

——— *Doctrine, applicability of—Estoppel—Mesne profits, suit for—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 109—Second suit growing out of first—Receiver, appointment of—Possession of Receiver.*

In a suit for recovery of possession and mesne profits on the strength of the plaintiff's title as lessee under four documents executed by the defendant in his favour on the 17th January 1913 the defendant pleaded that the suit was not maintainable as the plaintiff had fraudulently interpolated words and clauses in the leases. It was also urged that the claim for mesne profits for a period antecedent to three years prior to the institution of the suit was barred by limitation. It appeared that previous to this suit plaintiff had on the refusal of the Registrar to register the aforesaid leases instituted a suit to enforce registration under the provisions of the Registration Act and the defendant had raised the same plea in that suit. It was eventually held that the leases were genuine and the suit was decreed:

Held, (1) that, under the circumstances, the attempt made by the defendant to circumvent

the decision in the previous suit could not succeed as the matter was *res judicata* ;

(2) that the defendant could not be allowed to take up in this suit a position entirely inconsistent with that adopted in the previous suit ;

(3) that time did not commence to run against the plaintiff till the date when the leases were actually registered and the prayer for mesne profits was within time ;

(4) that the liability of the defendants for mesne profits, terminated on the date when a Receiver was appointed and from that date the plaintiff, if successful, would be entitled only to such sums as might be in the hands of the Receiver.

When the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles.

The property passes into legal custody as the Receiver is in the position of stake-holder and such custody is for the benefit of the true owner. **C** DWIJENDRA NARAIN ROY *v.* JOGESH CHANDRA DEY, 39 C. L. J. 40; (1924) A. I. R. (C.) 600 **520**

——— Erroneous decision on question of law, whether *res judicata*—Litigating under the same title, meaning of—Parties to subsequent suit—Title, when must come into existence. *See* CIVIL PROCEDURE CODE, s. 11 **621**

——— *Ex parte* decision. *See* CIVIL PROCEDURE CODE, s. 11 **660**

——— Judgment of Probate Court, when *res judicata*. *See* PROBATE AND ADMINISTRATION ACT, s. 50 **44**

——— Oral award. *See* CIVIL PROCEDURE CODE, s. 11 **742**

——— Same parties—Dispute over well—Public right—Municipal Board party to previous litigation—Failure to assert in subsequent litigation. *See* CIVIL PROCEDURE CODE, s. 11 **310**

——— Special case—Opinion of Court—Arbitrators, whether bound. *See* ARBITRATION ACT, ss. 10 (*b*), 11 **986**

——— Succession, decision as to—Legal representative, question of, whether *res judicata*. *See* CIVIL PROCEDURE CODE, s. 11 **891**

——— Suit by reversioner to contest alienation, dismissal of, effect of. *See* CIVIL PROCEDURE CODE, s. 11, EXPL. VI **484**

——— Unnecessary finding. *See* CIVIL PROCEDURE CODE, s. 11. **666**

Restitution of conjugal rights—*Marriage in exchange—Delay in instituting suit, explanation of—Discretion of Court—Appeal, second, interference in.*

A suit for restitution of conjugal rights by a husband against his wife was decreed by the lower Appellate Court on the findings that the defendant's marriage with the plaintiff had been in exchange for the marriage of plaintiff's sister with the defendant's brother, and that the delay in bringing the suit was due to several deaths

having taken place in the families of the parties and to the minority of the defendant and the illness of the plaintiff:

Held, that it could not be said that the discretion exercised by the lower Appellate Court was either arbitrary or illegal and that, therefore, the decree of the lower Appellate Court should not be disturbed by the High Court. **L** DAULAN *v.* ABDUL HAQ, 5 L. L. J. 95 **286**

———, *suit for—Wife expelled by husband—Maintenance, order for—Restitution, whether ought to be decreed.*

A husband turned his wife out of doors stating that he suspected her chastity. The wife then applied for and obtained a maintenance order under section 488 of the Criminal Procedure Code, which she sought to execute by the arrest of the husband. Even during the maintenance proceedings the husband refused to take the wife back into his house. In order to get rid of the maintenance order, however, the husband brought a suit for restitution of conjugal rights:

Held, that under the circumstances, the wife would have a reasonable apprehension of bodily injury if she returned to her husband, and the letter's suit was, therefore, liable to dismissal. **A** BABU RAM *v.* KOKLA, 22 A. L. J. 68; 10 O. & A. L. R. 204; 46 A. 210; (1924) A. I. R. (A.) 391 **634**

Revision—Amendment of plaint—Interlocutory order—General rule. *See* CIVIL PROCEDURE CODE, s. 115, O. VI, R. 13 **911**

——— Application for leave to sue *in forma pauperis*, dismissal of. *See* CIVIL PROCEDURE CODE, s. 115, O. XXXIII, R. 5 (4) **56**

——— Application to set aside auction sale—Dismissal of application, whether justified—Other remedy open—High Court, powers of. *See* CIVIL PROCEDURE CODE, s. 115, O. XXI, R. 89 **903**

——— Board of Revenue, orders of—High Court, jurisdiction of. *See* LETTERS PATENT (MAD.), CL. 16 **372**

——— Collector's order under Mamlatdars' Courts Act. *See* MAMLATDARS' COURTS ACT, ss. 23, 24 **847**

——— Execution sale, application to set aside —Dismissal in default—Order, effect of. *See* CIVIL PROCEDURE CODE, O. XXI, RR. 90, 92 **351**

——— Finding of fact—Onus misplaced. *See* CIVIL PROCEDURE CODE, s. 115 **602**

——— Inquiry into pauperism—Plaint allegations, whether enough—Refusal of permission to sue as pauper. *See* CIVIL PROCEDURE CODE, O. XXXIII, R. 5 **922**

———, interference in—Process fees, date for payment of—Court, duty of, to fix date—Default—Discretion of Court. *See* CIVIL PROCEDURE CODE, s. 115, O. IX, R. 2, O. XVII, RR. 2, 3, O. XLVIII, R. 1 **123**

——— Jurisdiction, order deciding question of. *See* CIVIL PROCEDURE CODE, s. 115 **168**

Revision—concld.

——— Order for execution of decree of small cause nature—Order for execution—Second appeal, if competent—Refusal to exercise jurisdiction. *See* DECREE OF SMALL CAUSE NATURE **605**

——— Order returning plaint for presentation in proper Court—Interference, whether desirable. *See* CIVIL PROCEDURE CODE, O. VII, R. 10 **237**

——— Small Cause Court, judgment of—Limitation, question of. *See* CIVIL PROCEDURE CODE, s. 115 **848**

——— Withdrawal of suit—Jurisdiction, absence of—Material irregularity. *See* CIVIL PROCEDURE CODE, s. 115, O. XXIII, R. 1 **1033**

——— Withdrawal of suit—Legal defects alleged by defendant, whether sufficient—Judicial discretion. *See* CIVIL PROCEDURE CODE, S. 115, O. XXIII, R. 1 **1031**

Specific Relief Act (I of 1877), s. 22—*Specific performance—Agreement to sell by guardian on behalf of minor, whether can be enforced—Benefit of minor.*

No decree for specific performance of an agreement to sell immoveable property entered into on behalf of a minor by his guardian should be passed against the minor unless the Court is quite certain that the agreement was for the benefit of the minor and that it would be for his benefit that it should be enforced. **L** BAHADUR CHAND *v.* MUHAMMAD ISMAIL, 4 L. 408; (1924) A. I. R. (L.) 181 **201**

——— **s. 42.** *See* HINDU LAW—WIDOW **670**

——— **s. 42**—*Declaratory relief—Express denial of title, absence of—Attitude and evidence of defendant—Cloud on title—Relief, grant of.*

The Courts have jurisdiction to grant declaratory relief even where on the pleadings of the defendant no case for the grant of such relief is made out, if the attitude of the defendant and the evidence put forward by him have the effect of casting a cloud on the plaintiff's title.

A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of the kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title and to stand in the way of a full and free exercise of his ownership, is a cloud upon his title, which he may remove. **O** RAJA BISHUNATH SARAN SINGH *v.* SITLA BAKHSH SINGH, 10 O. L. J. 315; (1924) A. I. R. (O.) 69 **784**

——— **s. 45**—*Mandamus—Erroneous exercise of jurisdiction—High Court, power of.*

The power given to the High Courts under section 45 of the Specific Relief Act is not to be used if the Tribunal whose decision is impugned has exercised the discretion entrusted to it *bona fide* not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally; they are not a Court of Appeal from the Tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the Tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous consideration in arriving at their conclusion or deciding a point other than those brought before them, in which cases the Courts have regarded them as declining jurisdiction.

Specific Relief Act—concld.

The Returning Officer for a constituency of the Bengal Legislative Council rejected the nomination paper of a candidate seeking election to the Council who on the date of the filing of the nomination paper was a member of the Indian Council of State, but had resigned his seat thereon before the date of the scrutiny of the nominations. Under the Bengal Electoral Rules, a person was not eligible as a member of the Council if he was a member of the Council of State or any other Legislative body constituted under the Government of India Act. The rejected candidate in an application under section 45 of the Specific Relief Act urged that the Returning Officer should have decided the question of his eligibility with reference to the date of the scrutiny and not with reference to the date of the filing of the nomination paper :

Held, that the High Court could not interfere as, although the Returning Officer may have put a wrong interpretation on the Electoral Rules, he had not refused a jurisdiction which was vested in him, nor, had he usurped a jurisdiction that he did not possess. **C** MANINDRA CHANDRA NANDI *v.* PROVAS CHANDRA MITTER, 39 C. L. J. 58; 51 C. 279 **1042**

——— **s. 54**—*Injunction—Light and air, free access of—Obstruction, whether serious injury—Compensation or damages—Appeal, second—Injunction, grant of—Discretion, judicial, exercise of—Interference, when feasible.*

Any act by the defendant which results in obstructing the free access of light and air to which the plaintiff is entitled is *prima facie* an injury of a serious character for which compensation in money would hardly be an adequate relief. In cases of this nature, injunction is the rule and damages the exception, inasmuch as the plaintiff is entitled to insist that he should be maintained in his enjoyment of the easement.

The grant of injunction is purely a discretionary matter and so long as it is not shown that the discretion was not exercised by the lower Court in a judicial manner, it should not be interfered with in second appeal. **L** JAWAHAR SINGH *v.* SEWA SINGH, 5 L. L. J. 487; (1924) A. I. R. (L.) 97 **572**

Squatter's land—*Abandonment, absence of—Refusal to assess land in name of occupier—Fresh occupier, position of—Possession, suit to recover.*

Plaintiff worked the land in suit for two years and paid revenue in respect thereof. The land was not worked in the third year and the Revenue Surveyor, without any reference to the plaintiff, struck out the latter's name and omitted to assess the land to revenue. Plaintiff tried to approach the Revenue Surveyor but without result. In the fourth year the Revenue Surveyor permitted defendant to enter upon the land and assessed it to

Squatter's land—concld.

revenue. Plaintiff sued defendant to recover possession of the land:

Held, that as plaintiff had not abandoned and had no intention of abandoning the land, the Revenue Surveyor was not justified in refusing to assess the land in his name, and his suit must, therefore, succeed, as the defendant was a mere trespasser. R MAUNG PEIN *v.* MAUNG PO MAUNG, 2 Bur. L. J. 15; (1923) A. I. R. (R.) 138 **817**

Stamp Act (II of 1899), s. 35, Sch. I, Art. 5. *See* CONTRACT ACT, s. 25 **77**

Succession Act (X of 1865), s. 84, illus. (a). *See* WILLS, CONSTRUCTION OF **1026**

——— **s. 331.** *See* BURMA LAWS ACT, s. 13 **729**

Succession Certificate Act (VII of 1889), s. 18 (4)—*Succession certificate, revocation of—Schedule misleading—Concealment of facts.*

Where it is discovered that the schedule of debts attached to an application for the grant of a succession certificate was misleading and that material facts where concealed from the Court in obtaining the certificate, the Court has power to revoke the certificate under section 18 (4) of the Succession Certificate Act. **Pat.** DAMINI DASI *v.* FATUMANI DASI, 2 P. L. R. 34; 5 P. L. T. 564; (1924) A. I. R. (Pat.) 520 **639**

Suit against insolvent—Permission of Insolvency Court not obtained—Permission to continue suit, grant of—Civil Court, power of. *See* PROVINCIAL INSOLVENCY ACT, ss. 28, 29 **662**

——— against rival landlord—Tenant, whether necessary parties. *See* LANDLORD AND TENANT **1038**

——— against village headman—Village headman, whether Public Officer—Notice, whether necessary—Report to Deputy Commissioner, whether notice. *See* CIVIL PROCEDURE CODE, ss. 2 (17) (*e*), 80 **818**

——— by after-born son—Alienation by Hindu father—Limitation, operation of. *See* LIMITATION ACT, SCH. I, ART. 126 **1010**

——— beyond Court's pecuniary jurisdiction—Sale in execution—Suit to set aside sale and recover plaintiff's share—Valuation. *See* SUITS VALUATION ACT, s. 8 **333**

——— by one collateral for whole estate, whether maintainable—Custom—Succession—Collateral, right of, nature of. *See* CUSTOM—SUCCESSION **211**

——— by Company against Director to recover losses due to his negligence—Limitation. *See* LIMITATION ACT, s. 10, SCH. I, ARTS. 36, 90 **740**

——— by prior mortgagee—Subsequent mortgagee impleaded as party—Omission to redeem prior mortgage—Subsequent suit to redeem, whether maintainable. *See* MORTGAGE—PRIOR MORTGAGEE, SUIT BY **654**

——— by tenant to recover possession of ex-proprietary holding—Jurisdiction. *See* AGRA TANANCY ACT, s. 79 **318**

——— for declaration of ownership—Street land, meaning of—Survey of town—City Survey Officer, decision of—Government, whether necessary party. *See* BOMBAY DISTRICT MUNICIPAL ACT, s. 3 (12) **192**

——— for declaration of plaintiff's right and injunction against defendant—Value for purposes of jurisdiction and Court-fee. *See* COURT FEES ACT, s. 7 (4) (*c*) **358**

——— for declaration of right to joint tenancy—Civil or Revenue Court—Jurisdiction. *See* JURISDICTION **367**

——— for declaration of title and injunction—Prayer for appointment of Receiver—Valuation of suit. *See* COURT FEES ACT, s. 7 (4) (*c*) (*d*) **668**

——— for declaration of *waqf* and injunction against those interested—Subsequent addition of co-defendants—Fresh sanction, whether necessary. *See* CIVIL PROCEDURE CODE, s. 92 **539**

——— for declaration that decree has been satisfied, maintainability of. *See* CIVIL PROCEDURE CODE, s. 47, O. XXI, R 2 **125**

——— for declaration that plaintiff is liable to pay royalty at particular rate. *See* COURT FEES ACT, s. 7, CL. i (*e*), xiv (*f*) **343**

——— for dividened due before purchase—Auction-purchaser of Company shares, position of—Company, whether trustee for purchaser. *See* LIMITATION ACT, s. 10, ART. 116 **947**

——— for divorce—Plaintiff, what must prove. *See* MAJORITY ACT, s. 2 (*a*) **535**

——— for partition—Hindu joint family—Court-fee payable. *See* COURT FEES ACT, s. 7 **913**

——— for partition—Muhammadan Law—Co-heirs—Alienation by co-heir—Partial partition. *See* MUHAMMADAN LAW—CO-HEIRS **841**

——— for possession by reversioner—Adoption, invalidity of, involved—Limitation. *See* LIMITATION ACT, SCH. I, ARTS. 118, 141 **971**

——— for possession by reversioner—Hindu Law—Widow, death of—Property of husband—Accretion. *See* HINDU LAW—WIDOW **627**

——— for possession—Mutual arrangement for purposes of cultivation, cancellation of. *See* PLEADINGS AND PROOF **494**

——— for possession of portion of mortgaged property, whether maintainable. *See* CIVIL PROCEDURE CODE, O. XI, R. 2 **687**

——— for possession of property purchased—Question relating to satisfaction of decree—Suit, whether barred—Mortgagee decree-holder purchasing property. *See* CIVIL PROCEDURE CODE, s. 47 **486**

——— *for possession on being dispossessed by co-owner—Necessary parties.*

In a suit for possession by one co-owner, other co-owners are not necessary parties. S MAHOMED FARUG *v.* SIDIK **59**

——— for profits, maintainability of—Non-payment by landholder of profits to co-sharer, effect of. *See* AGRA TENANCY ACT, s. 201 (3) **638**

——— for redemption—Ancillary claim for surplus mesne profits—Suit, valuation of. *See* COURT FEES ACT, s. 7, CL. (*ix*) **303**

——— for rent, maintainability of—Cultivated grove. *See* OUDH RENT ACT, s. 127 **722**

Suit—contd.

——— for rent of homestead land—Small Cause Court, jurisdiction of—Agricultural land. *See* Provincial Small Cause Courts Act, Sch. II, Art. 8 **557**

——— for restitution of conjugal rights—Wife expelled by husband—Restitution, whether can be decreed. *See* Restitution of conjugal rights **634**

——— for return of ornaments given at betrothal —Jurisdiction. *See* Presidency Small Cause Courts Act, s. 19 (*q*) **517**

——— for setting aside decree for injunction not to disturb possession and for consequential relief—Court-fee payable. *See* Court Fees Act, s. 7 iv (*c*) **982**

——— for value of goods sent—Parcel sent per V. P. P.—Goods not delivered to consignee. *See* Post Office Act, ss. 6, 34 **334**

——— in Civil Court to challenge decision of Revenue Court that *gujaradars* are under-proprietors, whether maintainable. *See* Oudh Rent Act, s. 107-E, cl. (*a*), s. 107-H **1051**

——— on mortgage—Mortgage by managing members of joint Hindu family—Son, whether necessary parties. *See* Hindu Law—Joint family **1001**

——— Rent-free grantee, ejectment of—Suit, whether cognizable in Revenue Court—Proper remedy. *See* Agra Tenancy Act, ss. 4 (5), 79 **587**

——— to contest ejectment—Ex-proprietary tenant, whether tenant of entire proprietary body—Ejectment by one member of proprietary body—Ejectment by landlord—Limitation. *See* Agra Tenancy Act, s. 79 **1025**

——— to enforce mortgage—Person in possession of mortgaged property, whether necessary party. *See* Mortgage—Suit to enforce mortgage **614**

——— to enfore payment of money charged on property—Limitation *See* Limitation Act, Sch. I, Art. 132 **942**

——— to recover damages—Damage caused by action of Canal Officers—Limitation. *See* Northern India Canal and Drainage Act, ss. 6, 15, 58 **208**

——— to recover damages—Damages caused by construction of canal—Limitation. *See* Limitation Act, Sch. I, Art. 2 **185**

——— to recover balance—Mutual accounts—Cash advances and re-payments in kind—Account, nature of. *See* Limitation Act, Sch. I, Arts. 57, 85 **998**

——— to recover over payments—Sale of goods —Payment by *hundis*—Place of suing. *See* Civil Procedure Code, s. 20 (*c*) **800**

——— to recover possession—Squatter's land—Abandonment, absence of—Refusal to assess land in name of occupier—Fresh occupier, position of. *See* Squatter's land **817**

Suit—concld.

——— to recover value of trees appropriated by tenant, nature of—Occupancy tenant, grove planted by—Trees, whether belong to *zemindar*. *See* Agra Tenancy Act, s. 57 **599**

——— to recover value of trees cut and removed by defendant, nature of—Suit, whether cognizable by Small Cause Court. *See* Provincial Small Cause Courts Act, Sch. II, Art. 35 (*ii*) **138**

Suits Valuation Act (VII of 1887), s. 8. *See* Court Fees Act, s. 7 (IV) (*c*) **358**

——— **s. 8**—*Sale in execution—Suit to set aside sale and recover plaintiff's share—Valuation—Suit beyond Court's pecuniary jurisdiction—Procedure.*

Where property has been sold in execution and plaintiff sues to recover possession of his share therein by setting aside the sale the valuation of the suit should be calculated on the value of the entire property and not only on that of the plaintiff's share.

Where the Court comes to the conclusion that it has no jurisdiction to entertain a suit the proper procedure is to return the plaint to the plaintiff with directions to present it to the proper Court. **C** Pran Krishna Gharai *v.* Nitya Gopal Maiti, 50 C. 892; (1924) A. I. R. (C.) 239 **333**

——— **s. 11**—Trial Court, findings by, on all issues—Appeal—Order of remand. *See* Civil Procedure Code, O. XLI, r. 23 **857**

Thak and survey maps—*Evidentiary value —Boundary line.*

Maps and surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct.

In finding the boundary line between the estates there is no reason to suppose that greater weight should be attached to the *thak* map than to the revenue survey map. If the evidence supports the survey map it is open to a Court of fact to consider its evidentiary value in connection with other evidence in the case. **C** Kali Prosanna Bhaduri *v.* Hemanta Kumari Debi **1038**

Tort—*Wrongful detention—Measure of damages—Extravagant claim—Amount awarded substantial —Costs.*

Plaintiff sued the G. I. P. Railway and various Officials of the Railway Company claiming Rs. 25,000 as damages on the ground that she was wrongfully detained by the defendants on account of her travelling in a first class compartment of a Railway carriage while holding a second class ticket. It appeared that she had been put into a first class compartment by the officers of the Railway Company. The Court having awarded Rs. 1,200, plaintiff appealed:

Tort—concld.

Held, (1) that the plaintiff was entitled to damages but it was not a case in which vindictive damages could be claimed from the Railway Company or their servants;

(2) that the amount awarded was a substantial sum;

(3) that the claim as originally made being extravagant, plaintiff was liable to pay so much of the costs which were incurred by the defendants owing to the extravagance of her claim.

All that was required was for the Court to show by the amount awarded that it considered that the action of the Railway Company and their servants could not be justified, and, therefore, it was necessary that substantial sum should be awarded, and not a nominal sum. **B** KASTURIBAI BHRATAR ONKARDAS MARWADI *v.* G. I. P. RAILWAY COMPANY, (1923) A. I. R. (B.) 172 **245**

Transfer in favour of trustee, whether voidable —Purchaser, whether includes trustee—Valuable consideration, meaning of. *See* PROVINCIAL INSOLVENCY ACT, ss. 53, 55 **888**

———, *mala fide*—Intention to prefer one creditor —Transfer, whether enforceable. *See* TRANSFER OF PROPERTY ACT, s. 53 **625**

———, *power of, restriction on, effect of—Sale in execution, whether restrained.*

A general restriction against assignment placed on the powers of an owner does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. **N** KASTURI *v.* BALIRAM **117**

Transfer of Property Act (IV of 1882), principles of, applicability of, to Punjab. *See* BENGAL REGULATION XVII OF 1806 **248**

——— **s. 6** (c)—*Decree for dower, sale of — Time of the essence of the contract—Vendee, failure of, to fulfil conditions—Re-sale by vendor—Second vendee, rights of.*

There is nothing in law to prevent a man transferring property of which he claims the ownership merely by reason of the fact that his title to it may be in dispute.

M held a decree for dower-debt due to his sister and transferred the decree together with certain property to one *K* stipulating that if *K* did not take out execution of the decree within one year or if he did not within three days institute a suit in respect of the other property the sale should be cancelled. *K* instituted the suit but did not sue at execution of the decree. Subsequently, *M* resold the decree to *G* who attempted to take out execution but did not succeed. Therefore, he filed the present suit for a declaration that the sale-deed in favour of *K* had become void:

Held, (1) that time was of the essence of the contract of sale in favour of *K*;

(2) that what was sold to *G.* was not a mere right to sue but property in the decree, and plaintiff was entitled to succeed. **O** GULAB RAI *v.* KAUDAIJA BIBI, 9 O. & A. L. R. 111; 10 O. L. J, 295; (1924) A. I. R. (O.) 62 **214**

Transfer of Property Act—contd.

——— **s. 6** (e)—*Property, meaning of—Partner's right to sue for accounts—Transfer, validity of.*

The term "property" includes any property over which or the profits of which any person has disposing power which he may exercise for his own benefit.

A partner's right to sue for an account of a dissolved partnership is moveable "property" which, on his being adjudicated an insolvent and a vesting order made by the Court, vests in the Official Receiver.

Such a right is not a mere right to sue but can be assigned as an actionable claim. **S** THAWERDAS JETHANAND *v.* Seth VISHENDAS NIHALCHAND **384**

——— **s. 41**. *See* MUHAMMADAN LAW—CO-HEIRS **174**

——— **s. 41**. *See* VENDOR AND PURCHASER **687**

——— **s. 52**. *See* BURMA LAWS ACT, s. 13 **729**

——— **s. 53**—Mala fide *transfer—Intention to prefer one creditor—Transfer, whether enforceable.*

A transfer entered in bad faith with the intention to defraud one creditor and to give preference to another creditor of the vendor is not enforceable in law. **N** GANI *v.* SITARAM **625**

——— **s. 54**—*Contract for sale—Consideration, passing of—Sale-deed not executed or registered —Title, whether created—Registration Act (XVI of 1908), ss. 17, 49—Evidence Act (I of 1872), s. 92.*

Where there is no sale-deed the mere fact that a consideration has passed between the parties does not operate to create a title.

A mere contract does not create any equitable interest in immoveable property.

Plaintiffs sued to recover possession of certain rooms in a house. It appeared that previous to this a compromise had been arrived at in a criminal case between the parties which was embodied in a paper bearing an 8-annas stamp but which was not registered. It stated that room No. 126 of the house in dispute was given up by defendants in lieu of room No. 129 and that they should continue in possession of room No. 128 "as before":

Held, (1) that the document being unregistered it conveyed no title to the defendants and the plaintiffs were not estopped from claiming back their own property, but they must put the defendants in the same position in which they had been if there had been no compromise;

(2) that defendants could not be permitted to prove the agreement of relinquishment of title by oral evidence. **A** RAM SARUP *v.* HARDEO, 10 O. & A. I. R. 431; (1924) A. I. R. (A.) 396 **429**

——— **s. 54**—*Sale by unregistered document— Delivery of possession—Property of value below one hundred rupees—Sale, validity of—Sale-deed, whether can be referred to.*

Where there has been a sale or mortgage with delivery of possession of property less than Rs.100 in value the effect of transaction is not destroyed

Transfer of Property Act—contd.

because an unregistered sale-deed was executed at the same time.

In such a case the unregistered sale-deed can be referred to in order to ascertain the nature of the possession sought to be disturbed. **A** DAYA RAM *v.* SITA RAM 394

——— **s. 55 (1) (g)**—*Sale—Covenant to indemnify vendee on loss of property—Statutory covenant, whether excluded.*

Plaintiffs purchased certain property from the defendants under a deed which recited that if any portion of the property was lost as a result of a claim by any encumbrances, the vendors would indemnify the vendees to the extent of the loss suffered. Subsequently, on a decree for sale being obtained by a mortgagee of the property, the plaintiffs had to pay a large sum of money to avoid sale. They then brought a suit to recover the amount from the defendants:—

Held, (1) that the express covenant by the vendee to pay a proportionate amount if any portion of the property was lost on account of a claim on a prior encumbrance, excluded the statutory covenant to be found in section 55 (1) (*g*) of the Transfer of Property Act;

(2) that inasmuch as the parties substituted a written contract for the statutory contract they could not now throw away the written contract and rely on the statutory contract;

(3) that as no portion of the property had passed out of the hands of the plaintiffs-vendees, they were not entitled to recover the amount claimed. **A** RAM CHANDER *v.* BHAGWATI, 22 A. L. J. 576 590

——— **s. 58 (c)**—*Construction of document—Sale-deed—Agreement to re-convey—Mortgage by conditional sale—Pre-emption.*

Certain property was conveyed by a sale-deed, and a contemporaneous agreement was executed between the parties which recited that the sale-deed was subject to the condition that if the vendor re-paid the amount of the purchase-money within a certain period, the property would be re-conveyed to him. Both documents were presented for registration at the same time:

Held, (1) that the sale-deed and the agreement formed part of the same transaction;

(2) that the transaction was a mortgage by conditional sale within the meaning of section 58 (*c*) of the Transfer of Property Act and was not, therefore, liable to pre-emption. **A** RAM CHARAN LAL *v.* DHARAM SINGH, 22 A. L. J. 10; 46 A. 173; (1924) A. I. R. (A.) 444 626

——— **s. 68**—*Mortgage with possession—Mortgagee ousted by person claiming adversely to mortgagor—Duty of mortgagor—Mortgagee, whether entitled to sue for mortgage-money.*

Where a mortgagee in possession is ousted from possession of the mortgaged property by a person claiming title adversely to the mortgagor, it is the duty of the latter to defend his title and to restore the mortgagee to possession, and if he fails to do so, the mortgagee is entitled, under section

Transfer of Property Act—contd.

68 of the Transfer of Property Act, to sue for the mortgage-money. **R** MAUNG PO KIN *v.* MAUNG KYAUK YE, 2 Bur. L. J. 47; (1924) A. I. R. (R.) 143 815

——— **s. 75.** *See* LIMITATION ACT, SCH. I, ART. 148 498

——— **s. 82**—*Contribution between mortgagee and mortgagor.*

No question of contribution can arise between the mortgagee and a representative of the mortgagor who is not a transferee from the latter. **A** CHAUBE BENAIK RAO *v.* PUTTAIN SINGH 69

——— **ss. 83, 84**—*Mortgage—Redemption—Deposit in Court—Interest, cessation of—Mesne profits, right as to.*

A mortgagor deposited the mortgage-money in Court to the credit of the mortgagee's heirs under section 83 of the Transfer of Property Act and allowed it to remain in Court till his redemption suit was decreed. The money was not drawn by the mortgagee's heirs owing to quarrels among themselves:

Held, that the mortgagor had done all he could to enable the mortgagee's heirs to draw out the money, and interest had, therefore, ceased to run on the mortgage-money from the date of the deposit and the mortgagor was entitled to mesne profits. **M** NAGATHAL *v.* ARUMUGAM PILLAI, 17 L. W. 154; 44 M. L. J. 362; 32 M. L. T. 371; (1923) A. I. R. (M.) 354 40

——— **s. 89.** *See* MORTGAGE—PRIOR MORTGAGEE, SUIT BY 654

——— **s. 101**—*Mortgages, several—Payment of earlier mortgage by owner, effect of—Priority charge, whether kept alive—Presumption.*

In India, where there are several mortgages on a property, the owner of the property subject to the mortgage may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor; or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. Where there is no indication to the contrary, it must be presumed that the owner intended to keep alive the previous charge if it would be for his benefit.

For the purposes of this rule it is immaterial that the charge paid off comprised properties not included in the other charges.

The rule, however, is not applicable if the owner had personally covenanted to pay the later mortgage-debt. **P C** MALIREDDI AYYAREDDI *v.* ADUSUMILLI GOPALAKRISHNAYYA, 22 A. L. J. 45; 46 M. L. J. 164; (1924) A. I. R. (P. C.) 36; 19 L. W. 215; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 P. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 47 M. 190; 28 C. W. N. 1025 (P. C.) 592

——— **s. 106**, *applicability of—Ejectment—Notice to quit, when should expire.*

Transfer of Property Act—contd.

Section 106 of the Transfer of Property Act merely lays down in a codified form what has always been understood to be the general law on the subject, and the section is applicable in the absence of a contract to the contrary.

In the absence of an agreement or local custom to the contrary a notice to quit must be given to expire on and with the last day of some period of the tenancy.

A condition in a lease that the landlord would give one month's notice if he wants to have the premises vacated does not mean that notice can be given at any time and that it is not to expire with the end of the month of the tenancy as required by section 106 of the Transfer of Property Act. **L** CHUNI LAL *v.* CHUNI LAL, (1923) A. I. R. (L.) 659 **957**

——— **s. 106**—*Landlord and tenant—Ejectment—Notice—Denial of landlord's title—Agreement to vacate on demand.*

Where a tenant is sought to be ejected without notice on the ground of denial of the landlord's title, it must be shown that the title of the landlord had been denied prior to the suit.

Where a tenant agrees to vacate the demised premises whenever required to do so, section 106 of the Transfer of Property Act becomes inapplicable to the case, and the tenant is not entitled to notice before ejectment. **A** MUKAT SINGH *v.* MISRA PARAS RAM **106**

——— **ss. 107, 117**—*Registration Act (XVI of 1908), ss. 17, 49—Evidence Act (I of 1872), s. 91—Agricultural lease—Registration, whether necessary—Unregistered lease, whether admissible in evidence—Part performance, doctrine of, applicability of.*

By virtue of the provision contained in section 117 of the Transfer of Property Act, it is not necessary under that Act that a lease for agricultural purpose should be made by a written instrument. It may be effected by oral agreement, and when so affected no registration is required, but if it is reduced to writing, then, in the case of a lease from year to year or for any term exceeding a year, or reserving a yearly rent, registration would be required under section 17 of the Registration Act, and, if unregistered, the lease will be inadmissible in evidence under section 49 of the Act, and other evidence of its terms would be precluded by section 91 of the Evidence Act.

If, however, the subsequent acts of the parties themselves disclose a state of affairs consistent only with the existence of an agreement mutually recognised and acted upon as if the instrument were binding upon the parties, then, although the written document may be defective as a valid and finally concluded agreement, such defects may be supplied by the subsequent actings and conduct of the parties.

A document which is inadmissible in evidence for the purposes mentioned in section 49 of the Registration Act, may nevertheless be admitted for a collateral purpose, as, for example, to explain why a transferee under a deed imperfect through lack of registration was in possession, or to prove the nature of that possession. **Pat** JASKI KUAR *v.* BIRJ BHIKHAN OJHA, 3 Pat. 329, 1924 Pat. 185; 6 P. L. T. 541 **26**

——— **s. 108 (j)**—*Lease, transfer of—Liability to pay rent, whether extinguishable.*

Where a lessee transfers the lease, whether permanent or temporary, the claim to pay rent to the lessor is not extinguished by assignment under section 108 (j) of the Transfer of Property Act. **C** SHELAITS OF IDOL SHRIDHAR JIU *v.* NALINAKSHA RAI **557**

——— **s. 111**, *applicability of—Will—Right of residence without power to grant lease, devise of—Forfeiture.*

Section 111 of the Transfer of Property Act does not apply to a forfeiture claimed by reason of an infringement of the provisions of a devise.

Plaintiff was given under a Will a right of residence in a house without power to sub-let. He sub-let the house and defendants, who were the heirs of the testator, claimed that the plaintiff had forfeited his right of residence under the Will:

Held, (1) that section 111 of the Transfer of Property Act was not applicable to the case;

(2) that in the absence of a clause in the Will providing for a right of re-entry in case a sub-lease was granted by the plaintiff, the latter could not be held to have forfeited his right of residence in the house. **O** SHANKAR DAYAL *v.* BINAYAK PRASAD, 27 O. C. 1; (1924) A. I. R. (O.) 305 **695**

——— **s. 123**—*Gift of immoveable property—Deed of gift not registered—Donee in possession—Donor, heirs of, whether can claim possession—Equitable relief.*

PS and his wife *ML* made a gift of certain lands to their grandchild *MN* a minor. Mutation was accordingly effected and the land stood in the name of *MN* on the death of *PS* his son *PS* (the father of the donee) who was managing the estate on behalf of his mother, acting in collusion with the plaintiff, a money-lender, fraudulently induced the donee to execute a deed of sale of the lands in suit on a misrepresentation that it was only an instrument of exchange. The fraud was, however, discovered and the donee refused to subscribe to the registration of the deed. Thereupon the plaintiff sued to recover possession together with mesne profits:

Held, that the donee being in possession neither the donor nor any person claiming through them could dispute her right to the possession of land and it would be most unjust and inequitable if they could be allowed to do so.

The Transfer of Property Act was enacted in order to prevent fraud and deception, and it is founded on the highest principles of justice, equity and good conscience. **R** M. P. L. M. P. CHETTY *v.* MA NGWE SIN, 1 R. 665; (1924) A. I. R. (R.) 200 **485**

Trusts—*Succession—Hindu widow, position of—Custom.*

In the absence of a special custom to the contrary succession to trusteeship of property follows the ordinary rules of succession and a Hindu widow is entitled to succeed to it as heir to her husband. **M** KOTHANDARAMASWAMI NAIDU *v.* PAPPAMMAL **891**

Trusts Act (II of 1882), ss. 88, 90—*Joint business winding up—Receiver, appointment of—Member, whether can compete with Receiver—Injunction.*

Where a business of any kind is being wound up by the Court or otherwise the business being the property of more than one person carried on as partners, co-owners, members of a joint family or otherwise, during the winding-up persons who were the members of the concern are not allowed to enter into a competition so as to interfere with the successful winding up of the concern.

A Hindu joint family carried on a large *abkari* business and, as part of it, it had for many years the *abkari* monopoly in certain places. The joint family became divided in status. A partition suit was brought and Receivers were appointed for getting in all the assets of the family affairs. In the course of the winding-up, the Receivers applied for a renewal of the monopoly of the *abkari* contract. The members of the family also entered into competition with the Receivers to obtain the contract. On an application by the Receivers for an injunction restraining the members of the family from entering into competition:

Held, that the action of the respondents was a direct interference with the Receivers and was directly contrary to the interests of the family as a whole, and that, therefore, the injunction prayed for must issue. **M** THAVASAMUTHU NADAR *v.* BALAGURUSWAMY NADAR **658**

U. P. Land Revenue Act (III of 1901), s. 36, *scope of—Agreement to pay specified rent, how far enforceable.*

There is nothing in section 36 of the U. P. Land Revenue Act to prevent the parties agreeing upon a rent which is not above the legal maximum nor is there any reason why such rent, if agreed upon by the parties, should not be recoverable in the Courts. **A** SRI KANTOO SINGH *v.* IMDAD ALI **665**

——— **s. 233**—*Oudh Rent Act (XXII of 1886), s. 52—Document creating tenancy rights, interpretation of—Jurisdiction of Civil Courts.*

The Civil Courts have no jurisdiction to interpret a document purporting to grant a lease of tenancy rights so as to declare whether under it the period of the lease has expired or not. **O** RAJA BISHUNATH SARAN SINGH *v.* SITLA BAKHSH SINGH, 10 O. L. J. 315; (1924) A. I. R. (O.) 69 **784**

——— **s. 233 (K)**—*Application for partition—Subsequent suit for exclusive possession, whether maintainable—Jurisdiction of Civil Court.*

Where proceedings for partition under the provisions of the U. P. Land Revenue Act are pending a suit by one co-sharer for exclusive possession of certain plots and for damages for the value of the crops misappropriated by the defendants, is excluded from the cognizance of a

U. P. Land Revenue Act—concld.

Civil Court. **A** NAZIR AHMAD *v.* MUHAMMAD SHARIF, 46 A. 453 **345**

U. P. Municipalities Act (II of 1916), s. 162 (1)—*Professional Tax—Residence, meaning of.*

In cases of persons who carry on business at places other than their native home their place of residence is the place where they earn a living and do their daily work, nor does that place cease to be their residence because for purposes of rest or recreation of family ties they occasionally return to the family home where they and their families have been brought up. **A** MUNICIPAL BOARD OF BAREILLY *v.* ALA BAKSH, 22 A. L. J. 457 **567**

Upper Burma Registration Regulation (II of 1897), rules framed under, rr. 5, 7—*Registration—Presentation of document—Signature of person presenting document, whether necessary—Endorsement, correctness of—Presumption—Note as to absence of party, omission of, effect of.*

There is no provision in Upper Burma Registration Regulation II of 1897 or in the rules framed thereunder that requires the signature of the person presenting a document for registration. Rule 7 prescribes the mode of registration and the contents of the endorsement to be made by the registering officer, and the correctness of this official endorsement must be presumed.

Rule 5 of the rules framed under Upper Burma Registration Regulation II of 1897, requires that where any party to a document is unable or refuses to appear, a note of the circumstance should be made by the registering officer. The omission to make such a note, however, is one for which the person presenting the document cannot be held responsible: it is at most a defect in procedure which does not vitiate a registration made on a proper presentation. **P. C.** BAIJNATH SINGH *v.* JAMAL BROTHERS AND CO., LTD., 22 A. L. J. 42; (1924) A. I. R. (P. C.) 48; 19 L. W. 345; (1924) M. W. N. 196; 10 O. & A. L. R. 288; 51 C. 354; 2 R. 99; 28 C. W. N. 1029 (P. C.) **940**

Vendor and purchaser—*Purchase from ostensible owner—Good faith—Notice of doubtful title—Equity, rule of—Transfer of Property Act (IV of 1882), s. 41.*

Where a transferee of property having notice of a suit brought against his transferor by a third person for the recovery of the said property, fails to make any attempt to ascertain whether his transferor has the right to make the transfer or not, he cannot be said to be acting in good faith, and the transfer in his favour is not binding on the rightful claimant in view of the rule of equity embodied in section 41 of the Transfer of Property Act. **L** RAGHO *v.* DWARKA DAS, 10 P. W. R. 923 **687**

Waiver, *conditions of.*

Waiver must be an intentional act and with knowledge of the necessary facts. **B** CHATURBHUJ *v.* DEOKARAN, 26 Bom. L. R. 84; (1924) A. I. R. (B.) 370 **769**

Borrower's No.	Issue Date	Borrower's No.	Issue Date

S. N. Das

Advocate High Court
Jammu & Kashmir
Srinagar.

S. N. Das

Advocate High Court
Jammu & Kashmir
Srinagar.